MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
ATTORNEYS AT LAW
A Partnership Including Professional Corporations

1681 BIRD STREET
P.O. BOX 1679
OROVILLE, CALIFORNIA 95965-1679

Writer's e-mail:dcooper@minasianlaw.com

PAUL R. MINASIAN, INC.
JEFFREY A. MEITH
M. ANTHONY SOARES
DUSTIN C. COOPER
DAVID J. STEFFENSON
EMILY E. LaMOE

WILLIAM H. SPRUANCE, Retired

MICHAEL V. SEXTON, Retired

TELEPHONE: (530) 533-2885

FACSIMILE: (530) 533-0197

August 7, 2013

Heather Halsey, Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: *Claimants' Rebuttal 10-TC-12 and 12-TC-01*

Dear Ms. Halsey:

Joint Claimants South Feather Water & Power Agency ("South Feather"), Paradise Irrigation District ("Paradise"), Richvale Irrigation District ("Richvale"), and Biggs-West Gridley Water District ("Biggs") (hereinafter collectively "Claimants") submit the following rebuttal to the responses to consolidated Test Claims 10-TC-12 and 12-TC-01 filed by the California Department of Water Resources ("DWR") and California Department of Finance ("DOF").

ARGUMENT

1. The Mandates Of The Act And Regulations Are Unique To Local Government And Involve The Provision Of An Essential Public Service.

The Constitution requires reimbursement when a program is new or the state imposes an increased level of service on local government.[1] DWR claims that the Constitutional subvention requirement does not apply in these test claims "because the

[1] Cal. Const., Art. XIII D, § 6

2009 Water Law applies to public and private entities alike, it is not a 'program'... and so it cannot be an unfunded mandate."

In *County of Los Angeles*, the California Supreme Court concluded that the term "program" has two alternative meanings: "programs that carry out the governmental function of providing services to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[2] Only one of these findings is necessary to trigger reimbursement. However, both are met in this case.

In defining what constitutes a "program", the Court in *Los Angeles* did not say that the requirements imposed need to be exclusively performed by local government. Rather, the Court said that the requirements must be imposed on local governments and not apply "generally" to all residents and entities. The word "generally" means "in general; extensively, though not universally; most frequently, but not without exceptions...."[3]

The Court in *Carmel Valley* found a reimbursable fire protection program, notwithstanding the existence of a minority of private fire brigades:

> Police and fire protection are two of the most essential and basic functions of local government. (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107 [133 Cal.Rptr. 649].) This classification is not weakened by State's assertion that there are private sector fire fighters who are also subject to the executive orders. ... [W]e have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function.[4]

The Court in *Carmel Valley* continued:

---

[2] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56

[3] *Webster's New Universal Unabridged Dictionary*, 2nd Ed., Dorset & Baber (1972), p. 762

[4] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because firefighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in firefighting.[5]

Applying these guiding principles to the Act and Regulations demonstrate the existence of a program. While not exclusive to local government, the mandates directed at "urban retail water suppliers" and "agricultural water suppliers" fall overwhelmingly on local governmental agencies.

According to the "Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement" prepared by DWR, "Costs of the regulation would fall directly on agricultural water suppliers, the vast majority of which are special districts (public agencies)."[6] In DWR's Final Statement of Reasons supporting the Regulations, DWR acknowledges that "agricultural water suppliers might need voter approval to increase rates since they are subject to Proposition 218, which divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval."[7] Through this statement DWR admits that the mandates apply predominately to governmental agencies because the limitations of Proposition 218 apply only to public, not private, entities.

Similarly, an examination of DWR's "2010 Legislative Report on the Status of the 2010 Urban Water Management Plans" reveals that an overwhelming majority of urban retail water suppliers subject to the Act are public agencies. Only 75 of the 448 urban retail water suppliers statewide can be described as "private." However, 47 of those 75 "private" urban suppliers are divisions of the same three private companies

[5] *Id.* at 538.

[6] Declaration of Dustin C. Cooper [hereinafter "Cooper Decl."], Exh. A, p. 2, underlining added.

[7] Cooper Decl., Exh. G, p. 25

(California American, California Water Service, and Golden State Water). Counting these divisions according to their legal status as 3 single business entities, there are in fact only 31 separate "private" urban retail water suppliers out of 404 total urban suppliers statewide. The balance of urban retail water suppliers, 373 out of 404, are public agencies. Phrased as percentages, 92.33% of urban retail water suppliers are public agencies, whereas only 7.67% are "private".[8]

Based on the foregoing, the overwhelming majority of urban and agricultural water suppliers are local agencies. DWR cannot credibly contend that the Act and Regulations apply generally to both public and private entities. Further, the provision of water involves a classic governmental function. Clean and abundant availability of water is the hallmark of any established, civilized society. Both the Act and Regulations manifest the Legislature's desire to require local government to more efficiently utilize water (described as an "essential resource" and a "public resource"[9]) for the betterment of the public and environment. The Act declares that "Growing population, climate change, and the need to protect and grow California's economy while protecting and restoring our fish and wildlife habitats make it essential that the state manage its water resources as efficiently as possible."[10] Mandating more efficient water use is a governmental service that satisfies the first test set forth by *County of Los Angeles*. Additionally, the second test is satisfied because the Act and Regulations impose unique requirements on local government that do not generally apply to all residents and entities of the state.

DWR's counterargument merely cites the Act's and Regulations' definitions of urban and agricultural water suppliers and how such suppliers can be either "privately or

[8] Cooper Decl., Exh. B and ¶ 4

[9] Water Code §§ 10608, subd. (a); 10608.4, subd. (a)

[10] *Id.* § 10608, subd. (b)

publicly owned".[11] This argument, however, ignores the practical reality that the overwhelming, "vast majority" of urban and agricultural water suppliers are local governments. The state should not be able to immunize itself from funding mandates by drafting clever definitions that, on their face, purport to have broad application. Rather, the Commission should look to the actual impact of the mandates on local government in determining whether they constitute programs, especially in this case where the mandates of the Act and Regulations fall disproportionately upon local governments that are ill equipped to handle financial responsibility for carrying out enhanced governmental functions in light of Propositions 13 and 218.

2. The Act And Regulations Constitute "New Programs" And Impose Obligations To Provide "Increased Levels Of Service" On Local Government.

DWR claims that the Act is not a "new program" and does not impose an "increased level of service" on local government. However, as discussed below, the mandates of the Act and Regulations fit within the parameters of both phrases, as defined by applicable case law.

a. The Act and Regulations Mandate New Programs That Did Not Previously Exist in the Statutory Scheme Applicable to Urban and Agricultural Water Suppliers.

To determine if a program is "new", the Commission is tasked with comparing the Act and Regulations with the legal requirements immediately before the enactment of the test claim legislation.[12] DWR claims that the Act's and Regulations' mandates are not "significantly different" to the pre-enactment legislative scheme and that such changes merely reflect an "incremental difference" in water conservation laws. As discussed hereafter, the record does not support DWR's attempt to minimize the

[11] See, e.g. *Id.* §§ 10608.12, subds (p), (r); 10853
[12] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist. v. Honig* (1998) 44 Cal.3d 830, 835

magnitude of change in the legislative scheme applicable to water agencies by enactment of the Act and Regulations.

Prior to enactment of the Act, Paradise and South Feather, as urban retail water suppliers, were not required to achieve a 20% per capita reduction in water use by 2020 or a 10% incremental reduction by December 31, 2015. As set forth in the declarations accompanying the narrative statement in 10-TC-12, to achieve the requisite per capita reduction, Paradise and South Feather will be forced to implement a combination of costly measures such as facility improvements, water conservation education and training, more aggressive tiered water rates to incentivize conservation (a change requiring compliance with Proposition 218), public information programs, and possibly hiring a conservation coordinator.

Prior to the Act, Paradise and South Feather were required to prepare urban water management plans. However, the Act amplifies the contents of plans to include "the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including references to supporting data."[13] The Act also imposes new requirements prior to adopting any plan to (1) consider community input regarding conservation efforts; (2) consider economic impacts of conservation efforts; and (3) to adopt a method for determining the agency's water use target.[14]

Prior to the Act, Richvale and Biggs, as agricultural water suppliers, were not required to implement "critical efficient management practices", which include mandates to:

[13] Water Code § 10608.20, subd. (e)

[14] *Id.* § 10608.26, subd. (a)(1)-(3)

> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).
>
> (2) Adopt a pricing structure for water customers based at least in part on quantity delivered.[15]

While it is correct that subdivision (a) of section 531.10 preexisted enactment of the Act, it was not imposed on Richvale and Biggs because subdivision (b) provided an exception to implementation of water measurement programs that are "not locally cost effective." As discussed in Section 3.b.vi., below, the language of the Act and Regulations, and DWR's position taken before the Office of Administrative Law all demonstrate that agricultural water suppliers must comply with farm-gate measurement mandates regardless of section 531.10(b) and considerations of cost effectiveness.

Prior to the Act, there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible.[16] Additionally, the Act expands and amplifies the requirements and contents of agricultural water management plans. Agencies required to prepare plans include all agricultural water suppliers that serve 10,000 or more irrigated acres[17] as opposed to the previous requirement applicable to agencies that supplied more than 50,000 acre-feet of water for agricultural purposes. The Act removed reimbursement provisions for agricultural suppliers who prepared plans prior to the Act. The Act requires a new plan on or before December 31, 2012, and an update on or before December 31, 2015, and every five years

[15] *Id.* § 10608.48, subd. (b)(1)-(2)

[16] *Id.* at subd. (c)

[17] As set forth in Water Code section 10853, agricultural water suppliers that provide water to less than 25,000 irrigated acres are not required to comply with the mandates "unless sufficient funding has specifically been provided to the water supplier for these purposes." However, suppliers like Richvale and Biggs that provide water to 25,000 or more irrigated acres are subject to all mandates.

thereafter.[18] Finally, the Act imposed new procedural requirements, including: (1) making the draft plan available for public inspection; (2) holding a public hearing on the draft plan; (3) publishing notice of the hearing once per week for two successive weeks in a newspaper of general circulation; (4) providing copies of the adopted plan to DWR, cities, counties, nearby urban water suppliers, libraries, and other entities within 30 days of adoption; and (5) posting the adopted plan on the agricultural water supplier's website or providing an electronic copy to DWR.[19]

Prior to adoption of the Regulations, agricultural water suppliers, pursuant to the Act, were required to "measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10". Section 531.10(a) provides that "An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices." Aggregate data, developed for all customers served by the system, was previously sufficient.

The Regulations also impose new mandates on agricultural suppliers by requiring real time measurement of water flow at any point in time to a single customer (each farm-gate) at a certified level of accuracy of ±12% by volume for existing measurement devices; or new or replacement devices must be accurate to a level of ±5% by volume if laboratory certified or ±10% by volume if using non-laboratory certification.[20] Prior to the Regulations, there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception.[21] Rather, the

[18] Water Code § 10820, subd. (a)

[19] *Id.* §§ 10841, 10843, 10844

[20] Cal. Code Regs., Tit. 23, § 597.3

[21] *Id.* subds. (a), (b)(1)

Act permitted "aggregated farm-gate delivery data"[22] and only required volumetric measurement of water delivered to customers with "sufficient accuracy"[23]. Prior to the Regulations, there was no obligation to certify (using a licensed engineer), test, inspect, analyze and report on water measurement devices in agricultural water management plans.[24] Lastly, prior to the Regulations, there was no requirement to include in Claimants' agricultural water management plans the information listed in 23 CCR section 597.4(e)(1) through (e)(4) of the Regulations.

b. The Act and Regulations Impose Higher Levels of Service on Local Agencies.

A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[25] Measures designed to increase the level of governmental service provided to the public constitutes a "higher level of service".[26] However, increases in the cost of providing the service without a resulting enhancement or increase in the provision of governmental services are not reimbursable.[27] The Act and Regulations are clearly designed to increase the level of governmental service provided to the public.

[22] Water Code § 531.10, subd. (a)

[23] *Id.* § 10608.48, subd. (b)(1)

[24] Cal. Code Regs, Tit. 23, § 597.4

[25] *San Diego Unified School Dist., supra,* 33 Cal.4th at 877

[26] See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173

[27] See, e.g., *County of Los Angeles, supra,* 43 Cal.3d at 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190

The Act and Regulations describe water as a "public resource" and an "essential resource".[28] The mandates are designed to make the use of this essential, public resource more efficient to the betterment of the public:

> Growing population, climate change, and the need to protect and grow California's economy while protecting and restoring our fish and wildlife habitats make it essential that the state manage its water resources as efficiently as possible.[[29]]

Similarly, "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions."[30] For these reasons, the Legislature intended to "Require all water suppliers to increase the efficiency of use of this essential resource" when it adopted the Act and directed DWR to adopt the Regulations based on the existence of an emergency.[31]

Implementing measures to ensure the most efficient water use possible equate to a "higher level of service" to the public under the commonly understood sense of the phrase. These conservation mandates are new in comparison to the preexisting scheme applicable to urban and agricultural water suppliers. The Act was intended to provide an enhanced service to the public, including greater water availability for a growing population, environmental enhancement, lower energy use, etc. According to then-Governor Schwarzenegger "Conservation is one of the key ways to provide water for Californians and protect and improve the Delta ecosystem."[32] Legislative acts designed to make the provision of governmental services more effective or efficient evince intent

---

[28] See, e.g., Water Code §§ 10608, subd. (a); 10608.4, subd. (a)

[29] *Id.* § 10608, subd. (b)

[30] *Id.* subd. (d)

[31] *Id.* §§ 10608.4, subd. (a); 10608.48, subd. (i)(2)

[32] Cooper Decl. Exh C, p. 6

to produce a higher level of service to the public.[33] The Act clearly effectuates a desire to provide higher levels of governmental service to the public.

3. Proposition 218 Divests Claimants Of Authority To Pass The Costs Of The Mandates On To Their Customers; Claimants Lack Other Non-Tax Revenue Sources To Fund The Mandates.

a. Under Proposition 218, Claimants Lack Authority To Impose A Property Related Fee, Standby Charge, Or Assessment On Its Customers.

Adopted in 1996, Proposition 218, which added Articles XIII C and XIII D to the California Constitution, applies to all local governments, including special districts such as Claimants.[34] Proposition 218 divests the elected Boards of local governments of authority to establish or increase property related fees or charges and assessments.[35] To establish or increase fees and assessments, local governments are required to obtain voter/customer approval following the procedure set forth in sections 4 (assessments) or 6 (property related fees and charges) of Article XIII D of the California Constitution. Importantly, under Proposition 218, Claimants' customers could reject the Board's action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates.

Both DOF and DWR cite *Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382, a case that expressly states it "need not consider" Proposition 218 (p. 403), to allege that Claimants can pass the costs of the mandates onto their

---

[33] *Carmel Valley, supra*, 190 Cal.App.3d at 537-538; *San Diego, supra*, 33 Cal.4th at 877

[34] Cal. Const., Art. XIII C, § 1, subd. (b); Gov. Code § 53750, subd. (a); See also Declarations accompanying Narrative Statement to 10-TC-12: Glaze Decl. ¶ 15; Mattson Decl. ¶ 15; Barber Decl. ¶ 15; Peters Decl. ¶ 15.

[35] Providing potable water and irrigation water to customers is considered to be a property related fee subject to Proposition 218. *Bighorn-Desert View Water Agency* (2006) 39 Cal.4th 205, 217 [Proposition 218 applies to potable water]; *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 [Proposition 218 applies to irrigation water]. DWR acknowledges that Proposition 218 "divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval." (Cooper Decl., Exh. G, pp. 13, 25).

customers, thereby precluding reimbursement under Government Code section 17556(d). DOF also claims that Water Code section 35470, part of the California Water District Law[36], provides fee authority for Claimants to pass the costs of the mandates onto Claimants' customers.

Both DOF and DWR ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09:

> The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners. [37]

Finding *Connell* inapposite, the Commission observed that "The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[38]

Similarly, as noted by the Commission, "the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with the 'notice,

[36] Only Biggs-West Gridley Water District, as a water district, is subject to section 35470, part of the California Water District Law (Division 13 of the Water Code, §34000 et seq.). The remaining Claimants are all irrigation districts formed and existing under the Irrigation District Law (Division 11 of the California Water Code, §20500 et seq.).

[37] *Discharge of Stormwater Runoff*, 07-TC-09, p. 106, underlining in original (Cooper Decl., Exh. D). See also p. 115 where the same analysis is applied to property related fees and charges that "is contingent on the outcome of a written protest by a majority of the parcel owners."

[38] *Id.* p. 107

protest, and hearing procedures [of Proposition 218]."[39] Claimants that are irrigation districts, while not subject to section 35470, are nonetheless also constrained by Proposition 218 and cannot pass through the costs of the mandates to customers without complying with the notice, protest, and hearing procedures of Proposition 218.[40] The 2007 amendment to Water Code section 35470 also amended provisions of the Irrigation District Law (Division 11 of the Water Code) to require irrigation districts to comply with Proposition 218.[41]

DWR contends that "Although Claimants could have, they have not attempted to seek the consent and authorization of Claimant's [*sic*] landowners pursuant to Proposition 218's requirements." The Commission considered and rejected this argument in 07-TC-09, concluding that "such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate."[42] Instead, to the extent the electorate approves a fee increase or an assessment to implement the mandates, such action "would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities."[43]

---

[39] *Ibid.*

[40] Water Code § 22280; See also Gov. Code § 53753, subd. (a) ["The notice, protest, and hearing requirements imposed by this section supersede any statutory provisions applicable to the levy of a new or increased assessment that is in existence on the effective date of this section, whether or not that provision is in conflict with this article."]

[41] See Stats 2007 Ch. 27, §§ 29, 19 (SB 444), effective January 1, 2008.

[42] *Discharge of Stormwater Runoff*, 07-TC-09, p. 107 (Cooper Decl., Exh. D).

[43] *Ibid.*

b. The State's Citations to Alternate Fee Authorities and Sources of Offsetting Revenue Lack Merit.

i. Mandates to Conserve Water Do Not Generate Surplus Water Sales.

In circuitous logic, DOF claims that this Commission can "assume that surplus water will accrue to [Claimants] that result from the Act's and Regulation's conservation requirements." DOF claims that the water conserved from implementing the conservation mandates can be sold to offset the costs of the mandate. DOF's reasoning undermines the Legislature's intent to provide improved streamflows and other environmental benefits through water conservation[44], as opposed to providing more water available for sale, and it rests upon faulty assumptions.

DOF incorrectly assumes that water conserved through implementation of the mandates can be captured and sold to Claimants' customers or other third parties. Many water rights specify a maximum quantity of water that can be diverted annually or seasonally. The unused portion of the water right is left at the source (i.e., it is not diverted) and does not accrue or carryover to future years. For example, Biggs, Richvale and two other public agencies jointly hold a water right, implemented through an agreement with DWR, to divert up to 555,000 acre-feet from the Feather River from April 1 through October 31 of each year.[45] If those districts jointly divert less than their full allotment (e.g., 500,000 acre-feet), they are not entitled to carry over the unused amount to the following year. There will be no offsetting benefit in the form of expanded water sales available to Biggs and Richvale resulting from conserving water.

DOF incorrectly assumes that there will be growing customer demand and ability to serve more customers if conserved water can be temporarily captured and

[44] Water Code § 10608, subd. (d)

[45] Cooper Decl., Exh. E

stored for future use. Paradise and South Feather own and operate reservoirs that, in some water type years, would allow for the temporary storage of conserved water for future use. However, Paradise and South Feather over the last 30+ years have had little growth in their customer bases. Moreover, the reservoirs must be brought down to minimal levels to provide space for storage in the succeeding winter, and to meet Corps of Engineer and/or California Division of Safety of Dams flood control criteria. Even if conserved water could be temporarily stored over the course of the winter, there is not a dynamically growing customer base to utilize the conserved water.

Additionally, all of Claimants' water rights have specific place of use restrictions specifying the geographic location where the water may be applied to beneficial use. The sale or application of water outside each Claimant's specific place of use area (e.g., to accommodate customer growth) requires either the consent of DWR (in the case of Richvale and Biggs) or an order from the State Water Resources Control Board (in the case of Paradise and South Feather), including overcoming likely protest from DWR, under Water Code section 1700 et seq. Offsetting revenue will not accrue because Claimants are serving a relatively fixed customer base that is not experiencing significant growth and can only serve water in specific geographic locations absent state approval.

ii. Claimants Will Not and Cannot Currently Transfer Water Conserved as a Result of Mandates.

DWR makes a related argument that Claimants may use water transfer revenue to offset the costs of the mandates. However, neither the Act nor the Regulations contemplate water transfers in this manner and they make no substantive change to the laws governing water transfers. The state does not say, for example, that it will purchase water conserved as a result of implementing the mandates. Thus, it cannot be said that the Act or the Regulation "provides for offsetting savings to local

agencies...that result in no net costs to local agencies ..., or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate."[46]

DWR claims that the ability of a public agency to sell, lease, or transfer property rights should be considered a state mandate offset. A water right is a form of property not unlike land, buildings and other forms of real property. As noted above, there can be no sales or transfers of RID's and BWGWD's water without the consent of DWR, which may be withheld in DWR's discretion.[47] Transfers of Paradise's and South Feather's water rights require a permit from the State Water Resources Control Board, including overcoming any opposition, such as that from DWR or other entities or persons. More importantly, DWR's reasoning that a public agency's real property can simply be sold, leased or transferred to offset state mandates would effectively nullify the Constitutional subvention requirement. Unfunded mandates could be heaped upon local agencies and school districts simply because the State believes those agencies could sell, transfer, or lease their property to offset the expenses.

Furthermore, the State does not currently allow the type of water transfer that would be needed to market water conserved as a result of implementing the mandates. A forbearance water transfer is one in which the water right holder sells the unused portion of the water right.[48] However, forbearance transfers are currently not recognized by DWR. In its Technical Information for Preparing Water Transfer Proposals in 2013, DWR states that only stored water, cropland idling/crop shifting, and groundwater substitution transfers would be considered in 2013.[49] None of the

[46] Gov. Code § 17556, subd. (e)

[47] See ¶ 5 of Earley Decl. and ¶ 5 of Massa Decl. submitted contemporaneously with this Rebuttal.

[48] Cooper Decl., ¶ 5

[49] Cooper Decl., Exh. F, p. 3

recognized types of transfers would allow the transfer of water made available by Claimants as a result of implementation of the mandates.

Finally, water transfers are voluntary and require a willing seller and willing buyer.[50] Paradise has never participated in a water transfer and, given limited water supply, storage and other factors, will likely never participate in any type of water transfer. South Feather participated in a water transfer in 2008, but its Board of Directors resolved to not participate in any possible future transfers as a result of conditions imposed by DWR, which can control any aspect of a South Feather transfer due to the location of Lake Oroville downstream of South Feather's reservoirs. To help alleviate the effects of statewide droughts, Biggs' landowners participated in rice land idling transfers in 2010, and 2012, and Richvale's landowners participated in rice land idling transfers in 2009, 2010, and 2012. However, such transfers were limited to one irrigation season (April – September), required consent of DWR, and neither District currently has plans or a program in place for another transfer.

iii. Water Code section 1009 Authorizes Collecting Costs of Conservation Measures from New Customers; It Does not Provide an Exception to Proposition 218's Restrictions and Limitations on the Implementation of Fees or Assessments on Existing Customers to Fund Conservation Mandates.

Section 1009 gives municipal water suppliers, in this case Paradise and South Feather, authority to "require, as a condition of new service, that reasonable water-saving devices and water reclamation devices be installed to reduce water use." Connection and capacity charges for new services are not subject to Proposition 218, whereas fees and assessments for existing customers must be adopted in conformance with Proposition 218. This distinction was discussed by the California Supreme Court in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 428:

[50] Water Code §§ 109, 475, 480

> A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection.

Paradise and South Feather seek reimbursement for the cost of the mandates that, in light of Proposition 218, cannot be passed on to existing customers.

iv. Water Code Sections 10654 And 529.7 Authorize Recovering Certain Costs And Pricing Schemes Subject To, Not In Lieu Of, Proposition 218.

Section 10654 authorizes urban water suppliers to seek recovery of costs incurred in preparing and implementing water conservation measures included in urban water management plans. Section 529.7 authorizes water purveyors to promote conservation through volumetric pricing. These provisions may be implemented subject to, not in lieu of, Proposition 218.

Proposition 218 applies to "all assessments, fees and charges"[51] and requires compliance with the procedures outlined in sections 4 or 6 of Article XIII D. Read in light of Proposition 218, sections 10654 and 529.7 provide authority to *seek recovery* of water conservation costs and the imposition of volumetric pricing subject to the processes outlined in Proposition 218. Neither section 10654 nor section 529.7 provides an exception to Proposition 218 to recover expenses through the imposition of fees or assessments or in modifying an agency's fee structure to impose a volumetric pricing scheme.

[51] Cal. Const., Art. XIII D, § 1

v. Claimants Are Not Subject To Water Code Section 540; DWR Misreads The Scope Of The Fee Authority Provided By Section 540.

Section 540 applies to "aggregators" that facilitate "direct transactions" of electricity and permits the aggregator to "charge a fee that is equal to the district's cost for providing that service." Public Utility Code section 331 defines aggregator and direct transaction. None of Claimants fit within the defined terms.

Only one Claimant, South Feather, owns and operates hydroelectric power plants. It generates electricity for sale to Pacific Gas & Electric under a long-term agreement. South Feather is not an aggregator that "combines the loads of multiple end-use customers in facilitating the sale and purchase of electric energy, transmission, and other services on behalf of these customers."[52] Similarly, having an agreement exclusively with PG&E and not directly with retail electricity customers, South Feather is not engaged in any "direct transaction" as defined by Public Utility Code section 331(c). Accordingly, neither South Feather nor any other Claimants have fee authority by virtue of Water Code section 540.

Even if, *arguendo*, Claimants were subject to section 540, DWR misreads the water district's authority to recoup costs of providing the service. DWR claims that water districts may collect costs under section 540 and then "redistribute" or subsidize other district expenses, including those related to implementing conservation mandates. Section 540 does not provide authority for revenue generation that could then be used for other district purposes; aggregators facilitating direct transactions are only permitted to "charge a fee that is equal to the district's cost for providing that service."

[52] Pub. Util. Code § 331, subd. (a)

vi. Farm-Gate Measurement Devices Must Meet Or Exceed The Accuracy Standards Of The Regulations Regardless Of Whether Such Devices Are Locally Cost Effective Under Water Code Section 531.10(b).

Citing Water Code section 531.10(b), DWR claims that "Water suppliers should be able to consider cost when choosing among the regulation's water measurement range of options of other equivalent water measurement method[s]." DWR fails to explain how subsection 531.10(b) provides offsetting revenue or fee authority independent of Proposition 218, nor can it. Proposition 218 established Constitutional limitations on changes to assessments and fees. It cannot be subverted or amended by statute. Indeed, even accepting DWR's statement as true, agricultural water suppliers, like Richvale and Biggs, are still required to implement the Regulations' mandates, including the requirement to "measure water and groundwater that [the agricultural water supplier] delivers to its customers pursuant to the accuracy standards in this section."[53]

Under the Regulations, agricultural water suppliers retain some discretion in selecting a measurement device or devices, including considering the capital cost and ongoing maintenance and operation of each device.[54] Agricultural water suppliers, however, do not retain discretion in how accurate each device must be. No matter what type of measurement device is selected, they must satisfy the accuracy requirements set forth in 23 CCR section 597.3(b). Thus, notwithstanding Water Code section 531.10(b), agricultural water suppliers are mandated to install farm-gate measurement devices that satisfy the accuracy standards of the Regulations.

[53] Cal. Code Regs., Tit. 23, § 597.3

[54] The Richvale Evaluation and Biggs Evaluation, prepared by Davids Engineering, Inc., set forth the feasibility and estimated cost of alternative measurement approaches. Copies of the Evaluations are attached to the Declaration of Grant Davids submitted along with the Narrative Statement in 12-TC-01.

During the Regulations' approval process before the Office of Administrative Law, Claimants and others specifically asked to include cost effectiveness of section 531.10(b) in the Regulations. DWR's response to this request is as follows:

> **Department Response:** Reject – The legislation (SBx7-7) explicitly included the 'cost-effectiveness' condition for the implementation of other efficient water management practices listed under section 10608.48(c). The 'cost-effectiveness' condition was however left out from the water measurement requirement in section 10608.48(b) for agricultural water suppliers with irrigated acreage greater than 25,000 acres (the subject of this regulation).[55]

Thus, DWR's position offered to this Commission is inconsistent with the language of the Act and Regulations and is inconsistent with the position DWR took before OAL when it sought approval of the Regulations. The post hoc rationalization of DWR's counsel should be ignored[56].

In sum, Proposition 218 divests local agencies, like Claimants, of authority to pass the costs of state mandates onto their customers. Claimants' customers/voters may refuse to accept higher fees or assessments under the Proposition 218 process, yet Claimants would still be obligated to implement the mandates. Neither DOF nor DWR has cited any fee authority independent of Proposition 218 or other offsetting revenue that would accrue from implementing the mandates. Claimants are required to implement the state mandates using proceeds of taxes, the very thing the Constitutional subvention requirement was designed to prohibit.

---

[55] Cooper Decl., Exh. G, p. 9; see also p. 28 ["Both OAL and DWR have acknowledged that cost considerations are not a valid basis for an exemption from the statutory requirement to measure at the farm-gate."]

[56] *Southern Cal. Edison Co. v. Public Utilities Commission* (2000) 85 Cal.App.4th 1086, 1111 ["a court 'may not accept appellate counsel's post hoc rationalizations for agency action.'"]

4. The Regulations Mandate Water Measurement Efficiency Standards on all Agricultural Water Suppliers and Impose Penalties and Potential Legal Liability for Noncompliance.

DWR claims that "No local government is required to comply with those regulations" because such mandates are "optional". DWR confuses the agricultural water supplier's discretion in selecting farm-gate measurement devices with the mandate to install some device, whatever it may be, that satisfies the accuracy standards set forth in the Regulations.

Water Code section 10608.48(b) provides that agricultural water suppliers

> ... shall implement all of the following critical efficient management practices:
>
> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).
>
> (2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(Underlining added). Subdivision (i)(1) states that DWR shall adopt regulations that provide a "range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in paragraph (1) of subdivision (b)." The Regulations, at 23 CCR section 597.3, state that agricultural water suppliers "shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards of this section." (Underlining added). The foregoing is mandatory; Biggs and Richvale, as agricultural water suppliers, must comply with the Regulations by installing measurement devices that meet or exceed the accuracy standards set forth therein and must adopt a pricing structure based at least in part on the quantity of water delivered.

DWR claims that failure to comply with the mandates results in no penalties, except ineligibility for state grants and loans. Not true. The Act, at Water Code section 10850, sets forth a new cause of action or proceeding to "attack, review, set aside, void, or annul the acts or decisions of an agricultural water supplier on the grounds of noncompliance with this part...." Thus, agricultural water suppliers who fail to comply with the Act and Regulations are subject to legal liability, in addition to ineligibility for state grants and loans.

Similarly, urban water suppliers are ineligible for state grants and loans and exposed to potential litigation for noncompliance with the Act's mandates, although litigation challenging a supplier's failure to meet per capita water reduction targets may not be brought until after January 1, 2021.[57]

5. The Legislature Made No Finding That The Water Conservation Act Was Necessary To Avoid Waste Or Unreasonable Use Of Water; Accordingly The Conservation Mandates Cannot Be Said To Have "Evolved" From Existing Obligations To Reasonably And Beneficially Use Water.

Citing the California Constitution's prohibition on waste and unreasonable use of water, DWR asserts that the mandates are merely an evolution of preexisting obligations to conserve water. A necessary premise in DWR's argument is that failure to comply with the conservation mandates amounts to unconstitutional waste or unreasonable use of water; otherwise, the Constitutional provision would not be implicated.

For the reasons discussed in Section 2, above, DWR's claim lacks merit because the Act and Regulations impose a "new program" and "higher level of service" uniquely on local government. Additionally, the Act and Regulations were not enacted to avoid waste or unreasonable use of water or to establish a new standard of what constitutes

[57] Water Code § 10608.8, subd. (a)(2)

reasonable and beneficial use of water. Rather, it was enacted to mandate more efficient use of water for the benefit of the public and environment.[58]

The Act restates the Constitution's prohibition of waste and unreasonable use of water.[59] However, nowhere in the Act or Regulations does the Legislature state that failure to comply with the mandates constitutes waste or unreasonable use of water. The Legislature specified that the Act "does not require a reduction in the total water used in the agricultural and urban sectors" implying that a failure to actually generate additional conserved water through implementation of the mandates is not actionable.[60]

All water resources of the state must be utilized in a manner that complies with Constitutional provision of reasonable and beneficial use.[61] Yet the Act only imposes mandates on "urban retail water suppliers" who supply treated water to 3,000 or more end users and "agricultural water suppliers" who provide water to more than 25,000 irrigated acres. Agricultural water suppliers that serve between 10,000 and 25,000 irrigated acres are exempt from the mandates until "sufficient funding" is provided.[62] This funding exception is the Legislature's recognition that the Act imposes state mandates.

The Legislature chose to selectively impose conservation mandates in a manner that uniquely impacts local government. This fact belies DWR's claim that the Act and Regulations derive from the Constitution's universal command to reasonably and beneficially use water. It is also ironic that DWR simultaneously argues there are no penalties for violating the mandates of the Act and Regulations, yet now claims such

---

[58] *Id.* § 10608.4, subd. (a)

[59] *Id.* § 10608, subd. (a)

[60] *Id.* § 10608.8, subd. (c)

[61] Cal Const., Art. X, § 2; see also Water Code § 100

[62] *Id.* § 10853

mandates establish evolved standards of waste and non-beneficial use. If, *arguendo*, it is wasteful and unreasonable to serve water without farm-gate measurement and volumetric pricing, such a finding could not be limited only to "agricultural water suppliers" providing water to more than 25,000 irrigated acres.[63] The Act and Regulations certainly contain no findings – express or implied – that the same water use practices are Constitutionally acceptable for some entities that provide water to less than 10,000 irrigated acres; are conditionally acceptable for entities supplying between 10,000 and 25,000 irrigated acres, unless funding is provided; and amount to unconstitutional waste and unreasonable use for entities providing water to 25,000 or more irrigated acres.

Claimants are certainly obligated to reasonably and beneficially use water in a manner that avoids waste or unreasonable use and have and will continue to operate in such a manner. That obligation, however, does not translate into a mandate applicable only on select urban and agricultural water suppliers to reduce per capita water consumption 20% by 2020 or to install measurement devices at each farm-gate and impose volumetric pricing.

6. Claimants Are Subject To The Tax And Spend Limitations Under Articles XIII A And XIII B Of The California Constitution And Must Expend The Proceeds Of Taxes To Implement The Mandates.

DOF urges the Commission to direct Claimants to provide information that Claimants are subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution. Additionally, although not explicit, DOF appears to contend that Claimants should demonstrate that the mandated costs can be recovered solely from the proceeds of taxes.

---

[63] Additionally, such a finding must be made on a case-by-case basis, not at a policy level. It is well established that what constitutes reasonable and beneficial use of water "depends on the facts and circumstances of each case." (*Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570, citing *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567)

Prior to Proposition 13, Claimants, as irrigation and water districts, were authorized to impose ad valorem taxes and assessments. Proposition 13, however, capped the maximum amount of "any ad valorem tax" on real property to no more than 1%, and limited the collector of such taxes to the counties. Revenues thereby derived by the respective counties are apportioned to the districts, such as Claimants, within their respective counties using a legislatively mandated formula.[64] Claimants and other districts, cities, and special districts were left with the authority to impose only special taxes by a two-thirds vote of the qualified electors of the district.[65] Similarly, Claimants, as "local governments" are subject to the limitation on total appropriations set forth in Article XIII B of the California Constitution.[66]

Claimants are also subject to Proposition 218, Articles XIII C and XIII D of the California Constitution. Proposition 218 provides: "Notwithstanding any other provision of this Constitution: (a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes."[67] The establishment or increase of any fee/charge or assessment requires compliance with the notice, hearing and voting requirements of sections 4 (assessments) and/or 6 (property related fees and charges) of Article XIII D. Thus, Claimants are subject to the tax and spend limitations of Articles XIII A and XIII B and are subject to the limitations on imposing new or increased taxes, assessments, and property related fees and charges as set forth in Articles XIII C and XIII D of the California Constitution.

---

[64] Cal Const., Art. XIII A, § 1

[65] *Id.* § 4; see also Gov. Code §§ 50075 et seq.

[66] *Id.* Art. XIII B, §§ 1, 8, subd. (d)

[67] *Id.* Art. XIII C, § 2, subd. (a)

Answering DOF's second inquiry – Claimants should demonstrate that the mandated costs can be recovered solely from the proceeds of taxes – requires invoking a process of elimination. As noted in Section 3.a., above, Claimants lack authority to impose new or increased fees and assessments without complying with the notice, hearing and voting requirements of Proposition 218. As discussed in Section 3.b., Claimants lack fee authority, independent of Proposition 218, that would provide direct or offsetting revenue to fund the costs of the mandate. Claimants' only remaining source of revenue available to implement the mandates is tax revenue, which is severely restricted by Propositions 13 and 218. The subvention requirement was adopted to address the very problem confronting Claimants by protecting "the tax revenues of local governments from state mandates that would require expenditure of such revenues."[68]

The cases cited by DOF are inapposite. *County of Fresno*, a pre-Proposition 218 case, found Government Code section 17556(d) facially constitutional.[69] To the extent a local agency has authority to levy service charges, fees, or assessments sufficient to pay for the mandates, section 17556(d) states that subvention is not required. However, as repeatedly demonstrated above, Claimants no longer have sufficient fee or assessment authority in light of Proposition 218. This conclusion has been confirmed in previous Commission decisions. In *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, a case with facts arising before adoption of Proposition 218 and that does not mention Proposition 218, the Court found redevelopment agencies do not expend "proceeds of taxes" given the tax increment financing that such agencies receive.[70] Claimants are not redevelopment agencies and do not receive tax increment financing. Given Proposition 218 and the unavailability of

---

[68] *County of Fresno v. State of California* (1991) 23 Cal.3d 482, 487

[69] *Ibid.*

[70] *Redevelopment Agency, supra*, 55 Cal.App.4th at 986-987

other revenue sources, Claimants are forced to comply with the mandates by utilizing their meager share of tax proceeds.

CONCLUSION

In light of the foregoing, Claimants respectfully request that the Commission find that Act and Regulations constitute unfunded state mandates and direct the parties to proceed with establishing parameters and guidelines governing Claimants' and other agencies' right to reimbursement.

Very truly yours,

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP

By: _____
DUSTIN C. COOPER

DCC:aw

Declaration of Dustin C. Cooper
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, Dustin C. Cooper, declare as follows:

1. I make this declaration of my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am a partner in the law firm of Minasian, Meith, Soares, Sexton & Cooper LLP, counsel for Claimants Richvale Irrigation District, Biggs-West Gridley Water District, Paradise Irrigation District and South Feather Water & Power Agency.

3. Attached as Exhibits A through G are true and correct copies of the following documents:

    a. Exhibit A: Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, dated April 22, 2011, prepared by DWR;

    b. Exhibit B: 2010 Legislative Report of the 2010 Urban Water Management Plans, April 2012, prepared by DWR, including my handwritten notations as described in greater detail in paragraph 4, below;

    c. Exhibit C: Senate Floor Analysis of the Act (SBx7-7), Third Reading, dated November 3, 2009, reproduced from leginfo.ca.gov on August 5, 2013;

    d. Exhibit D: Statement of Decision *Discharge of Stormwater Runoff* 07-TC-09, adopted March 26, 2010;

e. Exhibit E: Agreement on Diversion of Water from the Feather River, dated May 27, 1969, between the California Department of Water Resources, Richvale Irrigation District, Biggs-West Gridley Water District, Butte Water District and Sutter Extension Water District;

f. Exhibit F: Technical Information for Water Transfers in 2013, prepared by DWR and the United States Bureau of Reclamation;

g. Exhibit G: Final Statement of Reasons dated May 18, 2012, prepared by DWR in support of Agricultural Water Measurement Regulations;

4. Exhibit B includes my handwritten notations beginning on page 16 through 39. The check marks identify entities that I believe to be "private", non-public urban retail water suppliers subject to the mandates of the Act. I make such representation on the basis of information and belief, my experience as General Counsel for approximately 50 public agency and private water suppliers throughout the State, internet investigation, and the surnames of the various entities (i.e. water district, irrigation district, municipal water district, community services district, city, etc. being public agencies versus mutual water company, irrigation company, or water company signifying private corporations, typically nonprofit mutual benefit corporations). A comprehensive listing of the various types of public agency water districts is contained in Water Code section 20200. Based on the foregoing, I conclude on the basis of information and belief that:

a. There are 448 urban retail water suppliers in California.

b. 75 out of the 448 are private urban retail water suppliers, meaning they are mutual water companies, irrigation companies, or some other private entity that fall within the definition of "urban retail water supplier" under the Act.

c. However, 47 of the 75 private entities are divisions of three large private companies (California American Water Company [4

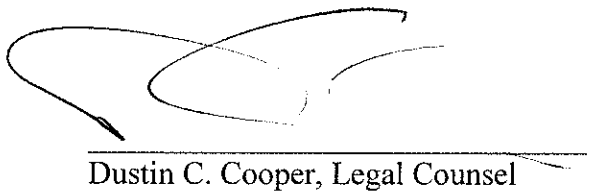
divisions], California Water Service [24 divisions], and Golden State Water Company [19 divisions]). I am informed and believe and on that basis declare that the divisions are subunits of the respective parent company and that there are only three legal entities providing water to 47 separate locations.

d. Counting these company divisions as three entities, there are in fact only 31 separate private urban retail water suppliers out of 404 total urban suppliers statewide (7.67%).

e. 373 out of 404 urban retail water suppliers are public agencies (92.33%).

5. I assisted Richvale and Biggs when they participated in water transfers in the past to help alleviate the effects of statewide droughts. For these transfers, Richvale's and Biggs' landowners sold water generated by idling rice fields that would otherwise have been planted and irrigated. In land idling transfers, the seller is compensated on the basis of evapotranspiration of applied water ("ETAW"), which is the portion of applied water that is evaporated from the soil and plant surfaces and actually used by the crop. For rice, ETAW is 3.3 acre-feet of water per overlying acre of land. In approximately February of 2011 at a meeting convened by DWR's Water Transfer Office, I asked DWR staff if it would consider forbearance transfers in future years. Forbearance transfers would credit sellers for water forborne under a valid water right (e.g., a seller that diverts 75 acre-feet under a 100 acre-feet water right would receive credit for the 25 acre-feet difference). DWR indicated that such transfers were not currently being considered for Richvale and Biggs and staff had no intention of considering such transfers in the future. In order to sell water made available through implementation of conservation measures, a forbearance transfer, as opposed to a crop idling or groundwater substitution transfer, would be necessary.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 7th day of August, 2013, at Oroville, California.



Dustin C. Cooper, Legal Counsel
Claimants

EXHIBIT A

COST ANALYSIS FOR PROPOSED AGRICULTURAL WATER MEASUREMENT REGULATION IN SUPPORT OF ECONOMIC AND FISCAL IMPACT STATEMENT, DATED APRIL 22, 2011, PREPARED BY DWR

California Department of Water Resources
Water Use and Efficiency Branch

Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement

April 22, 2011

1.0 Summary

Statewide costs to comply with proposed agricultural water measurement regulation were estimated. Potentially affected irrigated acreage was estimated to be nearly 2.9 million acres. This value excludes agricultural water suppliersô less than 25,000 acres, CVP contractors with an accepted water management plan and suppliers that signed the Quantification Settlement Agreement (QSA).

Significant uncertainty associated with data and assumptions suggest that the range of potential cost is large. The mid-range estimates of total present value of costs are $333 million over 20 years, and $420 million over 40 years. About $70 million of that would be initial assessments and capital improvements while the remainder is the present value of annual operation and maintenance (O&M), administration and capital replacement. Costs could be as little as half that amount or as much as twice that amount. Average costs per acre potentially affected were estimated and used to calculate average costs per farm potentially affected. Costs to individual farms are likely to vary significantly. As an example, costs were also calculated for a very small farm of 20 acres if it were required to pay for replacement of a single measuring device. Benefits were briefly described but not quantified.

2.0 Introduction

The Economic and Fiscal Impact of a regulation is a requirement of the Office of Administrative Law, and requires the Department of Water Resources (DWR) to complete and submit Form 399 with its proposed regulation. The form includes the following sections and categories of analysis:

- Economic impacts on private businesses and individuals, including costs and benefits (if they might occur)
- Fiscal impacts on local governments
- Fiscal impacts on state government

Costs of the regulation would fall directly on agricultural water suppliers, the vast majority of which are special districts (public agencies). They, in turn, will recover the costs through their water charges and assessments, so all costs would immediately be passed on to the customers (nearly all being private businesses and individuals). Therefore, the following conventions were used to organize and display estimates in Form 399:

- All costs were shown as private sector costs (economic impacts on businesses or individuals).
- Customers were assumed to be businesses. No attempt was made to divide costs into those imposed on businesses versus individuals ï for purposes of this analysis all were assumed to fall on businesses. DWR recognizes that some affected customers are not commercial businesses, but has not estimated the number of non-commercial customers.
- As a result of the above conventions, no additional fiscal impacts on local government are shown. This section of the Form 399 refers the reader back to the previous sections on private sector impacts.

DWR staff, assisted by the Agricultural Water Measurement Project Team and its consultants, has prepared an analysis of costs based on a combination of existing studies, new information provided by Agricultural Stakeholder Committee (ASC) members and other assumptions as needed to generate a reasonable estimate of costs or range of costs. This memorandum describes the methods, data and assumptions and results of the analysis.

3.0 Methods

The following process was used to develop reasonable data, assumptions, and results:

- Compile and review existing information and studies related to costs of measuring water delivery to customers.
- Prepare information requests for ASC members and review responses.
- Use available data to construct a spreadsheet model of costs of measurement. The spreadsheet included the following categories of information or estimates:
    - A list of potentially affected agricultural water suppliers, including irrigated acres of each.
    - Assignment of affected suppliers into regions, and an assessment of whether they already comply with U.S. Bureau of Reclamation (USBR) Water Management Plan (WMP) criteria or are exempt as QSA signatories.
    - For each region:
        - Number of delivery points affected and the number of acres affected, based on the 2003 CALFED report, the 2010 Cooperative Study and information provided by the ASC.
        - Cost for the supplier to conduct an initial assessment based on estimates provided by ASC members.
        - The representative cost of converting or adjusting the current measurement to one that will meet the regulation based on the 2010 Cooperative Study and other information provided by ASC members.
        - Representative cost of O&M, based on the 2010 Cooperative Study and other information provided by ASC members.
        - Representative cost of administration and reporting based on information provided by ASC members.
    - Use the representative cost estimates and the number of potentially affected suppliers, irrigated acres and delivery points to create an estimate of the total cost by region, supplier size category and cost item. Also, calculate the present discounted value of total costs.
- Convert the total costs into costs per representative business (farm) and small business (farm) using information on average and median farm size from the 2007 Census of Agriculture.
- Discuss uncertainties in data, assumptions and results.

4.0 Data Sources

4.1 Existing Studies

Several existing studies were relied on for specific information and cost estimates or as general reference.

The Final Report of the Independent Panel on Appropriate Measurement of Agricultural Water Use was prepared for the California Bay-Delta Authorityôs Water Use Efficiency Program (CALFED, 2003). This report included a statewide assessment, by region, of existing agricultural water measurement and the potential effects of installing or upgrading water measurement. The report addressed measurement at a number of locations within the system, including regional-level estimates of the existing measurement of water delivered at farm turnouts, number of turnouts, and average irrigated acreage per turnout. In addition, the report assessed the costs of installing, operating, and maintaining measurement for three levels of measurement accuracy. The costs in that 2003 report are now outdated, but other information on the number of turnouts and average acreage per turnout was the most comprehensive available for use in this analysis.

The Sacramento River Settlement Contractors, in cooperation with the USBR, commissioned the Cooperative Water Measurement Study Report (SRSC, 2010). The study assessed the costs, benefits, and other technical issues associated with measuring water at the district, lateral, and farm turnout levels in the Sacramento Valley. The study provides estimates of the capital, operation, maintenance, and data collection costs associated with measurement at these different levels. This is the most recent study available to DWR for estimating costs of installing the kinds of measurement devices typical of what suppliers might use, if needed to comply with the proposed regulation. In addition, the report provided consistent estimates for both turnout-level and lateral-level measurement. This economic and fiscal impact analysis relied on the estimates from this report.

Imperial Irrigation District (IID) is currently in the process of planning and implementing its System Conservation Plan, a component of its Efficiency Conservation Definite Plan (IID, 2007). As part of the Plan implementation, IID has evaluated the cost and performance of a range of turnout measurement devices. This information was reviewed during the development of the proposed regulation and again during the compilation of cost estimates. Cost estimates developed for the Plan were used as an alternative source of information in the discussion of uncertainties in Section 6.6.

4.2 Information Requests to ASC

DWR staff made two requests to the ASC members for information to assist in the estimation of economic and fiscal impacts. The initial request for information asked them to identify categories of costs (including but not limited to out-of-pocket costs), and to provide any existing information or studies that would assist DWR in estimating the local economic and fiscal impacts. This request for information is attached as Exhibit 1, and focused on the following categories of potential costs to local water suppliers and growers:

- Initial assessment of existing measurement devices
- Installation of new devices or repair/adjustment of existing devices, as needed
- On-going O&M of upgraded measurement devices (the incremental change in cost compared to what the supplier would have spent in the absence of the regulation)
- Record-keeping, reporting and other administrative costs.

DWR received specific numerical estimates from three ASC members that responded directly to the information request. In addition, several other ASC members provided written or verbal responses.

DWR staff also solicited additional information or advice on assumptions that it needed for preparing the quantitative estimates. It requested assistance from selected ASC members. These included members from the academic institutions (Cal Poly, San Luis Obispo and California State University at Fresno) and private consultants who had a range of knowledge and experience with different water suppliers and regions. Their informal suggestions were considered in the analytical assumptions.

5.0 Data and Assumptions Used in the Analysis

5.1 Regions

Estimates and calculations used in this economic and fiscal impact analysis split the State into regions. This allows for a more detailed analysis than would result from a single set of statewide average numbers. Regions differ substantially in their existing measurement devices and their potentially affected acreage. Regions can be defined in many different ways, but for purposes of this impact analysis, the regional definitions used in the CALFED report (2003) were adopted, but with some modification. The following are the definitions of regions used for this analysis. The assignment of suppliers to these regions

is only for purposes of deriving the cost estimates and has no other policy or implementation implication.

Sacramento Valley: This area is bounded by the American River and the legal Delta in the south and Lake Shasta in the north. The primary rivers in this area are the American, Sacramento, Yuba, Bear and Feather. In addition, these rivers have numerous tributaries.

Delta: This is the legal Delta that incorporates portions of Contra Costa, Sacramento, San Joaquin, Solano and Yolo Counties.

Eastside San Joaquin Valley: This area is bounded by the American River and legal Delta to the north, Fresno County to the south and the San Joaquin River to the west.

Westside San Joaquin Valley: This area is bounded by the San Joaquin River on the east, the coast range on the west, Kings County to the south and the legal Delta to the north. This region is heavily dependent on imported water and incorporates the CVP Delta Mendota and San Luis Unit service areas.

Southern San Joaquin Valley: This area is bounded by the San Joaquin River to the north and the Tehachapi Mountains to the south. It excludes the CVP San Luis Unit service area. Major rivers in the region include the Kings, Kern, Kaweah and Tule.

Other California: This region covers agricultural areas outside of the Central Valley. This region includes the Napa and Sonoma Valleys, the Central and North Coast, the South Coast, Klamath, and desert regions. Note, this includes both the Coachella and Imperial Valleys, but the large suppliers there are currently excluded from the analysis because they are QSA signatories.

5.2 Agricultural Water Suppliers and Irrigated Acreage Potentially Affected

DWR staff compiled a list of agricultural water suppliers for purposes of water measurement, reporting of aggregate deliveries, agricultural water management planning, and other purposes. The list included the supplierôs name and its reported irrigated acreage served. For purposes of this analysis, each supplier is identified by its region, including whether the supplier is a USBR contractor with an accepted Water Management Plan that meets the conditions in the proposed regulation, and whether the supplier is a signatory of the QSA for Colorado River water rights holders.

DWR staff attempted to compile a comprehensive list of suppliers that could potentially be affected by the proposed regulation. However, several difficulties must be acknowledged in the list:

- Suppliers have not been required in the past to report or register their location, irrigated acreage, and other characteristics in a consistent manner. Suppliers include retail agencies (special districts), investor-owned water companies, mutual water companies, and various forms of wholesale distributors. Therefore, simply compiling a comprehensive list was a challenge. It is nearly certain that some potentially affected suppliers have been inadvertently omitted from the list. It is also possible that acreage served by suppliers that have recently merged or changed name could be double-counted.
- Irrigated acreage varies from year to year, and it is difficult to assign some suppliers definitively to a size class to determine if they would be subject to the proposed regulation. Many suppliers are sufficiently larger than 25,000 irrigated acres that the yearly variation does not matter. Perhaps a dozen suppliers fall within about 3,000 acres above or below the 25,000 acre threshold and could be greater or less than the threshold in any reporting year.
- Suppliers may not report their irrigated acreage in a consistent manner. Definitions of irrigated acreage used by suppliers could include: acreage developed for and potentially served by the supplierôs water delivery system; acres of land actually irrigated in a given year or averaged over a number of years; or total acres of crops (counting each different crop in a rotation or double-cropping system) irrigated in a given year or averaged over a period of years. Some suppliers may include areas within their service area that use private groundwater wells. In addition, suppliers could report the gross acreage or the net acreage of an irrigated parcel. The net acreage could exclude the portion occupied by farm roads, irrigation facilities, drainage ditches, equipment turnaround areas, etc.

These suppliers have been assigned to regions of the state using the same regional breakdown developed for the CALFED (2003) analysis. Table 1 summarizes the number of potentially affected suppliers and their total irrigated acreage by region, for purposes of this economic and fiscal impact analysis.

5.3 Number of Water Measurement Devices (Delivery Points) Potentially Affected

Three sources of information were used to estimate the number of measurement sites potentially affected by the proposed regulation. The CALFED report (2003) estimated the average number of irrigated acres per turnout, or irrigation water delivery point, by region. This information was compared with data provided by ASC members in response to DWRôs request for information. In addition, the Cooperative Water Measurement Study Report (SRSC, 2010; see Tables E-1 and E-3) provided estimates of the typical irrigated acreage served by field turnouts and lateral-level measurement sites.

All of this information was considered in developing the estimates of representative acreage served per turnout or lateral measurement site. These estimates in turn were used with the total potentially affected acreage to estimate the number of potentially affected measurement devices at turnouts and laterals. Table 1 summarizes the estimates by region.

Table 1

Affected Acreage, Measurement Sites, and Number of Suppliers

Regions	Acres per Turnout	Potentially Affected Irrigated Acres	Potentially Affected Turnouts	Potentially Affected Lateral Sites	Potentially Affected Suppliers
		---------- Suppliers >25,000 Acres ----------			
Sacramento Valley	80	595,629	7,445	317	13
Delta	50	25,760	515		1
East San Joaquin Valley	40	558,387	13,960		7
West San Joaquin Valley	100	60,108	601		2
Southern San Joaquin Valley	60	1,452,402	24,207		20
Southern California, Coast, Other	70	187,840	2,683		3
Total		2,880,126	49,411		46
		---------- Suppliers 10,000-25,000 Acres ----------			
Sacramento Valley	80	161,684	2,021	86	12
Delta	50	43,002	860		3
East San Joaquin Valley	40	40,258	1,006		3
West San Joaquin Valley	100	68,914	689		4
Southern San Joaquin Valley	60	125,216	2,087		8
Southern California, Coast, Other	70	112,760	1,611		7
Total		551,835	8,274		37

See text for description of data. Potentially affected suppliers exclude those subject to CVP WMPs and signatories of the QSA. Lateral sites would be affected instead of (not in addition to) the turnouts.

5.4 Unit Costs of Measurement

Installing New Measurement Devices. Recent published estimates of unit equipment, installation, and operation and maintenance (O&M) costs were used to the extent possible. The SRSC (2010) report (Cooperative Study) described above was used for unit cost estimates when possible. This included the costs per device for capital and O&M (including meter reading) costs for turnout-level and lateral-level devices. After discussion with experts on the ASC, the high cost estimate for the lateral-level device was selected. Replacement costs for capital equipment were included using the 7-year expected life from the Cooperative Study. The capital costs at time of replacement were adjusted to reflect replacement rather than initial installation.

Repair or Modification of Existing Devices. It is anticipated that some fraction of existing devices that do not meet the proposed measurement requirements may be able to meet the requirement after repair or modification rather than full replacement by a new device. Generally applicable cost estimates are not available for such actions because of the very wide range of potential devices and repair or modification costs. After consultation with ASC experts, DWR staff made what it believes to be a reasonable estimate of the unit costs of repair or modification for purposes of this impact analysis.

Initial Assessment of Existing Measurement Devices. One of the ASC members provided an estimate of $1,000 per measurement device as a cost of initial assessment. Other experts on the ASC agreed that this was a reasonable estimate for purposes of this impact analysis. This cost was applied to the number of devices sampled in the initial assessment. The proposed regulation allows suppliers an option for calculating sample size, and a sample of 10 percent of total devices was used for purposes of this analysis.

Reporting and Administration. Two members of the ASC provided estimates of total additional administrative costs to gather, maintain, and report information on the accuracy of measurement devices. In order to apply the estimates to other suppliers and to the total potentially affected acreage, the estimates were converted into annual costs per irrigated acre, and a value within the range, $1.50 per acre, was selected as representative for purposes of this impact analysis.

Table 2 summarizes the unit costs used for the economic and fiscal impact analysis.

Table 2

Unit Costs of Measurement Devices

	Capital	O&M
Replacement of existing devices		
Turnout	$5,500	$1,100/yr
Lateral	$50,000	$10,000/yr
Repair and recalibration of existing devices		
Turnout	$1,500	$300/yr
Lateral	$15,000	$3,000/yr
Capital replacement factor [a]		
Turnout	80%	
Lateral	50%	

See text for description of data.

[a] The cost, as a percent of original capital, to replace components of a device every 7 years during the analysis period.

5.5 Current Condition of Measurement Devices

The total cost required for water suppliers to comply with the proposed regulation depends to a large degree on whether existing measurement devices meet the proposed measurement accuracy standard. No comprehensive survey has been completed to assess the current condition. The CALFED report (2003) faced the same problem, and asked a team of consultants with experience in different regions of California to develop a reasonable estimate of the current (at the time) condition. Their estimate is dated and not directly applicable for this impact analysis. DWR staff developed an assessment of the current condition of measurement devices, with input and review by ASC experts.

Existing measurement devices were grouped into three categories by region. The categories correspond directly to the required cost that would be needed to replace versus repair/modify devices. Table 3 summarizes the resulting judgments about current condition of devices. In each region, the numerical values in the table represent staffôs judgment about the proportion of devices that meet the proposed regulation, can meet it with repair or modification, or cannot meet it and require replacement.

5.6 Proportion of Area Using Turnout-level Measurement

The proposed regulation allows suppliers to measure deliveries upstream of delivery points to customers under defined conditions. These conditions are expected to occur for substantial areas within the Sacramento Valley. DWR staff developed its own estimate with input and review by ASC experts. For purposes of this impact analysis, it is assumed that half of the potentially affected irrigated acreage in the Sacramento Valley region would be measured at the lateral level. It is assumed for purposes of this analysis that suppliers in other regions use only turnout-level measurement.

5.7 Other Data and Assumptions

A 6% real discount rate was used when needed to convert annual costs to present value or up-front costs to annual costs. This rate is consistent with State guidelines for evaluating water resource projects and policies.

Both a 20-year and a 40-year time horizon were used for the cost analysis. The analysis is intended to represent the additional costs to suppliers and their customers relative to the costs that would be incurred in the absence of the proposed regulation. It is expected that existing measurement devices would be replaced over time with devices that would be likely to meet the proposed regulation. Reasons for this expectation include the new legislative requirement for pricing based in part on volume, and the range of local conditions of water cost and scarcity faced by suppliers. These will induce suppliers to improve measurement accuracy over time even in absence of the proposed regulation. The proposed regulation would not impose an unending cost burden on water suppliers, but it is uncertain how long the additional cost might last. Therefore, both a 20-year and a 40-year time horizon of additional cost were included.

Table 3

Assumed Current Condition of Measurement

Regions	Proportion of acreage already meeting the standard	Proportion that can meet standard with repair/modif. of existing device	Proportion requiring new devices
	For Measurement at Farm Turnouts		
Sacramento Valley	0.2	0.3	0.5
Delta	0.1	0.3	0.6
East San Joaquin Valley	0.4	0.4	0.2
West San Joaquin Valley	0.5	0.3	0.2
Southern San Joaquin Valley	0.7	0.2	0.1
Southern California, Coast, Other	0.4	0.3	0.3
	For Measurement at Laterals		
Sacramento Valley	0.2	0.4	0.4
Delta	na	na	na
East San Joaquin Valley	0	0.1	0.9
West San Joaquin Valley	0.1	0.3	0.6
Southern San Joaquin Valley	0.4	0.3	0.3
Southern California, Coast, Other	na	na	na

See text for process used to develop assumptions.

6.0 Results of Analysis

This section summarizes the results of the cost analysis used to support the Economic and Fiscal Impact Analysis for the proposed regulation. First, a set of best estimate costs are shown, expressed as the discounted present value of all costs and also as costs per irrigated acre. Both regional and statewide costs are shown, and the statewide cost estimates are used in Form 399: Economic and Fiscal Impact Statement. Second, the sensitivity of the results to some key assumptions is discussed. Finally, a brief discussion of benefits is presented.

6.1 Number of Measurement Sites Potentially Requiring Action

These estimates were derived using the estimated number of measurement sites shown in Table 1 and the assumed condition of those sites displayed in Table 3. Table 4 summarizes the results.

Based on the estimates and assumptions, suppliers serving more than 25,000 irrigated acres would need to repair or modify nearly 12,700 turnout measurement devices and install new devices on about 8,300 more. About 60 lateral-level measurement devices would need repair or modification, and another 60 would need new devices.

6.2 Estimated Regional and Statewide Costs

Table 5 summarizes the total costs by cost category, region, and supplier size. These estimates make use of the unit cost estimates discussed earlier, the number of existing devices needing repair/modification, and the number of new devices. So for example, the capital cost for a region includes the number of devices needing repair times the unit capital cost of repair, plus the number of sites needing new measurement devices times the unit cost of new devices.

Table 4

Estimated Number of Measurement Sites by Action Needed

Regions	Turnouts needing repair/ modif.	Turnouts needing new devices	Lateral sites needing repair/ modif.	Lateral sites needing new devices
	---------- Suppliers >25,000 Acres ----------			
Sacramento Valley	1,117	1,861	63	63
Delta	155	309		
East San Joaquin Valley	5,584	2,792		
West San Joaquin Valley	180	120		
Southern San Joaquin Valley	4,841	2,421		
Southern California, Coast, Other	805	805		
Total	12,682	8,308	63	63
	---------- Suppliers 10,000-25,000 Acres ----------			
Sacramento Valley	303	505	17	17
Delta	258	516		
East San Joaquin Valley	403	201		
West San Joaquin Valley	207	138		
Southern San Joaquin Valley	417	209		
Southern California, Coast, Other	483	483		
Total	2,071	2,052	17	17

Assumes 50% of Sacramento Valley acreage measured at the lateral and 50% at the turnout

Table 5

Estimated Regional and Statewide Costs to Comply with Proposed Regulation

Regions	Initial Assessment ($)	Capital ($)	O&M ($/yr)	Reporting and Admin. ($/yr)
	---------- Suppliers >25,000 Acres ----------			
Sacramento Valley ï Turnout-level	372,268	11,912,589	2,382,518	446,722
Sacramento Valley ï Lateral-level	158,412	4,118,714	823,743	446,722
Delta	51,520	1,932,000	386,400	38,640
East San Joaquin Valley	1,395,966	23,731,429	4,746,286	837,580
West San Joaquin Valley	60,108	931,667	186,333	90,161
Southern San Joaquin Valley	2,420,670	20,575,697	4,115,139	2,178,603
Southern California, Coast, Other	268,343	5,635,200	1,127,040	281,760
Total	4,727,288	68,837,296	13,767,459	4,320,189
	---------- Suppliers 10,000-25,000 Acres ----------			
Sacramento Valley ï Turnout-level	101,053	3,233,681	646,736	121,263
Sacramento Valley ï Lateral-level	43,001	1,118,028	223,606	121,263
Delta	86,004	3,225,141	645,028	64,503
East San Joaquin Valley	100,645	1,710,965	342,193	60,387
West San Joaquin Valley	68,914	1,068,171	213,634	103,371
Southern San Joaquin Valley	208,694	1,773,897	354,779	187,824
Southern California, Coast, Other	161,086	3,382,806	676,561	169,140
Total	769,397	15,512,688	3,102,538	827,751

All costs are in 2010 $. Initial assessment and capital costs occur once, and O&M and reporting and administration are annual costs. Capital replacement costs are not shown in this table but are included in subsequent total cost estimates.

6.3 Summary of Costs to Suppliers Greater than 25,000 Irrigated Acres

Table 6 provides a statewide summary of all anticipated costs based on the data, assumptions and calculations described above. It includes only costs for the water suppliers serving more than 25,000 acres. These are the costs that the suppliers are expected to bear and they would pass the costs onto growers and landowners in the form of higher water rates and assessments.

The average farm costs represent a statewide average and would not apply to every acre or farm in the State.

- Costs and acreage account only for potentially affected acreage. Lands in unaffected areas (suppliers less than 25,000 acres, individual groundwater or surface diverters, suppliers with CVP Water Management Plans, and QSA signatories) are not included. Farms in these unaffected areas would not bear any of the costs estimated above.
- Even within affected suppliers, the cost estimates account for a range of conditions, including: measurement devices that already meet the standard (and so require no additional cost), devices that need repair or modification and new devices. Costs and acreage in all three categories are added and shown as a total cost, average per-acre cost and average per-farm cost.
- Water suppliers may choose to recover these costs in different ways. The summary costs per-acre and per-farm are averages and do not include any assumption about how suppliers will recover costs ï that is beyond the intent of this analysis. For example, a supplier could recover costs from all growers and landowners regardless of the condition of the measurement device on any particular turnout. Alternatively, a supplier could recover costs by assessing only those landowners whose turnout has a measurement device needing replacement or repair. In this latter case, the capital cost per farm could range from zero up to a large amount to replace a number of measurement devices. Table 2 summarizes the cost per device.

The example 20-acre farm costs in Table 6 are calculated using the median farm size in California reported in the 2007 Census of Agriculture (U.S. Department of Agriculture, 2009). The median farm is substantially smaller than the average farm because of the large number of very small farms in the state. The census definition of a farm is ñany place from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census yearò. In other words, a farm does not even need to sell a product commercially. As a result, a large number of very small agricultural holdings are considered farms, even though they account for a relatively small portion of total irrigated acreage. Nevertheless, small farms could be affected by the proposed regulation if they receive water from a potentially affected agricultural water supplier.

The example is for a 20-acre farm served by one turnout and billed by the water supplier for the cost of the initial assessment, replacement with a new measurement device, and ongoing operation and maintenance of the new device. In addition, the farm would pay its proportionate share of administrative and reporting costs. This example is provided only to illustrate how costs of the proposed regulation could affect a very small farm. Actual costs to small farms would vary significantly, depending on a farmôs water supplier, its number of turnouts, condition of existing measurement devices and the cost recovery policies of its water supplier.

Table 6
Summary of Statewide Costs,
Suppliers greater than 25,000 irrigated acres

Present Value (PV) of Cost ($)	20-Year Horizon	40-Year Horizon
PV of capital and initial assessment	66,668,000	69,668,000
PV of annual O&M, capital replacement, administration and reporting	263,703,000	359,874,000
Total PV	333,371,000	429,542,000
Costs for average-sized farm		
Total affected acres	2,880,126	2,880,126
Initial cost per affected acre ($)	24.20	24.20
Annual ongoing cost per affected acre ($)	8.00	8.30
Average farm size	313	313
Average initial cost per affected farm ($)	7,570	7,570
Average annual ongoing costs per affected farm ($)	2,500	2,600
Costs for example 20-acre farm		
Initial cost per affected acre ($)	325.00	325.00
Annual ongoing cost per affected acre ($)	58.20	58.50
Example farm size	20	20
Average initial cost per affected farm ($)	6,500	6,500
Average annual ongoing costs per affected farm ($)	1,165	1,170

6% discount rate; Assumes capital costs are Incurred up front and replaced as needed.

Average farm size in California from 2007 Census of Agriculture.

Costs for average-sized farm are averaged over all potentially affected acres and farms. Costs to individual businesses could vary substantially from the average.

Costs for example 20-acre farm assume it would be assessed the cost of initial assessment, replacement, and O&M for one turnout measurement device.

6.4 Summary of Costs to Suppliers between 10,000 and 25,000 Irrigated Acres

Water suppliers serving between 10,000 and 25,000 irrigated acres are not required to meet the proposed measurement requirements unless they are provided with sufficient funding. If the State were to provide such funding, Table 7 provides the estimates of the total costs. Costs per acre and per farm are not included because the costs would not be passed on to individual farms.

Table 7
Summary of Statewide Costs
Suppliers between 10,000 and 25,000 irrigated acres
Assume Capital Costs Are Incurred Up Front

Present Value (PV) of Cost ($)	
PV of capital and initial assessment	15,404,000
PV of annual O&M, capital replacement, administration and reporting	57,694,000
Total PV	73,098,000

6% discount rate; 20-year time horizon over which regulation imposes significant additional cost.

6.5 Other potential costs

Other categories of costs could be required of some suppliers and have not been estimated here. These include:

- Costs to finance capital expenditures. These could include costs to conduct bond feasibility studies and costs to issue and insure bonds
- Costs to revise the supplierôs capital improvement plans to incorporate new spending
- Costs to modify other aspects of the supplierôs delivery system to accommodate new or modified measurement devices
- Costs to hold an approval vote for increased rates or assessments as may be required by Proposition 218.

6.6 Uncertainty in Data, Assumptions and Results

As the description of the data, assumptions, and calculations presented above should make clear, the cost estimates presented in this analysis are highly uncertain and therefore very approximate. Key uncertainties and implications include the following:

Affected Suppliers and Acreage. The list and irrigated acreage of affected suppliers is likely incomplete. DWR continues to modify the list with new information. In particular, the list probably excludes some wholesale suppliers that may be subject to the proposed

regulation. The list may double count some acreage in cases where suppliers have merged in the last few years. Finally, the estimates of irrigated acreage are not consistently defined across suppliers. Overall, the list and sizes of potentially affected suppliers needs further improvement but it is accurate enough to provide decision makers with a reasonable assessment of economic and fiscal impacts.

Number of Potentially Affected Measurement Sites. The estimated number of affected measurement sites is based largely on earlier estimates from the 2003 CALFED report and not on any recent survey. The estimates could be too high or too low. Also, the assessment of the current condition of measurement devices (Table 3) represents no more than a set of educated guesses by staff and selected experts on the ASC. Again, no survey information is available to provide more accurate data. Also, the affected acreage that might be served by lateral-level measurement devices is not known. In order to provide a conservatively higher estimate of costs, only a portion of the Sacramento Valley region was assumed to use lateral-level measurement.

Costs for New Devices. Unit costs to install, operate, and maintain measurement devices are based on a recent study, but are nevertheless rough estimates. Costs are highly dependent on site conditions, local labor costs, choice of measurement device, materials costs and other factors. As an example of other measurement cost estimates, IID (2007) developed costs to upgrade its existing meter gates to support greater measurement accuracy and to verify water conservation. The cost to install, for example, a magnetic flow meter in an existing turnout structure was estimated to cost $14,000, with additional O&M of $420 per year. Expected life of the equipment was estimated to be twenty years. IID further refined those costs during the implementation phase of its System Conservation Plan (IID, 2009). Capital plus installation costs for turnout upgrades sufficient to meet the proposed accuracy standard, but without SCADA or full automation, ranged from $7,300-$10,000 per turnout. Using the higher cost estimate ($14,000 initial cost and $420 per year O&M), with capital replacement after 10 years to be conservative, raises the 20-year present value of cost slightly from $333 million (see Table 6 above) to $341 million. The small increase is the combination of a higher initial capital cost but a longer useful life and a much lower annual O&M.

Initial Assessment. Costs of initial assessment are also highly uncertain and vary depending on water supplier circumstances. For example, some suppliers have suggested that they will need to assess all existing measurement devices even though the proposed regulation specifies that only a sample is required.

Accounting for Net Changes in Costs. Some suppliers may already have reporting mechanisms, data control, and administrative processes that will easily support the requirements of the proposed regulation at little additional cost. Further, suppliers would incur costs of measurement, device O&M, and capital replacement even in the absence of the proposed regulation. Some of the cost components included here, such as for O&M on new devices, are totals for the new device rather than the net increase for the new device relative to the existing device. Finally, suppliers are likely to develop cost-saving ideas as they assess and implement capital improvements.

Time Pattern of Implementation. Costs are discounted to the present using the Stateôs 6% real discount rate for water project evaluation. Discounting means that the timing of costs (i.e., when they are incurred during the planning horizon) can have a large influence on the present value. The cost estimates above assume that all needed capital expenditures occur at the beginning of the horizon ï within the first year of implementation. If instead the capital costs could be phased in over a longer period, the present value of costs would decline significantly. The additional O&M on new devices would also be delayed.

Overall Range of Uncertainty. Given such a range of uncertainties, any ñrigorousò method to develop a range of costs would require as many or more assumptions as developing a single cost estimate. The high level of uncertainty and judgment used to develop the cost estimate suggests a wide range around the 20-year present value cost of $333 million. Consistent with the AACE (1997) standard classification for a Class 5 estimate, a +100%/-50% uncertainty band is appropriate for such a screening-level estimate.

6.7 Benefits of Water Measurement Regulation

Benefits are not estimated quantitatively, and are even difficult to describe in a way that focuses solely on the water measurement regulation. The regulation does not require measurement per se; agricultural water suppliers were already required to measure and report aggregate water deliveries. The regulation is mandated by SBx7-7 to provide for a range of options that suppliers may use to measure water delivered to customers. More accurate measurement also can enable the implementation of volumetric water pricing, therefore providing the potential for price-induced reductions in farm water use and possibly off-setting the cost of compliancy with the regulation.

In general terms, the benefit of the proposed regulation is to support both statewide and local objectives to improve water management and to support the specific goals of reporting of aggregate deliveries and enabling pricing in part by volume. More accurate measurement provides better information for water suppliers, their customers, and the State.

References

AACE (Association for the Advancement of Cost Engineering), 1997. AACE Cost Estimate Classification System. Recommended Practice No. 17R-97. Morgantown, WV.

CALFED, 2003. Final Report of the Independent Panel on Appropriate Agricultural Water Measurement. California Bay-Delta Authority, Sacramento, CA.

DWR (California Department of Water Resources). Unpublished information compiled on the number and size of agricultural water suppliers potentially affected.

Glenn Colusa ID, 2011. Cost information submitted in response to DWR request to Agricultural Stakeholder Committee.

Imperial Irrigation District, 2007. Efficiency Conservation Definite Plan. Appendix 1.c - Improved Delivery Measurement. Imperial, CA.

Imperial Irrigation District, 2009. System Conservation Plan (information provided to Agricultural Stakeholder Committee by IIDôs representative). Imperial, CA.

Oakdale ID, Modesto ID, and Turlock ID (joint response), 2011. Cost information submitted in response to DWR request to Agricultural Stakeholder Committee.

Richvale ID, 2011. Cost information submitted in response to DWR request to Agricultural Stakeholder Committee.

SRSC (Sacramento River Settlement Contractors) and USBR, 2010. Cooperative Water Measurement Study Report. Report prepared by CH2MHILL and MBK Engineers.

U.S. Department of Agriculture. 2009. 2007 Census of Agriculture. Washington, D.C.

MEMORANDUM

To: ASC members
From: CCP on behalf of DWR, Water Use and Efficiency Branch
Date: February 2, 2011
Subject: Request for Information on Economic and Fiscal Impacts

DWR is required to prepare and submit an Economic and Fiscal Impact Statement for its proposed regulation on agricultural water measurement options. Staff is beginning to compile information on the costs that may be required to implement, and would like your assistance in identifying some initial information. Staff is not asking suppliers or others to make their own assessment of impacts, although if any have done that, DWR would like that information to consider. DWR also recognizes that some impacts will depend on the final language in the proposed regulation. However, based on the measurement options and approach that are taking shape in recent meetings, please provide the following: any reports, studies, plans, or formal documents that include costs of design, measurement device, installation, maintenance, and operations. The information provided will be part of the information record. So, be cautious not to provide proprietary information. The categories of costs we would be interested to receive are:

- Categories of costs that might be imposed on local governments. The major categories would include:
    - Initial assessment of measurement devices
    - Installation of new devices or repair/adjustment of existing devices, as needed
    - On-going O&M of upgraded measurement devices (the incremental change in cost compared to what the supplier would have spent in the absence of the regulation)
    - Periodic re-testing and certification
    - Record-keeping, training, other administrative costs.

  Are there other categories DWR should include? Are there levels of local government other than the water suppliers that might incur costs?
- Categories of costs that might be imposed on private individuals and businesses. Obviously, costs imposed on water suppliers will be passed on to their individual customers. Aside from these, are there additional out-of-pocket costs or other restrictions on operations that DWR should consider?

- Other information on the kinds of workers, training, and annual cost per worker for those you anticipate could be needed to meet the measurement regulations. Consider time required for engineers, maintenance technicians, ditch riders, administrative staff, etc. (Note: consider only those categories that might be needed to support the measurement requirement itself ï not volumetric pricing or annual reporting of aggregated delivery).
- Your recommendations on level of detail for the cost analysis. It is unlikely that DWR will have the time or information to evaluate every water supplier that might be affected, so a more aggregated approach will be used. What level of aggregation would be sufficient? Consider geographic regions and categories of suppliers (for example, based on existing delivery system and measurement devices)
- Any specific study or other information that documents quantitative benefits from agricultural water measurement.

Please submit your information by February 17, to:

Baryohay Davidoff
Department of Water Resources
Statewide Integrated Water Management
Water Use & Efficiency Branch
901 P Street, Room 313-A
Sacramento, CA 95814-6431

Or you may e-mail any materials to:
agwue@water.ca.gov

If you would like to discuss the cost issues with DWR staff, you may call DWR Economist Lorraine Marsh at (916) 653-6414.

EXHIBIT B

2010 LEGISLATIVE REPORT OF THE 2010 URBAN WATER MANAGEMENT PLANS, APRIL 2012, PREPARED BY DWR, INCLUDING HANDWRITTEN NOTATIONS

STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY
EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF WATER RESOURCES
1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791

JUN 11 2012

TO: Distribution List

The Department of Water Resources (DWR) respectfully submits a report required by Section 10644 (b) of the California Water Code. This section is part of the Urban Water Management Plan (UWMP) Act that requires to DWR to "*submit to the legislature, on or before December 31, in years ending in six and one, a report summarizing the status of the plans adopted pursuant to this part.*"

SB X7-7 extended the submittal date for urban water management plans from December 31, 2010 to August 1, 2011. Due to shorter time to review plans, the report will be submitted as two reports. This first report will document the UWMPs submitted to date, the water use baselines and targets reported and the documents and workshops provide by DWR to assist urban water suppliers in developing UWMPs.

The second report will be submitted when a majority of the UWMPs have been reviewed and will provide a summary of urban water use and urban water conservation as reported in the 2010 UWMPs. The second report will also highlight exemplary elements of individual plans.

If you have any questions, please contact me at (916) 653-7007 or your staff may contact Manucher Alemi, Chief of DWR's Water Use and Efficiency Branch, at (916) 651-9662 or by e-mail at malemi@water.ca.gov.

Sincerely,

Mark W. Cowin
Director

Attachments

JUN 11 2012

Distribution List

Electronic copy of one-page summary distributed to all members of the Legislature.

E. Dotson Wilson
Chief Clerk of the Assembly
State Capitol, Room 3196
Sacramento, California 95814

Gregory Schmidt
Secretary of the Senate
State Capitol, Room 400
Sacramento, California 95814

Office of the Legislative Counsel
State Capitol, Room 3021
Sacramento, California 95814

Gareth Elliott
Legislative Affairs Secretary
Governor's Office

Honorable John Laird
Secretary for Natural Resources
California Natural Resources Agency
1416 Ninth Street, Room 1311
Sacramento, California 95814

Keali'i Bright
Deputy Secretary for Legislation
California Natural Resources Agency
1416 Ninth Street, Room 1311
Sacramento, California 95814

Sue Sims
Chief Deputy Director
Department of Water Resources

Kasey Schimke
Assistant Director
Legislative Affairs Office
Department of Water Resources

Cathy Crothers
Chief Counsel
Office of the Chief Counsel
Department of Water Resources

DEPARTMENT OF WATER RESOURCES
1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791

A Summary of 2010 Legislative Report on the Status of the 2010 Urban Water Management Plans

April 2012

Pursuant to Section 10644 (b)

The Urban Water Management Planning (UWMP) Act requires urban water suppliers to submit water management plans in years ending in zero and five detailing their long term planning to ensure adequate water supplies. California Water Code, Section 10644 (b), requires the Department of Water Resources (DWR) to prepare and submit a report to the Legislature by December 31 of each year ending in six and one, summarizing the status of the plans and identifying the outstanding elements of individual plans.

Senate Bill X7-7 provided an extension to July 1, 2011, for water suppliers to adopt an Urban Water Management Plan (UWMP). Due to the later submittal of UWMPs, DWR will report on the status of plans through two reports. This first report documents UWMPs submitted to date and the baselines and targets reported therein. The second report will be submitted when a majority of the UWMPs have been reviewed and will provide a summary of urban water use and urban water conservation as reported in the 2010 UWMPs. The second report will also highlight exemplary conservation elements of individual plans.

As of April 12, 2012, DWR has received 381 UWMPs for which 342 retail water suppliers reported baseline water use and set water use targets in their plans. The statewide population weighted average baseline water use was 198 gallons per capita per day (gpcd) and the statewide population weighted 2020 target was 166 gpcd, a 16.2 percent reduction in water use.

State of California
The Natural Resources Agency
DEPARTMENT OF WATER RESOURCES
Division of Statewide Integrated Water Management
Water Use and Efficiency Branch

2010 Urban Water Management Plans

A report to the Legislature pursuant to Section 10644(b) of the California Water Code

April 2012

State of California
Edmund G. Brown Jr., Governor

California Natural Resources Agency
John Laird, Secretary for Natural Resources

Department of Water Resources
Mark W. Cowin, Director

Copies of this report are available from:

State of California
Department of Water Resources
P. O. Box 942836
Sacramento, CA 94236-0001

This report is also available on the Water Use and Efficiency web site at:
http://www.water.ca.gov/urbanwatermanagement/

State of California
Edmund G. Brown Jr., Governor

California Natural Resources Agency
John Laird, Secretary for Natural Resources

Department of Water Resources
Mark W. Cowin, Director

Susan Sims
Chief Deputy Director

Waiman Yip
Policy Advisor

Cathy Crothers
Chief Counsel

Nancy Vogel
Asst. Director Public Affairs

Kimberley Johnston-Dodds
Government and Community Liaison

Kasey Schimke
Asst. Director Legis. Affairs

Dale Hoffman-Floerke
Deputy Director
Delta/Statewide Water Management

Kathie Kishaba
Deputy Director
Business Operations

John Pacheco
Acting Deputy Director
California Energy Resources Scheduling

Carl Torgersen
Acting Deputy Director
State Water Project

Gary Bardini
Deputy Director
Integrated Water Management

Jennifer Marr and Michael Mierzwa
Assistants to the Deputy Director

John Andrew
Assistant Deputy Director
Climate Change

This report was prepared under the direction of

Division of Statewide Integrated Water Management
Kamyar Guivetchi, Chief

And

Water Use and Efficiency Branch
Manucher Alemi, Chief

By

Peter Brostrom, Senior Land and Water Use Scientist

Assisted by

Gwen Huff ..... Staff Land and Water Use Scientist
Joanne Chu ..... Water Resources Engineer
Elizabeth Vail ..... Staff Environmental Scientist
Spencer Kenner ..... Staff Counsel
Andria Avila ..... Office Technician
Guyla McCurry ..... Office Assistant

2010 Urban Water Management Plans

Legislative Report

Requirement to Submit Legislative Report

The Department of Water Resources (DWR) respectfully submits this report to the Legislature pursuant to the requirements of the Urban Water Management Planning Act. Specifically, California Water Code, Section 10644 (b), requires the DWR to prepare and submit a report to the Legislature by December 31 of each year ending in six and one, summarizing the status of the plans and identifying the outstanding elements of individual plans.

Senate Bill X7-7 provided an extension to July 1, 2011 for water suppliers to adopt an Urban Water Management Plan (UWMP). Due to the later submittal of UWMPs, DWR will submit this report in two stages. This is the first report which documents UWMPs submitted to date and the baselines and targets reported therein. The second report will be submitted when a majority of the UWMPs have been reviewed and will provide a summary of urban water use and urban water conservation as reported in the 2010 UWMPs. The second report will also highlight exemplary elements of individual plans.

Urban Water Management Plans

UWMPs are prepared by California's urban water suppliers to support their long-term resource planning and ensure that adequate water supplies are available to meet existing and future water demands. The Urban Water Management Planning Act (Water Code §10610 - 10656) specifies the requirements for UWMPs. Every urban water supplier that either provides over 3,000 acre-feet of water annually or serves more than 3,000 or more customers is required to submit a UWMP in years ending in zero and five.

Senate Bill X7-7 (SB X7-7)

SB X7-7 added new requirements for water suppliers in submitting UWMPs. Suppliers are to calculate a baseline water use and set 2015 and 2020 water use targets in their 2010 UWMPs. The setting of baselines and water use targets is part of a statewide goal of reducing urban per capita water use 20 percent by year 2020. Appendix A provides an overview of the SB X7-7 baseline and water use targets requirements.

DWR's Guidance and Assistance to Water Suppliers

DWR provided guidance and assistance on urban water management plans to urban water suppliers through the development of methodologies, regulations, guidebooks, workshops, and webinars. A description of the assistance provided is listed below.

Methodologies for Calculating Baseline and Compliance Urban Per Capita Water Use

As directed in the legislation, DWR, through a public process and in consultation with the California Urban Water Conservation Council (CUWCC), developed technical methodologies to provide guidance to urban retail water suppliers in developing baseline and water use targets. These methodologies and criteria were also presented to and approved by the California Water Commission.
http://www.water.ca.gov/wateruseefficiency/sb7/docs/MethodologiesCalculatingBaseline_Final_03_01_2011.pdf

Fourth Target Method

The SB X7-7 legislation provided three methods for water suppliers to calculate their 2015 and 2020 water use targets. As directed by the legislation, DWR, through a public process, developed a fourth method that water suppliers could use to calculate water use targets. This target method was presented to and approved by the California Water Commission
http://www.water.ca.gov/wateruseefficiency/sb7/committees/urban/u4/

Process Water Regulation

Process water is the water used to produce a product or the water used in research and development. As directed by the legislation, DWR developed a regulation to allow for the exclusion of process water from baseline and target water use calculations. The exclusion of process water can only be used by suppliers who meet thresholds established in the regulation. This regulation was reviewed and approved by the California Water Commission and underwent the rulemaking process through the Office of Administrative Law.
http://www.water.ca.gov/wateruseefficiency/sb7/committees/urban/u5/

Guidebook

DWR updated and made available a 2010 Urban Water Management Plan Guidebook to assist water suppliers in the preparation of their plans.
http://www.water.ca.gov/urbanwatermanagement/guidebook/

Workshops

DWR conducted a series of ten workshops throughout the state to assist urban water suppliers, consultants, planners, and other interested parties in preparing Urban Water Management Plans. Each workshop was well attended and provided step-by-step guidance and information on the following subjects:

- Overview of Urban Water Management Plans
- SB X7-7 Water Conservation
- 2010 UWMP Requirements
- 2010 UWMP Guidebook
- Online Data Submittal

Webinars

DWR held two webinars to provide information on setting baselines and urban water use targets.

DWR Online Submittal Tool (DOST)

DWR has developed a web portal (DWR On line Submittal Tool) referenced as DOST, to collect urban water management plan data in an Oracle database. The UWMP data can be entered by water suppliers or DWR reviewers. The urban water management plan data will be used to document statewide urban water use and conservation. Data will be used in the California Water Plan and by regional planning agencies, academics and other interested groups and individuals throughout the state. Currently, the data for over 240 UWMPs have been entered into DOST.
http://www.water.ca.gov/urbanwatermanagement/dost/

UWMP Submittals

381/448

As of April 14, 2012, 381 urban water suppliers out of 448 urban water suppliers known to DWR have adopted UWMPs and submitted them to DWR. 297 suppliers submitted UWMPs by the legislative deadline of August 1, 2011. The remainder submitted plans between July 1 and April 12, 2012. Appendix B provides 3 tables listing wholesale suppliers, retail suppliers and suppliers known to DWR who have not yet submitted plans.

Regional Urban Water Management Plans

Urban water suppliers may submit individual urban water management plans or may coordinate with other water suppliers and submit a regional urban water management plan. DWR has received seven regional 2010 UWMPs. Appendix C lists the regional UWMPs received and the participating water suppliers.

SB X7-7 Baselines and Targets

Recognizing the interest in water suppliers' baseline and water use targets, DWR staff recorded these volumes for each supplier as the plans were received. Not all of the plans have been reviewed by DWR staff. The average baseline water use (population-weighted) reported in 2010 UWMPs received to date was 198 gallons per person per day (GPCD). The average 2020 urban water use target reported in 2010 UWMPS received to date was 166 GPCD. Table 3 provides the population weighted average and target by hydrologic region. The data are presented spatially on a statewide map of California in Figure 1.

SB X7-7 requires suppliers to set a target with at least a five percent minimum reduction based on a five-year baseline (CWC 10608.22). Suppliers with five-year baselines under 100 GPCD are exempt from this minimum reduction requirement and are not required to adjust their targets to meet the five percent minimum reductions. 15 suppliers had five-year baselines under a 100 GPCD. Because these suppliers are exempt from the five percent minimum reduction and all selected target method 3 (a fixed regional value), the suppliers' targets were higher than their baselines. See Table 1.

DWR, for the purposes of calculating a statewide average, set the targets of these 15 suppliers equal to their 10-year baseline value. This was done on the assumption that the per capita water use of these suppliers would not go up and at a minimum would remain the same as the baseline value. This adjustment was done to more accurately represent the statewide average target and does not change the supplier's compliance target.

The Statewide target without adjusting the targets of the suppliers under 100 GPCD is 167, a 15.7% average reduction. The Statewide target with the adjusted targets is 166, a 16.2% reduction.

Table 1: Urban water suppliers with five-year baseline water use under a 100 GPCD

Urban Water Supplier	Date Received	Target Method	10 year Baseline GPCD	5 year Baseline GPCD	Target GPCD 2020 *(*asterisk indicates the value used by DWR in calculating the statewide average)*	Percent Reduction
Huntington Park, City of	7/20/2011	Method 3	77	76	142 *(*77)*	-84%
Golden State Water Company Bell-Bell Gardens	11/1/2011	Method 3	85	81	142 *(*85)*	-67%
Golden State Water Company Florence Graham	11/1/2011	Method 3	86	86	142 *(*86)*	-65%
Daly City, City of	7/12/2011	Method 3	78	68	124 *(*78)*	-59%
East Palo Alto, City of	7/18/2011	Method 3	79	75	124 *(*79)*	-57%
Hawthorne, City of	8/23/2011	Method 3	97	94	142 *(*97)*	-46%
South Gate, City of	7/11/2011	Method 3	97	97	142 *(*97)*	-46%
Park Water Company	7/18/2011	Method 3	99	98	142 *(*99)*	-43%
Compton, City of	8/10/2011	Method 3	106	100	142 *(*95)*	-34%
San Bruno, City of	7/15/2011	Method 3	95	89	124 *(*95)*	-31%
Watsonville, City of	7/29/2011	Method 3	104	99	117 *(*94)*	-13%
San Francisco Public Utilities Commission	6/22/2011	Method 3	98	92	100 *(*98)*	-2%
Lynwood, City of	8/2/2011	Method 3	99	88	99	0%
North Coast County Water District	8/1/2011	Method 3	87	85	87	0%
Westborough Water District	8/1/2011	Method 3	76	73	76	0%

Target Methods

Water suppliers selected from one of four different methods (options) to calculate their 2015 and 2020 water use targets. The number of suppliers choosing each target method is reported in Table 2.

Table 2: Preferred Target Method (04/14/12)

Target Method	# of Suppliers Selecting	Percent
1	193	56%
2	4	1%
3	127	37%
4	18	5%
Total	342*	100%

*Five retailers submitted their UWMP with incomplete baselines and target calculations.

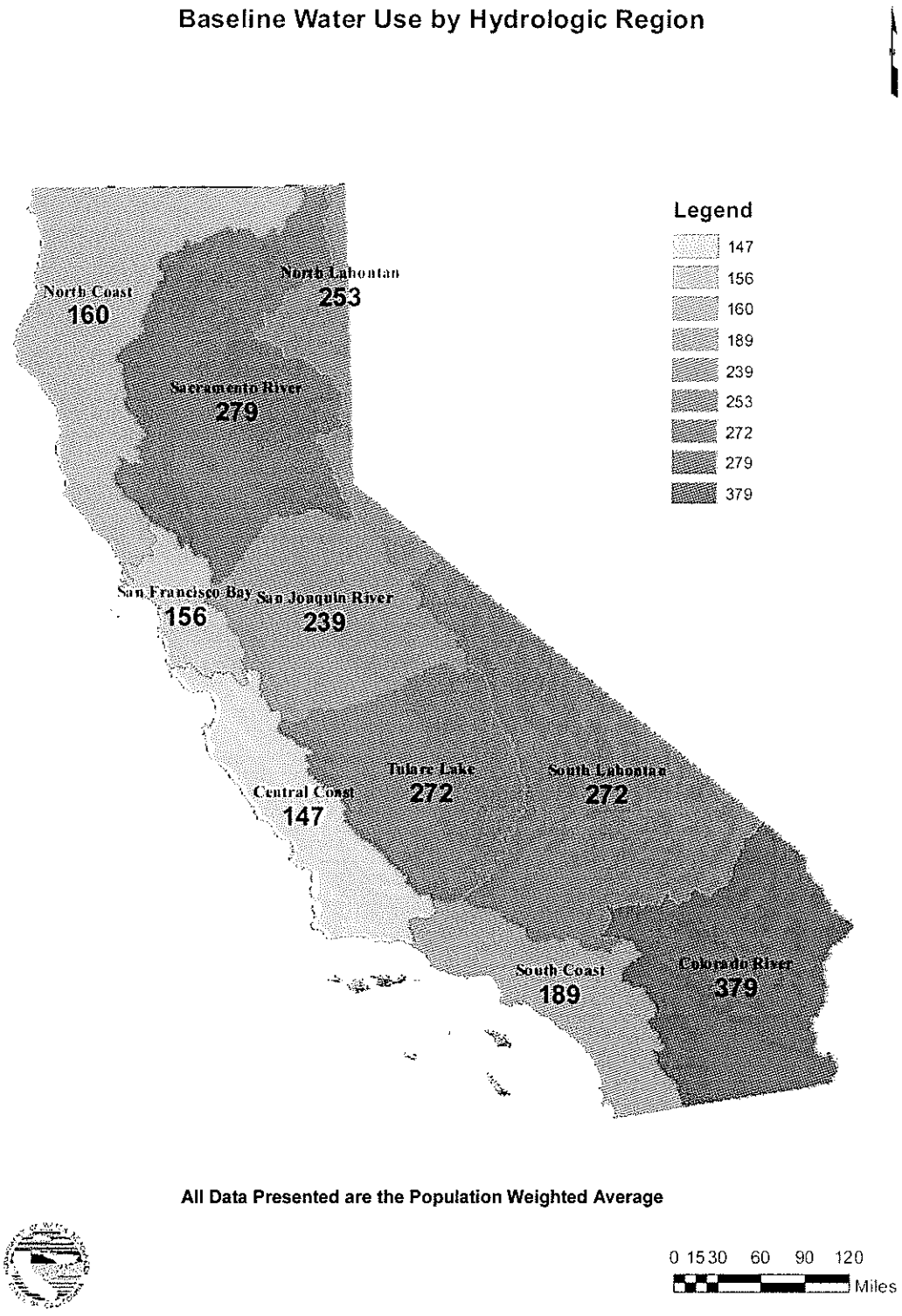
Regional Alliances

SB X7-7 permits urban water suppliers to set and comply with urban water use targets on an individual or a regional basis. Methodology 9: Regional Compliance, in *Methodologies for Calculating Baseline and Compliance Water Use* provides guidance in establishing regional groups, setting regional baselines and targets and regional compliance. The regional groups are called alliances and currently five alliances have been formed with 52 individual suppliers participating. Appendix D lists each alliance and the participating water suppliers.

Table 3: Population Weighted Average Baselines and Targets by Hydrologic Region

Baselines and Targets by Region (04/03/12)					
Region	Plans Received	2010 Population	Population Weighted Average Baseline	Population Weighted Average 2020 Target	Percent Reduction
1-North Coast	11	192,255	160	133	16.6%
2-San Francisco Bay	51	6,976,224	156	133	14.7%
3-Central Coast	24	988,047	145	125	13.5%
4-South Coast	154	18,897,360	189	160	15.4%
5-Sacramento River	32	2,508,245	280	225	19.8%
6-San Joaquin River	16	1,266,464	239	196	17.7%
7-Tulare Lake	16	756,296	272	219	19.4%
8-North Lahontan	5	183,132	253	206	18.8%
9-South Lahontan	17	762,946	272	219	19.5%
10-Colorado River	16	851,661	372	304	18.1%
Statewide Average	***342***	***33,382,630***	***198***	***166***	***16.2%***

Figure 1: Baseline Water Use by Hydrologic Region



APPENDIX A
Overview of Methodologies, Water Use Targets, and Reporting

The Water Conservation Act of 2009 was incorporated into Division 6 of the California Water Code, commencing with Section 10608 of Part 2.55. All quotations of the Water Code in this report are from sections added by this legislation, unless otherwise noted.

The methodologies, water use targets, and reporting apply to urban retail water suppliers that meet a threshold of number of end users or annual volume of potable water supplied. Section 10698.12 (p) defines the water suppliers affected:

> *"Urban retail water supplier" means a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes.*

This overview summarizes the process that urban retail water suppliers must follow and the options they have for complying with the legislation.

Methodologies

The legislation specifically calls for developing seven methodologies and a set of criteria for adjusting daily per capita water use at the time compliance is required (the 2015 and 2020 compliance years) under Section 10608.20(h):

> *(1) The department, through a public process and in consultation with the California Urban Water Conservation Council, shall develop technical methodologies and criteria for the consistent implementation of this part, including, but not limited to, both of the following:*
>
> *(A) Methodologies for calculating base daily per capita water use, baseline commercial, industrial, and institutional water use, compliance daily per capita water use, gross water use, service area population, indoor residential water use, and landscaped area water use.*
>
> *(B) Criteria for adjustments pursuant to subdivisions (d) and (e) of Section 10608.24.*

Sections 10608.20 and 10608.28 of the Water Code allow water suppliers the choice of complying individually or regionally by mutual agreement with other water suppliers or regional agencies. DWR has also developed a methodology for regional compliance.

The following methodologies are included in this report:

- Methodology 1: Gross Water Use
- Methodology 2: Service Area Population
- Methodology 3: Base Daily Per Capita Water Use

- Methodology 4: Compliance Daily Per Capita Water Use
- Methodology 5: Indoor Residential Use
- Methodology 6: Landscaped Area Water Use
- Methodology 7: Baseline Commercial, Industrial, and Institutional (CII) Water Use
- Methodology 8: Criteria for Adjustments to Compliance Daily Per Capita Water Use
- Methodology 9: Regional Compliance

The methodologies provide specific guidance to water suppliers on how to calculate baseline, target, and compliance-year water use. Each methodology defines how its calculations are to be used, with direct reference to the applicable section of the Water Code.

Each methodology describes the calculations, data needed, and, where applicable, optional steps and alternative approaches that water suppliers may use depending on their specific circumstances.

The methodologies for indoor residential water use; landscaped area water use; and baseline CII water use (Methodologies 5, 6, and 7) apply only to urban retail water suppliers who use Method 2 (see Water Use Targets below) to set water use targets.

Baseline Water Use

Water suppliers must define a 10- or 15-year base (or baseline) period for water use that will be used to develop their target levels of per capita water use. Water suppliers must also calculate water use for a 5-year baseline period, and use that value to determine a minimum required reduction in water use by 2020. The longer baseline period applies to a water supplier that meets at least 10 percent of its 2008 measured retail water demand through recycled water. Methodology 3: Base Daily Per Capita Water Use describes the calculations.

Water Use Targets

An urban retail water supplier, as defined above, must set a 2020 water use target and a 2015 interim target using one of four methods. Three of these are defined in Section 10608.20(a)(1), with the fourth developed by DWR by the end of 2010. The 2020 water use target will be calculated using one of the following four methods:

- Method 1: Eighty percent of the water supplier's baseline per capita water use
- Method 2: Per capita daily water use estimated using the sum of performance standards applied to indoor residential use; landscaped area water use; and CII uses
- Method 3: Ninety-five percent of the applicable state hydrologic region target as stated in the State's April 30, 2009, draft 20x2020 Water Conservation Plan
- Method 4: An approach developed by DWR and reported to the Legislature by December 2010 (a description of this target method will be included as Appendix C)

The target may need to be adjusted further to achieve a minimum reduction in water use regardless of the target method (this is explained in Methodology 3). The Water Code directs

that water suppliers must compare their actual water use in 2020 with their calculated targets to assess compliance. In addition, water suppliers will report interim compliance in 2015 as compared to an interim target (generally halfway between the baseline water use and the 2020 target level). The years 2015 and 2020 are referred to in the methodologies as compliance years. All baseline, target, and compliance-year water use estimates must be calculated and reported in gallons per capita per day (GPCD).

Water suppliers have some flexibility in setting and revising water use targets:

- A water supplier may set its water use target and comply individually, or as part of a regional alliance (see Methodology 9: Regional Compliance).
- A water supplier may revise its water use target in its 2015 or 2020 urban water management plan or in an amended plan.
- A water supplier may change the method it uses to set its water use target and report it in a 2010 amended plan or in its 2015 urban water management plan. Urban water suppliers are not permitted to change target methods after they have submitted their 2015 UWMP.

Data Reporting

DWR will collect data pertaining to urban water use targets through three documents: (1) through the individual supplier urban water management plans; (2) through the regional urban water management plans; and (3) through regional alliance reports.

Water suppliers that comply individually must report the following data in their urban water management plans (applicable urban water management plan dates are included in parentheses).

- Baseline Gross Water Use and Service Area Population (2010, 2015, 2020)
- Individual 2020 Urban Water Use Target (2010, 2015, 2020) and Interim 2015 Urban Water Use Target (2010)
- Compliance Year Gross Water Use (2015 and 2020) and Service Area Population (2010, 2015, 2020)
- Adjustments to Gross Water Use in the compliance year (2015, 2020)
- Water suppliers who choose Target Method 2 also must provide Landscaped Area Water Use and Baseline CII Water Use data (2010, 2015, and 2020).
- Water Suppliers who choose Target Method 4 must provide the components of calculation as required by Target Method 4. Appendix C describes Target Method 4 and the regional compliance reporting that applies to that method (2010, 2015, and 2020).

Water suppliers that comply regionally must fulfill additional reporting requirements. These are described in greater detail in Methodology 9: Regional Compliance.

Consequences if Water Supplier Does Not Meet Water Use Targets

Each urban retail water supplier, as defined above, must comply by establishing 2015 and 2020 water use targets, demonstrating that its water use is in compliance with its targets, and reporting water use baselines, targets, compliance year water use, and supporting data in its

urban water management plan. Section 10608.56 (a) states that a water supplier not in compliance will not be eligible for water grants or loans that may be administered by DWR or other state agencies:

> *On and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part.*

Two exceptions to this are allowed. Section 10608.56 (c) states that a water supplier shall be eligible for a water loan or grant if it "has submitted to the department for approval a schedule, financing plan, and budget, to be included in the grant or loan agreement, for achieving the per capita reductions."

Section 10608.56 (e) states that a water supplier can also be eligible for a water loan or grant if it "has submitted to the department for approval documentation demonstrating that its entire service area qualifies as a disadvantaged community."

Appendix B 2010 Urban Water Management Plans

Table 1: Wholesale Urban Water Suppliers

Wholesale Urban Water Supplier	Date Received
Alameda County Flood Control and Water Conservation District Zone 7	12/24/2010
Antelope Valley East Kern Water Agency	7/19/2011
Calleguas Municipal Water District	6/13/2011
Castaic Lake Water Agency	7/21/2011
Central Coast Water Authority	7/1/2011
Chino Basin Desalter	7/1/2011
Covina Irrigating Company	7/6/2011
Crestline-Lake Arrowhead Water Agency	8/31/2011
Foothill Municipal Water District	6/15/2011
Humboldt Bay Municipal Water District	10/11/2011
Inland Empire Utilities Agency	7/1/211
Kern County Water Agency Improvement District No. 4	6/23/2011
Metropolitan Water District	12/7/2010
Modesto Irrigation District	6/9/2011
Mojave Water Agency	7/7/2011
Municipal Water District of Orange County	7/11/2011
North of The River Municipal Water District	6/23/2011
San Antonio Water Company	7/22/2011
San Benito County Water District	7/29/2011
San Bernardino Valley Municipal Water Department	7/14/2011
San Diego County Water Authority	7/21/2011
San Gorgonio Pass Water Agency	6/3/2011
San Luis Obispo County Flood Control & Water Conservation district Zone 3	7/29/2011
Santa Clara Valley Water District	6/22/2011
Solano County Water Agency	7/21/2011
Sonoma County Water Agency	7/20/2011
South San Joaquin Irrigation District	10/3/2011
Stockton East Water District	7/7/2011
Suburban Water Systems	7/5/2011
Three Valleys Municipal Water District	6/20/2011
United Water Conservation District	7/21/2011
Upper San Gabriel Valley Municipal Water	7/7/2011
Water Facilities Authority	7/11/2011
West Basin Municipal Water District	6/22/2011

Table 2: Urban Water Suppliers who Submitted an Urban Water Management Plan.

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Adelanto, City of	7/21/2011	Method 1	322	204	37%
Alameda County Water District	7/1/2011	Method 4	169	137	19%
Alhambra, City of	7/27/2011	Method 3	130	122	6%
Amador Water Agency	11/14/2011	Method 1	208	166	20%
American Canyon, City of	10/6/2011	Method 1	190	152	20%
Anaheim, City of	6/29/2011	Method 1	202	161	20%
Antioch, City of	7/15/2011	Method 3	186	165	11%
Apple Valley Ranchos Water Company	7/14/2011	Method 1	306	245	20%
Arcadia, City of	7/11/2011	Method 1	294	236	20%
Arcata, City of	7/28/2011	Method 3	119	110	8%
Arroyo Grande, City of	1/24/2012	Method 1	186	149	20%
Azusa, City of	8/1/2011	Method 1	210	168	20%
Banning, City of	7/27/2011	Method 1	315	252	20%
Bear Valley Community Services District	7/29/2011	Method 3	200	179	11%
Bellflower-Somerset Mutual Water Company	8/1/2011	Method 1	128	100	22%
Benicia, City of	7/21/2011	Method 2	195	180	8%
Beverly Hills, City of	8/18/2011	Method 1	284	228	20%
Blythe, City of	8/1/2011	Method 1	274	218	20%
Brawley, City of	8/1/2011	Method 1	276	222	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Brea, City of	7/15/2011	Method 1	275	220	20%
Brentwood, City of	7/7/2011	Method 1	238	191	20%
Buena Park, City of	6/7/2011	Method 1	200	160	20%
Burbank, City of	7/5/2011	Method 1	195	156	20%
Burlingame, City of	6/16/2011	Method 4	163	134	18%
Calaveras County Water District	7/29/2011	Method 1	215	172	20%
Calexico, City of	9/12/2011	Method 3	180	172	4%
California American Water Company - Los Angeles District	2/8/2012	Method 4	215	187	13%
California American Water Company - Sacramento District	11/3/2011	Method 1	217	173	20%
California American Water Company - San Diego District	2/8/2012	Method 3	121	116	4%
California American Water Company - Ventura District	2/8/2012	Method 4	289	234	19%
California Water Service Company Antelope Valley	7/13/2011	Method 1	352	281	20%
California Water Service Company Bakersfield	7/13/2011	Method 1	298	239	20%
California Water Service Company Bear Gulch	7/13/2011	Method 1	238	190	20%
California Water Service Company Chico District	7/13/2011	Method 1	286	229	20%
California Water Service Company Dixon, City of	7/13/2011	Method 3	171	164	4%
California Water Service Company Dominquez	7/13/2011	Method 1	214	171	20%
California Water Service Company East Los Angeles	7/13/2011	Method 3	127	115	9%
California Water Service Company Hermosa/Redondo	7/13/2011	Method 3	141	126	11%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
California Water Service Company Kern River Valley	7/13/2011	Method 3	202	179	11%
California Water Service Company King City	7/13/2011	Method 1	178	142	20%
California Water Service Company Livermore	7/13/2011	Method 1	198	158	20%
California Water Service Company Los Altos/Suburban	7/13/2011	Method 1	241	193	20%
California Water Service Company Marysville	7/13/2011	Method 1	250	200	20%
California Water Service Company Mid Peninsula	7/13/2011	Method 3	137	124	9%
California Water Service Company Oroville	7/13/2011	Method 1	335	268	20%
California Water Service Company Palos Verdes	7/13/2011	Method 1	282	225	20%
California Water Service Company Redwood Valley	7/13/2011	Method 3	176	157	11%
California Water Service Company Salinas District	7/13/2011	Method 3	146	117	20%
California Water Service Company Selma	7/13/2011	Method 1	269	215	20%
California Water Service Company South San Francisco	7/13/2011	Method 3	151	124	18%
California Water Service Company Stockton	7/13/2011	Method 3	182	165	9%
California Water Service Company Visalia	7/13/2011	Method 1	243	194	20%
California Water Service Company Westlake	7/13/2011	Method 1	491	393	20%
California Water Service Company Willows	7/13/2011	Method 1	248	198	20%
Camarillo, City of	7/11/2011	Method 1	223	179	20%
Cambria Community Services District	3/28/2012	Method 3	112	105	6%
Camrosa Water District	6/29/2011	Method 1	454	363	20%
Carlsbad Municipal Water District	7/7/2011	Method 4	257	207	19%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Carmichael Water District	7/11/2011	Method 1	306	244	20%
Carpinteria Valley Water District	7/29/2011	Method 3	126	117	7%
Casitas Municipal Water District	7/18/2011	Method 1	319	255	20%
Castaic Lake Water Agency Santa Clarita Water Division	7/21/2011	Method 1	235	188	20%
Ceres, City of	8/12/2011	Method 1	243	194	20%
Cerritos, City of	7/21/2011	Method 3	131	123	6%
Chino, City of	8/1/2011	Method 1	237	189	20%
Citrus Heights Water District	7/1/2011	Method 1	287	230	20%
Clovis, City of	12/22/2011	Method 1	249	199	20%
Coachella Valley Water District	7/29/2011	Method 1	591	473	20%
Coachella, City of	7/25/2011	Method 3	202	181	10%
Coastside County Water District	6/29/2011	Method 3	128	120	6%
Colton, City of	7/14/2011	Method 1	241	193	20%
Compton, City of	8/10/2011	Method 3	106	142 *(*95)*	-34%
Contra Costa Water District	7/5/2011	Method 1	183	146	20%
Corona, City of	7/12/2011	Method 1	264	212	20%
Crescenta Valley Water District	7/21/2011	Method 3	152	140	8%
Cucamonga Valley Water District	7/29/2011	Method 1	285	228	20%
Daly City, City of	7/12/2011	Method 3	78	124 *(*78)*	-59%
Davis, City of	2/7/2012	Method 3	202	167	17%
Delano, City of	9/9/2011	Method 1	196	157	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Desert Water Agency	7/1/2011	Method 1	736	589	20%
Diablo Water District	7/21/2011	Method 3	175	157	10%
Downey, City of	2/9/2012	Method 3	145	139	4%
Dublin San Ramon Services District	7/1/2011	Method 1	204	163	20%
East Bay Municipal Utilities District	7/27/2011	Method 2	165	150	9%
East Niles Community Service District	7/19/2011	Method 1	404	323	20%
East Orange County Water District	7/18/2011	Method 1	329	263	20%
East Palo Alto, City of	7/18/2011	Method 3	79	124 *(*79)*	-57%
East Valley Water District	7/14/2011	Method 4	342	277	19%
Eastern Municipal Water District	7/6/2011	Method 2	212	184	13%
El Centro, City of	7/25/2011	Method 3	193	190	2%
El Dorado Irrigation District	7/11/2011	Method 1	281	225	20%
El Monte, City of	7/25/2011	Method 3	113	105	7%
El Toro Water District	6/17/2011	Method 1	201	161	20%
Elk Grove Water Service	7/1/2011	Method 1	253	202	20%
Elsinore Valley Municipal Water District	7/26/2011	Method 2	248	240	3%
Escondido, City of	8/8/2011	Method 1	228	182	20%
Estero Municipal Improvement District/Foster City	6/15/2011	Method 1	161	129	20%
Eureka, City of	9/16/2011	Method 3	128	122	5%
Exeter, City of	10/17/2011	Method 1	235	188	20%
Fair Oaks Water District	2/21/2012	Method 1	322	258	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Fallbrook Public Utility District	7/29/2011	Method 1	467	374	20%
Folsom, City of	7/12/2011	Method 1	429	343	20%
Fortuna, City of	7/1/2011	Method 3	126	118	6%
Fountain Valley, City of	6/24/2011	Method 3	170	142	16%
Fruitridge Vista Water Company	2/3/2012	Did not submit Targets and Baselines			
Fullerton, City of	7/29/2011	Method 1	222	178	20%
Garden Grove, City of	7/5/2011	Method 3	162	142	12%
Georgetown Divide Public Utilities District	8/1/2011	Method 3	197	167	15%
Gilroy, City of	7/1/2011	Method 1	166	133	20%
Glendale, City of	7/12/2011	Method 3	144	137	5%
Glendora, City of	11/17/2011	Method 1	265	212	20%
Golden Hills Community Services District	7/29/2011	Method 3	144	136	6%
Golden State Water Company Artesia	11/1/2011	Method 3	113	108	4%
Golden State Water Company Barstow	7/29/2011	Method 1	287	229	20%
Golden State Water Company Bay Point	7/29/2011	Method 3	111	105	5%
Golden State Water Company Bell-Bell Gardens	11/1/2011	Method 3	85	142 *(*85)*	-67%
Golden State Water Company Claremont	11/8/2011	Method 1	344	275	20%
Golden State Water Company Cordova	7/29/2011	Method 1	369	295	20%
Golden State Water Company Cowan Heights	9/12/2011	Method 1	559	447	20%
Golden State Water Company Culver City	9/12/2011	Method 3	163	142	13%
Golden State Water Company Florence	11/1/2011	Method 3	86	142 *(*86)*	-65%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Graham					
Golden State Water Company Norwalk	11/1/2011	Method 3	119	113	5%
Golden State Water Company Ojai	12/12/2011	Method 1	299	239	20%
Golden State Water Company Orcutt	9/12/2011	Method 1	277	221	20%
Golden State Water Company Placentia	9/12/2011	Method 3	167	142	15%
Golden State Water Company San Dimas	9/12/2011	Method 1	231	185	20%
Golden State Water Company Simi Valley	9/12/2011	Method 1	195	156	20%
Golden State Water Company South Arcadia	9/12/2011	Method 3	131	124	5%
Golden State Water Company South San Gabriel	9/12/2011	Method 3	111	100	10%
Golden State Water Company Southwest	8/1/2011	Method 3	126	119	6%
Golden State Water Company West Orange	9/12/2011	Method 3	151	140	7%
Goleta Water District	12/7/2011	Method 3	119	111	7%
Great Oaks Water Company Incorporated	7/27/2011	Method 1	121	97	20%
Grover Beach, City of	7/12/2011	Method 1	141	113	20%
Hanford, City of	7/11/2011	Method 3	212	179	16%
Hawthorne, City of	8/23/2011	Method 3	97	142 *(*97)*	-46%
Hayward, City of	7/21/2011	Method 3	130	122	6%
Helix Water District	7/14/2011	Method 1	142	114	20%
Hemet, City of	9/22/2011	Method 1	176	141	20%
Hesperia Water District City of	9/15/2011	Method 1	207	165	20%
Hi-Desert Water District	7/21/2011	Method 3	123	117	5%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Hillsborough, Town of	10/19/2011	Method 1	334	267	20%
Hollister, City of	7/29/2011	Method 1	149	119	20%
Humboldt Community Service District	10/11/2011	Method 3	130	120	8%
Huntington Beach, City of	7/21/2011	Method 3	159	137	14%
Huntington Park, City of	7/20/2011	Method 3	77	142 *(*77)*	-84%
Imperial, City of	8/1/2011	Method 3	212	200	6%
Indian Wells Valley Water District	7/14/2011	Method 4	264	214	19%
Indio, City of	2/22/2011	Method 1	296	236	20%
Inglewood, City of	7/1/2011	Method 3	115	103	10%
Irvine Ranch Water District	6/27/2011	Method 1	213	170	20%
Joshua Basin Water District	7/11/2011	Method 3	172	156	9%
Jurupa Community Service District	6/6/2011	Method 1	248	199	20%
La Habra, City of Public Works	6/10/2011	Method 3	159	142	11%
La Palma, City of	6/3/2011	Method 3	156	136	13%
La Verne, City of	7/21/2011	Method 4	268	219	18%
Laguna Beach County Water District	6/24/2011	Method 1	201	161	20%
Lake Arrowhead Community Services District	7/1/2011	Method 3	199	162	19%
Lake Hemet Municipal Water District	6/29/2011	Method 3	162	142	12%
Lakeside Water District	7/20/2011	Method 3	148	142	4%
Lakewood, City of	6/21/2011	Method 1	105	84	20%
Las Virgenes Municipal Water District	6/29/2011	Method 1	307	246	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Lincoln Avenue Water Company	6/22/2011	Method 3	155	142	8%
Lincoln, City of	8/10/2011	Method 1	246	197	20%
Linda County Water District	8/4/2011	Method 3	195	167	14%
Livermore, City of	7/5/2011	Method 1	195	156	20%
Lodi, City of Public Works Department	8/28/2011	Method 1	248	199	20%
Loma Linda, City of	7/14/2011	Method 1	255	204	20%
Lomita, City of	7/12/2011	Method 3	126	115	9%
Lompoc, City of	7/20/2011	Method 3	124	117	6%
Long Beach, City of	6/13/2011	Method 1	134	107	20%
Los Angeles County Public Works Waterworks District 29	7/28/2011	Method 1	319	256	20%
Los Angeles County Public Works Waterworks District 40	7/28/2011	Method 1	353	282	20%
Los Angeles Department of Water and Power	5/31/2011	Method 3	152	138	9%
Los Banos, City of	6/15/2011	Method 1	233	186	20%
Lynwood, City of	8/2/2011	Method 3	99	99	0%
Madera, City of	10/11/2011	Method 1	247	197	20%
Mammoth Community Water District	11/28/2011	Method 1	176	141	20%
Manhattan Beach, City of	6/22/2011	Method 3	176	142	19%
Marin Municipal Water District	8/5/2011	Method 3	146	124	15%
Marina Coast Water District	7/17/2011	Method 3	133	117	12%
Martinez, City of	6/20/2011	Method 1	160	128	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
McKinleyville Community Service District	9/13/2011	Incomplete Baseline and Target Calculations			
Menlo Park, City of	7/14/2011	Method 1	262	210	20%
Merced, City of	7/12/2011	Method 1	310	248	20%
Mesa Consolidated Water District	6/20/2011	Method 1	179	143	20%
Mid-Peninsula Water District	8/1/2011	Method 3	130	119	8%
Millbrae, City of	6/29/2011	Method 3	119	113	5%
Milpitas, City of	6/23/2011	Method 1	176	141	20%
Mission Springs Water District	7/28/2011	Method 4	327	265	19%
Modesto, City of	6/9/2011	Method 1	285	228	20%
Monrovia, City of	6/23/2011	Method 1	202	162	20%
Monte Vista Water District	6/20/2011	Method 1	211	169	20%
Montebello Land and Water Company	7/21/2011	Method 1	115	92	20%
Morgan Hill, City of	7/1/2011	Method 1	199	159	20%
Morro Bay, City of	7/29/2011	Method 3	125	113	10%
Moulton Niguel Water District	7/11/2011	Method 1	215	172	20%
Mountain View, City of	7/18/2011	Method 4	180	146	19%
Napa, City of	7/11/2011	Method 1	165	132	20%
Nevada Irrigation District	6/29/2011	Method 1	254	203	20%
Newhall County Water District	7/21/2011	Method 1	244	195	20%
Newport Beach, City of	7/12/2011	Method 1	254	203	20%
Nipomo Community Services District	7/7/2011	Method 4	240	204	15%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
North Coast County Water District	8/1/2011	Method 3	87	87	0%
North Marin Water District	7/13/2011	Method 1	178	143	20%
North Tahoe Public Utility District	7/15/2011	Incomplete Baseline and Target Calculations			
Norwalk, City of	8/1/2011	Method 3	122	112	8%
Oceanside, City of	7/25/2011	Method 3	167	142	15%
Oildale Mutual Water Company	7/26/2011	Method 1	312	250	20%
Olivehurst Public Utilities District	12/20/2011	Method 1	186	149	20%
Olivenhain Municipal Water District	7/20/2011	Method 1	354	283	20%
Ontario, City of	7/21/2011	Method 1	248	198	20%
Orange Vale Water Company	7/15/2011	Method 1	347	278	20%
Orange, City of	6/22/2011	Method 1	224	179	20%
Orchard Dale Water District	7/21/2011	Method 3	108	105	3%
Otay Water District	7/26/2011	Method 1	190	152	20%
Padre Dam Municipal Water District	7/28/2011	Method 3	163	142	13%
Palmdale Water District	7/21/2011	Method 1	220	176	20%
Palo Alto, City of	7/12/2011	Method 1	223	179	20%
Paradise Irrigation District	8/1/2011	Method 1	272	218	20%
Paramount, City of	7/11/2011	Method 3	114	109	4%
Park Water Company	7/18/2011	Method 3	99	142 *(*99)*	-43%
Pasadena, City of	6/16/2011	Method 1	210	168	20%
Paso Robles	7/11/2011	Method 1	241	193	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Patterson, City of	7/21/2011	Method 3	169	160	5%
Petaluma, City of	7/1/2011	Method 1	170	136	20%
Phelan Pinon Hills Community Services District	7/19/2011	Method 3	185	162	12%
Pico Rivera, City of	8/1/2011	Method 1	126	101	20%
Pico Water District	7/29/2011	Method 4	139	128	8%
Pismo Beach, City of	10/7/2011	Method 4	236	192	19%
Pittsburg, City of	8/29/2011	Method 1	170	136	20%
Placer County Water Agency	7/15/2011	Method 4	298	238	20%
Pleasanton, City of	6/30/2011	Method 1	244	195	20%
Pomona, City of	7/27/2011	Method 3	176	142	19%
Port Hueneme, City of	9/12/2011	Method 3	118	112	5%
Poway, City of	6/30/2011	Method 1	269	215	20%
Quartz Hill Water District	7/28/2011	Method 1	373	298	20%
Rainbow Municipal Water District	7/15/2011	Method 1	1460	1168	20%
Ramona Municipal Water District	2/15/2012	Method 1	317	254	20%
Rancho California Water District	7/27/2011	Method 1	416	333	20%
Redlands, City of	7/14/2011	Method 1	365	292	20%
Redwood City, City of	7/18/2011	Method 3	141	124	12%
Rialto, City of	8/19/2011	Method 1	227	182	20%
Rincon Del Diablo Municipal Water District	8/1/2011	Method 1	266	213	20%
Rio Vista, City of	8/31/2011	Method 3	320	256	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Riverside Highland Water Company	6/23/2011	Did not submit targets and baselines			
Riverside, City of	8/1/2011	Method 1	264	211	20%
Rohnert Park, City of	7/18/2011	Method 1	162	119	27%
Rosamond Community Service District	7/20/2011	Method 1	177	142	20%
Roseville, City of	8/25/2011	Method 1	309	247	20%
Rowland Water District	8/19/2011	Method 1	196	157	20%
Rubidoux Community Service District	11/28/2011	Method 1	227	182	20%
Sacramento County Water Agency	7/20/2011	Method 1	278	223	20%
Sacramento Suburban Water District	7/13/2011	Method 1	242	193	20%
Sacramento, City of	11/2/2011	Method 1	279	223	20%
San Bernardino, City of	7/14/2011	Method 4	249	201	19%
San Bruno, City of	7/15/2011	Method 3	95	124 *(*95)*	-31%
San Buenaventura, City of	7/11/2011	Method 3	162	142	12%
San Clemente, City of	6/16/2011	Method 1	186	148	20%
San Diego, City of	7/29/2011	Method 3	166	142	14%
San Dieguito Water District	7/27/2011	Method 1	199	160	20%
San Fernando, City of	7/14/2011	Method 3	144	136	6%
San Francisco Public Utilities Commission	6/22/2011	Method 3	98	100 *(*98)*	-2%
San Gabriel County Water District	6/17/2011	Method 3	165	142	14%
San Gabriel Valley Fontana Water Company	7/19/2011	Method 1	218	175	20%
San Gabriel Valley Water Company	7/29/2011	Method 3	158	142	10%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
San Jacinto, City of	2/17/2012	Method 1	218	174	20%
San Jose Water Company	6/2/2011	Method 3	144	111	23%
San Jose, City of	7/5/2011	Method 1	180	144	20%
San Juan Water District	8/1/2011	Method 1	508	407	20%
San Luis Obispo, City of	7/18/2011	Method 3	124	117	6%
Santa Ana, City of	6/27/2011	Method 3	128	109	15%
Santa Barbara, City of	7/14/2011	Method 3	128	117	9%
Santa Clara, City of	6/23/2011	Method 1	235	186	21%
Santa Cruz, City of	1/12/2012	Method 3	113	110	3%
Santa Fe Irrigation District	7/5/2011	Method 1	631	505	20%
Santa Fe Springs, City of	7/21/2011	Method 1	332	266	20%
Santa Margarita Water District	7/27/2011	Method 1	210	168	20%
Santa Maria, City of	8/5/2011	Method 1	148	119	20%
Santa Monica, City of	8/1/2011	Method 1	154	142	8%
Santa Paula, City of	7/29/2011	Method 3	155	142	8%
Santa Rosa, City of	6/29/2011	Method 3	144	127	12%
Scotts Valley Water District	10/11/2011	Method 1	180	144	20%
Seal Beach, City of	7/20/2011	Method 3	152	140	8%
Serrano Water District	7/1/2011	Method 1	466	373	20%
Shafter, City of	8/22/2011	Method 1	279	223	20%
Sierra Madre, City of	6/6/2011	Method 1	262	210	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Soledad, City of	6/29/2011	Method 3	143	117	18%
Sonoma, City of	7/5/2011	Method 1	216	173	20%
Soquel Creek Water District	10/21/2011	Method 3	118	115	3%
South Coast Water District	7/21/2011	Method 1	186	149	20%
South Gate, City of	7/11/2011	Method 3	97	142 *(*97)*	-46%
South Pasadena, City of	7/14/2011	Method 1	182	146	20%
South Tahoe Public Utilities District	7/13/2011	Method 3	201	164	18%
Stallion Springs Community Services District	7/29/2011	Method 3	176	167	5%
Stockton, City of	8/16/2011	Method 3	195	165	15%
Suisun-Solano Water Authority	7/13/2011	Method 3	151	124	18%
Sunny Slope Water Company	7/13/2011	Method 3	152	142	7%
Sunnyslope County Water District	7/29/2011	Method 1	178	143	20%
Sunnyvale, City of	7/27/2011	Method 1	174	139	20%
Susanville, City of	11/22/2011	Baselines and targets not calculated correctly			
Sweetwater Authority	7/11/2011	Method 3	124	115	7%
Sweetwater Springs Water District	11/7/2011	Method 1	113	90	20%
Tahoe City Public Utilities District	11/18/2011	Method 1	346	277	20%
Tehachapi, City of	7/29/2011	Method 3	242	194	20%
Thousand Oaks, City of	7/18/2011	Method 3	242	194	20%
Torrance, City of	8/2/2011	Method 3	159	142	11%
Trabuco Canyon Water District	7/15/2011	Method 1	260	181	30%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Tracy, City of	6/22/2011	Method 1	227	182	20%
Triunfo Sanitation District	7/11/2011	Method 1	233	186	20%
Truckee-Donner Public Utilities District	6/15/2011	Method 1	408	326	20%
Tulare, City of	7/27/2011	Method 1	300	240	20%
Tuolumne Utilities District	7/18/2011	Method 3	187	165	12%
Turlock, City of	6/30/2011	Method 1	357	286	20%
Tustin, City of	7/5/2011	Method 1	190	152	20%
Twentynine Palms Water District	7/18/2011	Method 3	147	135	8%
Ukiah, City of	6/28/2011	Method 1	232	185	20%
Upland, City of	7/15/2011	Method 1	273	218	20%
Vacaville, City of	7/18/2011	Method 3	172	166 *(*172)*	3%
Valencia Water Company	7/21/2011	Method 1	278	222	20%
Vallecitos Water District	7/18/2011	Method 1	199	159	20%
Valley Center Municipal Water District	7/21/2011	Method 1	1768	1415	20%
Valley County Water District	7/13/2011	Method 3	121	118	2%
Valley of the Moon Water District	7/5/2011	Method 3	147	124	16%
Valley Water Company	5/5/2011	Method 1	362	289	20%
Vaughn Water Company	8/10/2011	Method 1	426	341	20%
Ventura County Waterworks District No 1	7/27/2011	Method 4	223	181	19%
Ventura County Waterworks District No. 8	7/21/2011	Method 1	236	189	20%
Vernon, City of	6/17/2011	Method 1	94111	75289	20%

Urban Water Supplier	Date Received	Target Method	Baseline GPCD	Target GPCD 2020 (*asterisk indicates the value used by DWR in calculating the statewide average)	Percent Reduction
Victorville Water District	7/18/2011	Method 1	260	208	20%
Vista Irrigation District	7/25/2011	Method 3	175	142	19%
Walnut Valley Water District	7/18/2011	Method 1	204	163	20%
Wasco, City of	7/5/2011	Method 1	248	198	20%
Watsonville, City of	7/29/2011	Method 3	104	117 *(*94)*	-13%
West Kern Water District	7/14/2011	Method 3	200	170	15%
West Sacramento, City of	11/21/2011	Method 1	305	244	20%
West Valley Water District	7/14/2011	Method 4	316	254	20%
Westborough Water District	8/1/2011	Method 3	76	76	0%
Western Municipal Water District of Riverside	7/15/2011	Method 4	432	358	17%
Westminster, City of	6/14/2011	Method 3	180	149	17%
Whittier, City of	5/12/2011	Method 1	179	143	20%
Windsor, Town of	6/27/2011	Method 3	156	130	17%
Woodland, City of	8/10/2011	Method 1	289	231	20%
Yorba Linda Water District	5/31/2011	Method 1	286	229	20%
Yreka, City of	7/21/2011	Method 1	321	257	20%
Yuba City, City of	9/12/2011	Method 1	275	220	20%
Yucaipa Valley Water District	7/14/2011	Method 1	291	233	20%

Table 3: Urban Water Suppliers who have not yet Submitted an Urban Water Management Plan.

California Urban Water Suppliers who have not submitted an UWMP (April 12, 2012)	DWR Region Office
Alco Water Service	South Central
Anderson, City of	Northern
Arvin Community Services District	South Central
Atascadero Mutual Water Company	South Central
Atwater, City of	South Central
Bakersfield, City of (Retail)	South Central
Bakersfield, City of (Wholesale)	South Central
Bakman Water Company	South Central
Beaumont Cherry Valley WD	Southern
Bella Vista Water District	South Central
Big Bear Lake, City of	Southern
California American Water Company - Central District/Monterey District	South Central
California City, City of	Southern
California Domestic Water Company (Wholesaler)	Southern
Covina, City of	Southern
Crescenta City, City of	Southern
Crestline Village CWD - Division 10	Southern
Del Oro Water Company	Northern
Dinuba, City of	South Central
Discovery Bay Community Services District	North Central
El Segundo, City of	Southern
Fairfield, City of	North Central

California Urban Water Suppliers who have not submitted an UWMP (April 12, 2012)	DWR Region Office
Fillmore Water Department	Southern
Fresno, City of	South Central
Galt, City of	North Central
Greenfield, City of	South Central
Groveland Community Service District	South Central
Healdsburg, City of	North Central
Kerman, City of	South Central
Kingsburg, City of	South Central
Lamont Public Utility District	South Central
Lathrop, City of	North Central
Lee Lake Water District	Southern
Lemoore, City of	South Central
Livingston, City of	South Central
Los Angeles County Public Works Waterworks District 4 and 34	Southern
Madera County	South Central
Manteca, City of	North Central
Montecito Water District	Southern
Monterey Park, City of	Southern
Myoma Dunes Mutual Water Company	Southern
Norco, City of	Southern
Oakdale, City of	South Central
Oxnard Water Department	Southern
Perris, City of	Southern
Pinedale County Water District	South Central

California Urban Water Suppliers who have not submitted an UWMP (April 12, 2012)	DWR Region Office
Placerville, City of	North Central
Porterville, City of	South Central
Red Bluff, City of	Northern
Redding, City of	Northern
Reedley, City of	South Central
Rio Linda/Elverta Community Water District	North Central
Ripon, City of	North Central
Riverbank, City of	South Central
Rubio Canyon Land and Water Association	Southern
San Bernardino County - Area 64	Southern
San Bernardino County - Area 70	Southern
San Joaquin County	North Central
San Juan Basin Authority	Southern
San Juan Capistrano, City of	Southern
San Lorenzo Valley Water District	North Central
Sanger, City of	South Central
Santa Ynez Water Cons Dist. ID#1	Southern
Shasta Lake, City of	Northern
South Feather Water and Power	Northern
Vallejo, City of	North Central
Winton Water and Sanitary District	South Central

APPENDIX C

Regional Urban Water Management Plans *(02/16/2012)*

Regional Plan Name	Date Received	Participating Agencies
Antelope Valley UWMP	8/4/2011	Los Angeles County Water Works District 40
		Quartz Hill Water District
Castaic Lake UWMP	7/21/2011	Castaic Lake Water Agency - Santa Clarita
		Castaic Lake Water Agency
		Newhall Community Water District
		Valencia Water Company
Hollister Urban Area UWMP	7/29/2011	City of Hollister
		Hollister/Sunnyslope Water Treatment Agency
		San Benito County Water District (Hollister Area)
		Sunnyslope County Water District
Kern County-North of the River UWMP	6/23/2011	Kern County Water Agency
		North of The River Municipal Water District
Modesto UWMP	6/9/2011	City of Modesto
		Modesto Irrigation District
San Bernardino Valley Regional UWMP	7/14/2011	City of Colton
		East Valley Water District
		City of Loma Linda
		City of Redlands
		City of San Bernardino
		San Bernardino Valley Municipal Water District
		West Valley Water District
		Yucaipa Valley Water District
Tehachapi Regional UWMP	07/29/2011	Bear Valley Community Services District
		Golden Hills Community Services District
		Stallion Springs Community Services District
		Tehachapi, City of
		Tehachapi-Cummings County Water District

APPENDIX D - Regional 20 X 2020 Alliances *(02/16/2012)*

Name of Regional Alliance	Alliance 2020 Target	Participating Water Agencies
Olivenhain Regional Alliance	**201**	Olivenhain WD
		Rincon Del Diablo MWD
		San Dieguito WD
		Vallecitos WD
Orange County Regional Alliance	**157**	Anaheim, City of
		Brea, City of
		Buena Park, City of
		East Orange County WD
		El Toro Water District
		Fountain Valley, City of
		Fullerton, City of
		Garden Grove, City of
		Golden State Water Company - Placentia
		Huntington Beach, City of
		Irvine Ranch Water District
		La Habra, City of
		La Palma, City of
		Laguna Beach County WD
		Mesa Consolidated Water District
		Moulton Niguel Water District
		Municipal Water District of Orange County
		Newport Beach, City of
		Orange, City of
		San Clemente, City of
		San Juan Capistrano, City of
		Santa Ana, City of
		Santa Margarita Water District
		Seal Beach, City of
		Serrano Water District
		South Coast Water District
		Trabuco Canyon Water District
		Tustin, City of
		Westminster, City of
		Yorba Linda Water District

Name of Regional Alliance	Alliance 2020 Target	Participating Water Agencies
Contra Costa Water District Alliance	209	Antioch, City of
		Contra Costa Water District
		Diablo Water District
		Golden State Water Company - Bay Point
		Martinez, City of
		Pittsburg, City of
North Marin - Sonoma Alliance	129	Marin Municipal Water District
		Petaluma, City of
		Rohnert Park, City of
		Santa Rosa, City of
		Sonoma, City of
		Valley of the Moon Water District
		Windsor, Town of
West Basin Regional Alliance	161	El Segundo, City of
		Hawthorne, City of (CWSC)
		Inglewood, City of
		Lomita, City of
		Manhattan Beach, City of
		West Basin Municipal Water District

1/19

EXHIBIT C

SENATE FLOOR ANALYSIS OF THE ACT (SBX7-7), THIRD READING, DATED NOVEMBER 3, 2009, REPRODUCED FROM LEGINFO.CA.GOV ON AUGUST 5, 2013

BILL ANALYSIS

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916)
327-4478

SB 7XXXXXXX

THIRD READING

Bill No: SB 7XXXXXXX
Author: Steinberg (D)
Amended: 11/3/09
Vote: 21

SENATE FLOOR : 21-13, 11/02/09
AYES: Alquist, Calderon, Cedillo, Corbett, DeSaulnier, Ducheny, Florez, Kehoe, Leno, Liu, Lowenthal, Maldonado, Negrete McLeod, Padilla, Pavley, Price, Romero, Simitian, Steinberg, Wiggins, Wright
NOES: Ashburn, Cogdill, Cox, Denham, Dutton, Harman, Hollingsworth, Huff, Strickland, Walters, Wolk, Wyland, Yee
NO VOTE RECORDED: Aanestad, Benoit, Correa, Hancock, Oropeza, Runner

ASSEMBLY FLOOR : 45-12, 11/3/09
(Roll call not available)

SUBJECT : Water conservation

SOURCE : Author

DIGEST : This bill requires the state to achieve a 20 percent reduction in urban per capita water use by December 31, 2020, requires agricultural water management plans and efficient water management practices for agricultural water suppliers, and promotes expanded development of sustainable water supplies at the regional level.

CONTINUED

Assembly Amendments deleted the contingency language relating to SB 5XXXXXXX.

ANALYSIS :

Specifics of SB 7XXXXXXX

1. Establishes statewide urban water conservation target of 10 percent by 2015, and 20 percent by 2020.

2. Establishes processes for urban water suppliers to meet the conservation targets:

   A. Requires urban retail water suppliers, individually or on a regional basis, to develop an urban water use target by July 1, 2011.

B. Provides four methodologies for urban water suppliers to choose from to set and achieve their water use target:

(1) Twenty percent reduction in baseline daily per capita use.

(2) A combination of efficiency standards for residential indoor use (55 gallons per capita daily), residential outdoor use (Model Water Efficient Landscape Ordinance), and commercial, industrial, and institutional (CII) use (10 percent reduction).

(3) A five percent reduction in the Department of Water Resources (DWR) regional targets.

(4) A method to be developed by DWR by December 31, 2010.

C. Requires a minimum five percent reduction in base water use by 2020 for all urban water suppliers.

D. Allows recycled water to count toward meeting urban supplier's water use target if recycled water offsets potable water demands.

CONTINUED

E. Allows urban suppliers to consider certain differences in their local conditions when determining compliance.

F. Requires urban water suppliers to hold public hearings to allow for community input on the supplier's implementation plan for meeting their water use target, and requires the implementation to avoid placing a disproportionate burden on any customer sector.

G. Conditions eligibility for water management grants and loans on an urban water supplier's compliance with meeting the requirements established by the bill.

3. Prohibits urban suppliers from requiring changes that reduce process water -- defined in the bill as water used in production of a product -- and allows urban water supplier to exclude process water from the development of the urban water target if substantial amount of its water deliveries are for industrial use.

4. Requires DWR review and reporting on urban water management plans and report to the Legislature by 2016 on progress in meeting the 20 percent statewide target, including recommendations on changes to the standards or targets in order to achieve the 20 percent target.

5. Creates a CII Task Force to develop best management practices, assess the potential for statewide water savings if the best management practices are implemented, and report to the Legislature.

6. Re-establishes agricultural water management planning program.

A. Defines "agricultural water supplier" as one that delivers water to 10,000 or more of irrigated acres, excluding recycled water, but exempts suppliers serving less than 25,000 irrigated areas unless funding is provided to the supplier for those purposes.

CONTINUED

B. Requires development and implementation of agricultural water management plans, with specified components by 2012, with five-year updates.

C. Requires DWR to review plans and report to the Legislature on status and effectiveness.

D. Requires two "critical" efficient water management practices -- measurement and pricing -- and only if locally cost-effective for 14 additional practices.

E. Conditions eligibility for water management grants and loans on an agricultural water suppliers' compliance with meeting the requirements for implementation of efficient water management practices.

F. Establishes agricultural water supplier reporting requirements on agricultural efficient water management practices.

7. Requires DWR to promote implementation of regional water resource management practices through increased incentives/removal of barriers and specifies potential changes.

8. Requires DWR, in consultation with the State Water Resources Control Board, to develop or update statewide targets as to recycled water, brackish groundwater desalination, and urban stormwater runoff.

9. Takes effect only if SB 1, SB 5, and SB 7 of the 2009-10 Seventh Extraordinary Session of the Legislature are enacted and become effective.

Background

Under existing law, the California Water Plan is accepted as the master plan that guides the orderly and coordinated control, protection, conservation, development, management and efficient utilization of the water resources of the state. DWR is required to update the Water Plan on or before December 31, 2003, and every five years thereafter. The plan shall include a discussion of various strategies

CONTINUED

that may be pursued in order to meet the future water needs of the state.

The Urban Water Management Planning Act requires urban water suppliers to prepare and submit Urban Water Management Plans to DWR every five years on or before December 31, in years ending in five and zero. Among other things, the plans are required to:

1. Describe the reliability of the water supply by water year type (average, single dry year, etc.).

2. Quantify, to the extent records are available, past, current, and projected water use, identifying the uses

among water use sectors (residential, commercial, etc.).

3. Describe each water demand management measure currently being implemented, or scheduled for implementation.

The Agricultural Water Management Planning Act required agricultural water suppliers that supply more than 50,000 acre-feet of water annually to develop agricultural water management plans by 1992. Among other things, and to the extent information was available, the reports were to address the following:

1. Current water conservation and reclamation practices being used.

2. Plans for changing current water conservation plans.

3. Conservation educational services being used.

4. Whether the supplier, through improved irrigation water management, has a significant opportunity to do one or both of the following:

   A. Save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies that fail to serve further beneficial uses.

   B. Reduce the quantity of highly saline or toxic drainage water.

CONTINUED

Existing law makes the terms of, and eligibility for, a water management grant or loan made to an urban water supplier and awarded or administered by the department, state board, or California Bay-Delta Authority or its successor agency conditioned on the implementation of the water demand management measures identified in the Urban Water Management Planning Act.

Under Federal law (Section 210 Public Law 97-293 of 1982) all Central Valley Project contractors are required to develop water conservation plans. In 1993, the Central Valley Project Improvement Act Section 3405(e) required the Bureau of Reclamation to develop criteria to determine the adequacy of the water conservation plans required by Section 210. The Bureau adopted the criteria in 1993, and the most recent update was done in 2005.

On February 28, 2008, Governor Schwarzenegger sent a letter to Senators Perata, Steinberg, and Machado in response to their concerns that his Administration was unilaterally beginning work on a "peripheral canal." In that letter, the Governor identified administrative actions he was considering as part of a comprehensive solution in the Delta. Included in that letter was the following "key element:"

> A plan to achieve a 20 percent reduction in per capita water use statewide by 2020. Conservation is one of the key ways to provide water for Californians and protect and improve the Delta ecosystem. A number of efforts are already underway to expand conservation programs, but I plan to direct state agencies to develop this more aggressive plan and implement it to the extent permitted by current law. I would welcome legislation to incorporate this goal into statute.

Comments

Urban Water Conservation . This bill establishes a statewide target to reduce urban per capita water use by 20

percent by 2020. This target is consistent with the Governor's February 2008 proposal. The Delta Vision Strategic Plan also recommended legislation requiring "Urban water purveyors to implement measures to achieve a

CONTINUED

20 percent reduction in urban per capita water use statewide throughout California by December 31, 2020." This bill requires urban retail water suppliers, individually or on a regional basis, to develop an urban water use target by December 31, 2010, requires each urban water supplier to meet their target by 2020, and to meet an interim target (half of their 2020 target) by 2015.

Flexibility . This bill provides options for how water agencies can achieve higher levels of water conservation but requires those options to meet a per capita reduction in water use. This bill sets the "20 by 2020" target (and the interim 2015 target) for the entire state and then allows water agencies to choose one of four methods for determining their own water-use target for 2020. Water suppliers also can choose to join with a broader group of suppliers to meet the targets regionally. Finally, this bill provides urban water suppliers with the option of shifting more water use to recycled water to meet their targets.

CII Water Management . This bill restricts urban water suppliers from imposing conservation requirements on process water. Other sections of the proposal address other CII concerns, including requiring urban water suppliers to avoid disproportionate impacts on any one sector and requiring an open transparent process for all water customers to review and provide input into the water supplier implementation plan. There are also no mandated conservation requirements or targets in the bill for CII.

Agricultural Water Management . For agriculture, this bill relies on implementation of efficient water management practices (EWMPs) for water use, which have been developed, at least in part, by the Agricultural Water Management Council. This bill creates two EWMP categories: "critical" that all agricultural water suppliers (i.e. measurement and pricing structures) must implement and "additional" EWMPs that must be implemented if the measures are locally cost effective and technically feasible. The two mandatory EWMPs are already required of all federal water contractors (e.g. Westlands Water District and Friant Water Authority) since 1992 under the Central Valley Project Improvement Act.

CONTINUED

Agricultural Water Management Plans . This bill reauthorizes dormant provisions of the Water Code that required agricultural water suppliers to prepare agricultural water management plans. This bill places agricultural water suppliers on an equal footing with urban suppliers who have been required to prepare and submit water management plans for approximately 15 years. This bill defines agricultural water suppliers as those with 10,000 acres of irrigated land, but exempts from the bill's requirements any supplier serving less than 25,000 of

irrigated land if the state does not provide funding for implementation.

Sustainable Water Management . This bill requires DWR to develop incentives for sustainable water management and alternative water supplies such as brackish water desalination and stormwater recovery.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT : (Unable to verify at time of writing)

Unknown at this time.

OPPOSITION : (Unable to verify at time of writing)

Unknown at this time.

DLW:mw 11/3/09 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

CONTINUED

EXHIBIT D

STATEMENT OF DECISION *DISCHARGE OF STORMWATER RUNOFF* 07-TC-09, ADOPTED MARCH 26, 2010

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758 Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L. Filed June 20, 2008, by the County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, and Vista, Claimants.	Case No.: 07-TC-09 *Discharge of Stormwater Runoff - Order No. R9-2007-0001* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on March 26, 2010*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on March 26, 2010. Tim Barry, John VanRhyn, Helen Peak, Shawn Hagerty and James Lough appeared on behalf of the claimants. Elizabeth Jennings appeared on behalf of the State Water Resources Control Board. Carla Shelton and Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 6-1.

Summary of Findings

The test claim, filed by the County of San Diego and several cities, alleges various activities related to reducing stormwater pollution in compliance with a permit issued by the San Diego Regional Water Quality Control Board, a state agency.

The Commission finds that the following activities in the permit (as further specified on pp. 122-132 below) are a reimbursable state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution:

- street sweeping (permit part D.3.a(5));
- street sweeping reporting (part J.3.a.(3)(c) x-xv);
- conveyance system cleaning (part D.3.a.(3));
- conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii));
- educational component (part D.5.a.(1)-(2) & D.5.b.(1)(c)-(d) & D.5.(b)(3));
- watershed activities and collaboration in the Watershed Urban Runoff Management Program (part E.2.f & E.2.g);
- Regional Urban Runoff Management Program (parts F.1., F.2. & F.3);
- program effectiveness assessment (parts I.1 & I.2);
- long-term effectiveness assessment (part I.5) and
- all permittee collaboration (part L.1.a.(3)-(6)).

The Commission also finds that the following test claim activities are not reimbursable because the claimants[1] have fee authority sufficient (within the meaning of Gov. Code § 17556, subd. (d)) to pay for them: hydromodification management plan (part D.1.g) and low-impact development (parts D.1.d.(7) & D.1.d.(8)), as specified below.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning; and
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

BACKGROUND

The claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region, (Regional Board), a state agency. Before discussing the specifics of the permit, an overview of the permit's purpose, and municipal stormwater pollution in general, puts the permit in context.

[1] In this analysis, claimants and the permit term "copermittees" are used interchangeably, even though two of the copermittees (the San Diego Unified Port District and San Diego County Regional Airport Authority) are not claimants. The following are the claimants and copermittees that are subject to the permit requirements: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, County of San Diego.

Municipal Stormwater

The purpose of the permit is to specify "requirements necessary for the copermittees[2] to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." Each of the copermittees or dischargers "owns or operates a municipal separate storm sewer system (MS4),[3] through which it discharges urban runoff into waters of the United States within the San Diego region."

Stormwater[4] runoff flowing untreated from urban streets directly into creeks, streams, rivers, lakes and the ocean, creates pollution, as the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[5]

Because of these stormwater pollution problems described by the Ninth Circuit, both California and the federal government regulate stormwater runoff.

California Law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

---

[2] "Copermittees" are entities responsible for National Pollutant Discharge Elimination System (NPDES) permit conditions pertaining to their own discharges. (40 C.F.R. § 122.26 (b)(1).)

[3] Municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[4] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

[5] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.)
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[6]
>
> In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits [national pollutant discharge elimination system] required by federal law. (§ 13374.)[7]

As to waste discharge requirements, section 13377 of the California Water Code states:

> Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

Much of what the Regional Board does, especially that pertains to permits like the one in this claim, is based in the federal Clean Water Act.

Federal Law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[8] from point sources[9] to waters of the United States, since

---

[6] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

[7] *Id.* at page 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements." (Wat. Code, § 13263).

[8] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other

discharges of pollutants are illegal except under a permit.[10] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[11] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[12]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a Regional Board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority

---

conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[9] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[10] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[11] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[12] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

> to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent* than required by federal law-from taking into account the economic effects of doing so.[13]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[14]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[15]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[16] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[17]

---

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 627-628.

[14] Best management practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

[15] *Environmental Defense Center, Inc. v. U.S. E.P.A., supra,* 344 F.3d 832, 841-842.

[16] 33 USCA section 1342 (p)(2)(C).

[17] 33 USCA section 1342 (p)(3)(B).

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application. The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[18]

General State-Wide Permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[19] as described in the permit as follows:

> In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (state and local) storm water regulation. Under this dual system, the Regional Board is responsible for enforcing the General Construction Activities Storm Water Permit, SWRCB Order 99-08 DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, SWRCB Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit), and each municipal Copermittee is responsible for enforcing its local permits, plans, and ordinances, which may require the implementation of additional BMPs than required under the statewide general permits.

The State and Regional Boards have statutory fee authority to conduct inspections to enforce the general statewide permits.[20]

The Regional Board Permit (Order No. R9-2007-001, Permit CAS0108758)

Under Part A, "Basis for the Order," the permit states:

> This Order Renews National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, which was first issued on July 16, 1990 (Order No. 90-42), and then renewed on February 21, 2001 (Order No. 2001-01). On August 25, 2005, in accordance with Order NO. 2001-01, the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit.

Attachment B of the permit (part 7(q)) states that "This Order expires five years after adoption." Attachment B also says (part 7 (r)) that the terms and conditions of the permit "are automatically

---

[18] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[19] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[20] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of the expired permits (40 CFR 122.6) are complied with."[21]

Part J.2.d. of the permit requires the Principal Permittee (County of San Diego) to "submit to the Regional Board, no later than 210 days in advance of the expiration of this order, a report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements." The permit specifies the contents of the ROWD.

The permit is divided into 16 sections. It prohibits discharges from MS4s that contain pollutants that "have not been reduced to the maximum extent practicable" as well as discharges "that cause or contribute to the violation of water quality standards." The permit also prohibits non-storm water discharges unless they are authorized by a separate NPDES permit, or fall within specified exemptions. The copermittees are required to "establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." The copermittees are also required to develop and implement an updated Jurisdictional Urban Runoff Management Program (JURMP) for their jurisdictions that meets the requirements specified in the permit as well as a Watershed Urban Runoff Management Program (watersheds are defined in the permit) and a Regional Urban Runoff Management Program, each of which are to be assessed annually and reported on. Annual fiscal analyses are also required of the copermittees. The principal permittee has additional responsibilities, as specified.

The Regional Board prepared a 115-page Fact Sheet/Technical Report for this permit in which are listed, among other things, Regional Board findings, the federal law, and the reasons for the various permit requirements.

The 2001 version of the Regional Board's permit (treated as prior law in this analysis) was challenged by the Building Industry Association of San Diego County, among others. They alleged that the permit provisions violate federal law because they prohibit the municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law.[22] The court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[23]

Attached to the claimants' February 2009 comments is a document entitled "Comparison Between the Requirement of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Stormwater Permit" that compares the 2001 permit with the 1990 and earlier permits. One of the document's conclusions regarding the 2001 permit is: "40% of the requirements in Tentative Order 2001-01 which 'exceed the federal regulations' are based

---

[21] California Code of Regulations, title 23, section 2235.4.

[22] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880.

[23] *Id.* at page 870.

almost exclusively on (1) guidance documents developed by USEPA and (2) SWRCB's [State Board's] orders describing statewide precedent setting decision on MS4 permits."

Claimants' Position

Claimants assert that various parts of the Regional Board's 2007 permit constitute a reimbursable state mandate within the meaning of article XIII B, section 6, and Government Code section 17514. The parts of the permit pled by claimants are quoted below:

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

Parts F.2. and F.3. (F. Regional Urban Runoff Management Program) of the permit provide:

> Each Copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program. The Regional Urban Runoff Management Program shall meet the requirements of section F of this Order, reduce the discharge of pollutants[24] from the MS4 to the MEP, and prevent urban runoff[25] discharges from the MS4 from causing or contributing to a violation of water quality standards.[26] The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> 2. Develop the standardized fiscal analysis method required in section G of this Order.[27]
>
> 3. Facilitate the assessment of the effectiveness of jurisdictional, watershed,[28] and regional programs.

[24] Pollutant is defined in Attachment C of the permit as "Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated."

[25] Urban Runoff is defined in Attachment C of the permit as "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows).

[26] Water Quality Standards is defined in Attachment C of the permit as "The beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.) of water and the water quality objectives necessary to protect those uses.

[27] Section G requires the permittees to "collectively develop a standardized method and format for annually conducting and reporting fiscal analyses of their urban runoff management programs in their entirety (including jurisdictional, watershed, and regional activities)." Specific components of the method and time tables are specified in the permit (Permit parts G.2 & G.3).

[28] Watershed is defined in Attachment C of the permit as "That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as a drainage area, catchment, or river basin)."

Part L (All Copermittee Collaboration) of the Permit states:

> 1. Each Copermittee collaborate [sic] with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.
>
> a. Management structure – All Copermittees shall jointly execute and submit to the Regional Board no later than 180 days after adoption of this Order, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum:
>
> (1) Identifies and defines the responsibilities of the Principal Permittee[29] and Lead Watershed Permittees;[30]
> (2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;
> (3) Establishes a management structure to promote consistency and develop and implement regional activities;
> (4) Establishes standards for conducting meetings, decision-making, and cost-sharing.
> (5) Provides guidelines for committee and workgroup structure and responsibilities;
> (6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;
> (7) Includes any and all other collaborative arrangements for compliance with this order.

Claimants stated that the Copermittees' costs to comply with this activity for fiscal year 2007-2008 was $260,031.29.

B. Copermittee collaboration – Regional Residential Education Program Development and Implementation

Part F.1 of the Permit provides:

The Regional Urban Runoff Management Program shall, at a minimum:

> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
>
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

[29] The Principal Permittee is the County of San Diego.

[30] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Claimants stated that the Copermittees' costs to comply with this activity was $131,250 in fiscal year 2007-2008.

C. Hydromodification[31]

Part D.1.g. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, g. Hydromodification – Limits on Increases of Runoff Discharge Rates and Durations) states:

> g. HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS
>
> Each Copermittee shall collaborate with the other Copermittees to develop and implement a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects,[32]

---

[31] Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."

Hydromodification is also defined as changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." *Draft Hydromodification Management Plan for San Diego County*, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009 .

[32] According to the permit, "Priority Development Projects" are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

[¶]…[¶] [Part D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This

where such increased rates and durations are likely to cause increased erosion[33] of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses[34] and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan][35] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for

---

category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[33] Erosion is defined in Attachment C of the permit as "When land is diminished or worn away due to wind, water, or glacial ice. Often the eroded debris (silt or sediment) becomes a pollutant via storm water runoff. Erosion occurs naturally but can be intensified by land clearing activities such as farming, development, road building and timber harvesting."

[34] Beneficial Uses is defined in Attachment C of the permit as "the uses of water necessary for the survival or well being of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. … "Beneficial Uses" are equivalent to "Designated Uses" under federal law." (Wat. Code, § 13050, subd. (f).)

[35] The Standard Urban Storm Water Mitigation Plan is defined in Attachment C of the permit as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations[36] shall not exceed pre-project runoff flow rates and durations,[37] where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow[38] that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

---

[36] Flow duration is defined in Attachment C of the permit as "The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). … Flow duration within the range of geomorphologically significant flows is important for managing erosion.

[37] Attachment C of the permit defines "Pre-project or pre-development runoff conditions (discharge rates, durations, etc.) as "Runoff conditions that exist onsite immediately before the planned development activities occur. This definition is not intended to be interpreted as that period before any human-induced land activities occurred. This definition pertains to redevelopment as well as initial development."

[38] Critical channel flow, according to Attachment C of the permit, is "the channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc [critical channel flow], it should be based on the weakest boundary material – either bed or bank."

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

(2) The HMP may include implementation of planning measures (e.g., buffers and restoration activities, including revegetation, use of less-impacting facilities at the point(s) of discharge, etc.) to allow expected changes in stream channel cross sections, vegetation, and discharge rates, velocities, and/or durations without adverse impacts to channel beneficial uses. Such measures shall not include utilization of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc.

(3) Section D.1.g.(1)(c) does not apply to Development Projects[39] where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g.,

[39] Development projects, according to Attachment C of the permit, are "New development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision."

with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[40]

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) the project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

[40] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(b) the project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) the project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

Claimants stated that the total cost of this activity is $1.05 million, of which $630,000 was spent in fiscal year 2007-2008, and the remaining $420,000 will be spent in fiscal year 2008-2009.

D. Low-Impact Development[41] ("LID") and Standard Urban Storm Water Mitigation Plan ("SMUSP")

Part D.1.d. of the Permit (D. Jurisdictional Urban Runoff Management Program, 1. Development Planning Component, d. Standard Urban Storm Water Mitigation Plans – Approval Process Criteria and Requirements for Priority Development Projects), paragraphs (7) and (8) state as follows:

(7) Update of SUSMP BMP Requirements

The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP[42] requirements that meet or exceed the requirements of sections D.1.d.(4)[43] and D.1.d.(5),[44] and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs.[45] In addition, the update shall

[41] Low Impact Development (LID) is defined in Attachment C of the permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."

[42] Source Control BMPs are defined in Attachment C of the permit as "Land use or site planning practices, or structural or nonstructural measures that aim to prevent urban runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and urban runoff."

[43] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[44] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

[45] A treatment control BMP, according to Attachment C of the permit, is "Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants,

include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.
ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.
iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.
iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.
v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.
vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.
vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either

(1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

---

filtration, biological uptake, media absorption or any other physical, biological, or chemical process."

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).
ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

Claimants stated that the total cost of this activity is $52,200 to be spent in fiscal year 2007-2008.

E. Long Term Effectiveness Assessment

Part I.5 (I. Program Effectiveness Assessment) of the permit states:

5. Long-term Effectiveness Assessment

a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6) of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).[46]

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The claimants state that this activity is budgeted to cost $210,000.

[46] See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

Part D.3.a.(5) of the Permit (D.3 Existing Development Component, a. Municipal) provides:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Part J.3.a.(3)(c)x-xv (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
> xiii. Identification of the total distance of curb-miles swept.
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
> xv. Amount of material (tons) collected from street and parking lot sweeping.

Claimants state the following costs for this activity: in fiscal year 2007-2008: Equipment: $2,080,245, Staffing: $1,014,321, Contract costs: $382,624; for 2008-2009: Equipment: $3,566,139 (for 2008-2012), Staffing $1,054,893 (4% increase), Contract costs: $382,624.

B. Conveyance System Cleaning

Part D.3.a.(3) of the Permit (D.3. Existing Development Component, a. Municipal) provides:

> (3) Operation and Maintenance of Municipal Separate Storm Sewer System and Structural Controls
>
> (a) Each Copermittee shall implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Each Copermittee shall implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year[47] for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter[48] in a timely manner.
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
> v. Proper disposal of waste removed pursuant to applicable laws.
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

Part J.3.a.(3)(c) iv-viii (J. Reporting, 3. Annual Reports, a. jurisdictional urban runoff management program annual reports (3) Minimum contents (c) Municipal) requires annual reports to include the following:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

[47] According to Attachment C of the permit, May 1 through September 30 is the dry season.

[48] Attachment C of the permit defines "anthropogenic litter" as "trash generated from human activities, not including sediment."

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.
vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.
viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

The claimants state that this activity costs $3,456,087 in fiscal year 2007-2008, and increases 4% in subsequent years.

C. Program Effectiveness Assessment

Part I.1 and I.2 of the permit states:

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[49] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[50] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

[49] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[50] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[51] Water Quality Assessment,[52] and Integrated Assessment,[53] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff

---

Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

[51] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[52] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[53] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[54] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as

[54] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists the hydrologic units and major receiving water bodies.

necessary to achieve compliance with section A of this Order.[55] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Claimants state that this activity in I.1. and I.2 costs $392,363 in fiscal year 2007-2008, is expected to increase to $862,293 in fiscal year 2008-2009, and is expected to increase 4% annually thereafter.

D. Educational Surveys and Tests

Part D.5 of the permit (under D. Jurisdictional Urban Runoff Management Program) states:

5. Education Component

Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

· Municipal Departments and Personnel
· Construction Site Owners and Developers
· Industrial Owners and Operators
· Commercial Owners and Operators
· Residential Community, General Public, and School Children

a. GENERAL REQUIREMENTS

(1) Each Copermittee shall educate each target community on the following topics where appropriate:

[55] Section A is "Prohibitions and Receiving Water Limitations."

Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[56] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[56] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

Claimants state that this activity in D.5 will cost $62,617 in fiscal year 2007-2008, and is expected to increase to $171,319 in fiscal year 2008-2009, and rise 4% annually thereafter.

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

Parts E.2.f and E.2.g of the permit state:

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 below to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

f. Watershed Activities[57]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;
(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source

[57] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

Claimants state that the copermittees' staffing costs for watershed program implementation in fiscal year 2007-2008 is $1,033,219 and is expected to increase to $1,401,765 in fiscal year 2008-2009, and are expected to increase four percent annually. For consultant services, the costs are $599,674 in fiscal year 2007-2008 and are expected to be $657,101 in 2008-2009, and are expected to rise five percent annually. For Watershed Urban Runoff Management Program implementation, claimants allege that the cost in fiscal year 2008-2009 is $1,053,880.

Claimants filed a 60-page rebuttal to Finance's and the State Board's comments on February 9, 2009, which is addressed in the analysis below.

Claimant County of San Diego filed comments on the draft staff analysis in January 2010 that disagrees with the findings regarding fee authority for certain permit activities involving development. These arguments are discussed further below.

State Agency Positions

Department of Finance: In comments filed November 16, 2008, Finance alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because the permit conditions are required by federal laws so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that the State and Regional Water Boards "act on behalf of the federal government to develop, administer, and enforce the NPDES program in compliance with Section 402 of the CWA." Finance also states that more activities were included in the 2007 permit than the prior permit because "it appears … they were necessary to comply with federal law."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The copermittees elected to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies proposed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[58] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

[58] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

As to the claimants' identifying NPDES permits approved by other states to show the permit exceeds federal law, Finance states that this "demonstrates the variation envisioned by the federal authority in granting the administering agencies flexibility to address specific regional needs in the most practical manner."

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance commented on the draft staff analysis in February 2010, echoing the comments of the State Board, which are summarized and addressed below.

State Water Resources Control Board: The State Board and Regional Board filed joint comments on the test claim on October 27, 2008, alleging that the permit is mandated on the local agencies by federal law, and that it is not unique to government because NPDES permits apply to private dischargers also. The State Board also states that the requirements are consistent with the minimum requirements of federal law, but even if the permit is interpreted as going beyond federal law, any additional state requirements are de minimis. In addition, the State Board alleges that the costs are not subject to reimbursement because most of the programs were proposed by the cities and County themselves, and because the claimants may comply with the permit requirements by charging fees and are not required to raise taxes.

The State Board further comments that the 2007 permit mirrors or is identical to the requirements in the 2001 permit, only providing more detail to the requirements already in existence and to implement the MEP performance standard. Like earlier permits, the 2007 permit implements the federal standard of reducing pollutants from the MS4 to the MEP (maximum extent practicable), but according to the State Board, "what *has* changed in successive permits is the level of specificity included in the permit to define what constitutes MEP." [Emphasis in original.] The State Board asserts that this level of specificity does not make the permit a state mandate, but that even if it is, the additional requirements are de minimis. The State Board also states that the local agencies have fee authority to pay for the permit requirements.

The State Board also addresses specific allegations in the test claim, as discussed below.

The State Board submitted comments on the draft staff analysis in January 2010, arguing that the test claim should not be reimbursable because (1) federal law requires local agencies to obtain NPDES permits from California Water Boards; (2) federal law mandates the permit that was issued, which is less stringent than permits for private industry; (3) the draft staff analysis incorrectly applies the *Hayes* case because the state did not shift the cost of the federal mandate to the local agencies; rather the federal mandate was imposed directly on local agencies and not on the state; (4) the permit provisions are not in addition to, but are required by federal law; (5) even though municipalities are singled out in the federal storm water law, the law is one of general application; and (6) potential limitations on the exercise of fee authority due to Proposition 218 do not invalidate claimants' fee authority because Government Code section 17556, subdivision (d), does not require unlimited or unilateral fee authority. These arguments are addressed below.

Interested Party Comments

Bay Area Stormwater Management Agencies Association (BASMAA): In comments submitted February 4, 2009, BASMAA speaks generally about California's municipal stormwater permitting program, stating that "increased requirements entail both new programs and higher levels of service." BASMAA also states:

> [T]he State essentially asserts that the federal minimum for stormwater permitting is anything one of its Water Boards says it is. Likewise, the State's assertion that its 'discretion to exceed MEP [the maximum extent practicable standard] originates in federal law' and 'requires [it], as a matter of law, to include other such permit provisions as it deems appropriate' is nothing more than an oxymoron that begs the question of what the federal Clean Water Act actually mandates rather than allows a delegated state permit writer to require as a matter of discretion. [Emphasis in original.]

BASMAA emphasizes that the water boards have wide discretion in determining the content of a municipal stormwater permit beyond the federal minimum requirements, and says that the boards need to work "proactively and collaboratively" with local governments in "prioritizing and phasing in actions that realistically can be implemented given existing and projected local revenues."

League of California Cities (League) and California State Association of Counties (CSAC): The League and CSAC filed joint comments on the draft staff analysis on January 26, 2010, expressing support for it "and its recognition of the constraints placed on cities and counties with respect to adopting new or increased property-related fees."

The League and CSAC disagree, however, with the finding that the hydromodification management plan (HMP, part D.1.g.), the requirement to include low impact development (LID) in the Standard Urban Stormwater Mitigation Plans (SUSMPs) (part D.1.d.(7)-(8)), and parts of the education component (part D.5) are not reimbursable because the claimants have fee authority (under Gov. Code, § 66000 et seq., The Mitigation Fee Act) sufficient to pay for them. The League and CSAC point out examples where a city or county constructs a priority development project for which no third party is available upon whom to assess a fee. They also assert that for these city or county projects, a nexus requirement cannot be demonstrated "because no private development impact have generated the need for the projects."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[59] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[60] "Its

[59] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[61] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[62]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[63]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[64] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[65] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[66]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[67]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[68] In making its

---

crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[60] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[61] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[62] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[63] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[64] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[65] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[66] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[67] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[69]

The permit provisions in the test claim are discussed separately to determine whether they are reimbursable state-mandates.

Issue 1: Is the permit subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, whether they constitute a program, and whether they are a federal mandate or a state-mandated new program or higher level of service.

A. Is the permit an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which describes "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) Any agency, department, board, or commission of state government."[70]

The California Regional Water Board, San Diego Region, is a state agency.[71] The permit it issued is a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Is the permit the result of claimants' discretion?

The permit requires claimants to undertake various activities to reduce stormwater pollution in compliance with a permit issued by the Regional Board.

The Department of Finance, in comments submitted November 6, 2008, asserts that the claimants "had the option to use best management practices that would identify alternative practices to reduce pollution in water to the maximum extent practicable" Finance asserts that the claimants proposed permit requirements when they submitted the application for the permit,

---

[68] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[69] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[70] Section 17516 also states: "'"Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 904.

[71] Water Code section 13200 et seq.

and that increased costs due to downstream activities of an underlying discretionary activity are not reimbursable.

Similarly, the State Board, in its October 27, 2008 comments, states that the copermittees proposed the concepts that were incorporated into and form the basis of the permit provisions for which they now seek reimbursement.

In rebuttal comments submitted February 9, 2009, claimants dispute that the Report of Waste Discharge (ROWD, or permit application) "represents a copermittee proposal for 2007 Permit content or that the adopted 2007 Permit is 'based on the ROWD." According to claimants, the 2007 permit provisions "were not taken directly from, nor are they generally consistent with the intent of, most of the specific ROWD content upon which the state contends they are based."

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[72]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge. [73] Submitting it is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[74] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[75]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[76] Thus, submitting the ROWD is not discretionary because the claimants are required to do so by both federal and California law.

---

[72] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[73] The Report of Waste Discharge is attachment 36 of the State Water Resources Control Board comments submitted October 2008.

[74] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

[75] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[76] Water Code section 13376.

In addition to federal and state law, the 2001 permit required submission of the ROWD. The 2007 permit, under Part A "Basis for the Order," states: "On August 25, 2005, in accordance with Order No. 2001-01 [the 2001 Permit], the County of San Diego, as the Principal Permittee, submitted a Report of Waste Discharge (ROWD) for renewal of their MS4 Permit."[77]

And although the ROWD provides a basis for some (but not all) of the 2007 permit provisions at issue in this test claim, there is a substantial difference between what was included in the claimants' ROWD and the specific requirements the Regional Board adopted (e.g., copermittee collaboration, parts F.2., F.3 & L, Regional Residential Education Program Development, part F.1., Low Impact Development, part D.1.d(7)-(8), long-term effectiveness assessment, part I.5, program effectiveness assessment, parts I.1 & I.2, educational surveys and tests, part D.5, and the Watershed Urban Runoff Management Program, parts E.2.f & E.2.g). Other permit activities were not proposed in the ROWD (e.g., hydromodification, part D.1.g., street sweeping, parts D.2.a(5) & J.3.a(3)(c)x-xv, conveyance system cleaning, part D.3.a(3) & J.3.a(3)(c)iv-viii).

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which are not the result of the claimants' discretion.

C. Does the permit constitute a program within the meaning of article XIII B, section 6 of the California Constitution?

As to whether the permit provisions in the test claim constitute a "program," courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[78]

The State Board, in its October 2008 comments, argues that the NPDES program is not a program because the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government in that industrial and construction facilities must also obtain NPDES stormwater permits.

The State Board reiterates this argument in its January 2010 comments, asserting that the draft analysis "fails to consider that private entities, as well as certain state … and … federal agencies also receive NPDES permits for storm water discharges." The State Board and Finance also cite *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, for the proposition that "where municipalities have separate but not more stringent requirements than private entities, there is no program subject to reimbursement." Finance, in its February 2010 comments, asserts that "the requirements within the test claim permit apply generally to state and private dischargers."

---

[77] The 2001 Permit is attached to the State Water Resources Control Board, comments submitted October 2008, Attachment 25.

[78] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

Claimants, in their February 2009 rebuttal comments, disagree with the State Board and assert that an MS4 permit is unique to government and subject to unique regulations. Claimants cite the definition of an MS4 in 40 C.F.R. § 122.26(b)(8) as "a conveyance or system of conveyances … owned or operated by a State, city, town, borough, county, parish, district, association, or other public body …." Claimants argue that prohibiting "non-stormwater discharges into the storm sewers"[79] is a uniquely government function that provides for the health, safety, and welfare of the citizens in a community. Claimants also point out that the federal regulations for MS4 permits are in 40 C.F.R. §122.26(d), while the regulations pertaining to private industrial dischargers are in 40 C.F.R. § 122.26(c), different regulations that apply the Best Available Technology standard rather than the Maximum Extent Practicable standard imposed on MS4s.

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. In *County of Los Angeles v. Commission on State Mandates*, the State Board argued that an NPDES permit[80] issued by the Los Angeles Regional Water Quality Control Board does not constitute a "program." The court dismissed this argument, stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[81] In other words, whether the law regarding NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6 is not relevant. The only issue before the Commission is whether the permit in this test claim constitutes a program.

The permit activities in this claim (order no. R9-2007-001, NPDES no. CAS0108758) are limited to the local governmental entities specified in the permit. The permit defines the "permittees" as the County of San Diego and 18 incorporated cities, along with the San Diego Unified Port District and San Diego County Regional Airport Authority. [82] No private entities are regulated under this permit, so it is not a law (or executive order) of general application. That fact distinguishes this claim from the *City of Richmond* case cited by Finance and the State Board, in which the workers' compensation law was found to be one of general application. The same cannot be said of the permit in this claim (order no. R9-2007-001, NPDES no. CAS0108758) because no private entities are regulated by it.

Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in San Diego County. As stated in the permit: "This order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable."

---

[79] 33 U.S.C. § 1342(p)(3).

[80] Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001. The Commission issued a decision on parts 4C2a, 4C2b, 4E and 4Fc3 of this permit (test claims 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21) at its July 31, 2009 hearing.

[81] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

[82] The cities are Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

Thus, the permit carries out the governmental function of providing public services, and also imposes unique requirements on local agencies in San Diego County to implement a state policy that does not apply generally to all residents and entities in the state. Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

D. Are the permit provisions in the test claim a federal mandate or a state-mandated new program or higher level of service?

The next issue is whether the parts of the permit alleged in the test claim are a state mandate, or federally mandated, as asserted by the State Board and the Department of Finance. If so, the permit would not constitute a state mandate. The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs."[83]

Also discussed is whether the permit is a new program or higher level of service. To determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption, in this case, the 2001 permit.[84]

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[85] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[86]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[87] the court considered whether a state executive order involving school desegregation constituted a state mandate. The regulations required, for example, conducting mandatory biennial racial and ethnic surveys, developing a reasonably feasible plan every four years to alleviate and prevent segregation to include specifics

---

[83] *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 879-880, emphasis in original.

[84] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[85] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

[86] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1594.

[87] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

elements, and taking mandatory steps to involve the community including public hearings. The state argued that its Executive Order did not mandate a new program because school districts in California have a constitutional duty to make an effort to eliminate racial segregation in the public schools. The court held that the executive order did require school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements imposed on school districts.[88] The court stated:

> A review of the Executive Order and guidelines shows that a higher level of service is mandated because their requirements go beyond constitutional and case law requirements. …[T]he executive Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[89]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[90] The federal Clean Water Act allows for more stringent state-imposed measures, as follows:

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[91]

California in the NPDES program: Under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, which describes the NPDES program (and subdivision (p), which describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and

---

[88] *Id.* at 173.

[89] *Ibid.*

[90] 33 U.S.C. section 1370.

[91] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

> system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is not required to have its own NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[92] to comply with the Federal Water Pollution Control Act of 1972, stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this statute, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[93] to effect the stormwater permit program. Further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

Finance, in its February 2010 comments on the draft staff analysis, states:

> The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. …[N]o state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.

Similarly, the State Board's January 2010 comments argue that the *Hayes* case is distinguishable from this test claim because NPDES permits do not impose a federal mandate on the state. Rather, federal law requires municipalities to comply with the permit. The State Board also states:

---

[92] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

[93] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

> This [draft staff analysis'] approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not indicate that requirements extend beyond federal law, as in *Long Beach,* or convert the federal mandate into a state mandate.[94]

The Commission disagrees. As discussed above, the federal Clean Water Act[95] authorizes states to impose more stringent measures than required by federal law. The California Supreme Court has also recognized that permits may include state-imposed, in additional to federally required measures.[96] Those state measures that may constitute a state mandate if they "exceed the mandate in … federal law."[97] Thus, although California opted into the NPDES program, further analysis is needed to determine whether the state requirements exceed the federal requirements imposed on local agencies.

The permit provisions are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402 (p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26. The federal stormwater statute states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[98] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)).

The issues are whether the parts of the permit in the test claim are federal mandates or state mandates, and whether they are a new program or higher level of service.

---

[94] State Board comments submitted January 2010.

[95] 33 U.S.C. sections 1370 and 1342 (p)(3)(B)(iii).

[96] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

[97] Government Code section 17556, subdivision (b). *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[98] Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

Part D of the permit describes the Jurisdictional Urban Runoff Management Program (JURMP) of which each copermittee "shall develop and implement" an updated version (p.15). Part J of the permit ("Reporting") requires the JURMP to be updated and revised to include specified information. The test claim includes parts D.1.g (hydromodification management plan), D.1.d.(7)-(8) (low-impact development or LID), D3a(5) (street sweeping) and J.3.a(3)x-xv (reporting on street sweeping), D.3.a.(3) (conveyance system cleaning) and J.3.a.(3)(c)(iv)-(viii) (reporting on conveyance system cleaning), and D.5 (educational surveys and tests).

Hydromodification (part D.1.g.): Part D.1 of the permit is entitled "Development Planning." Part D.1.g. requires developing and implementing, in collaboration with other copermittees, a hydromodification management plan (HMP) "to manage increases in runoff discharge rates and durations from all Priority Development Projects."[99] Priority development projects can include both private projects, and municipal (city or county) projects. The purpose of the HMP is:

---

[99] According to the permit, Priority Development Projects are: a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)..

[¶]…[¶] [Section D.1.d.(2):] (2) Priority Development Project Categories (a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments. (b) Commercial developments greater than one acre. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than one acre. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities. (c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.). (d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539. (e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.g. (f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater. (g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Hydromodification is defined in Attachment C of the permit as "The change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow, interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[100]

As detailed in the permit and on pages 12-17 above, the HMP must have specified content, including "a description of how the copermittees will incorporate the HMP requirements into their local approval processes." Also required is collaborative reporting on the HMP and implementation 180 days after the HMP is approved by the Regional Water Board, with earlier implementation encouraged.

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

---

will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

[100] It is also defined as "changes in the magnitude and frequency of stream flows as a result of urbanization, and the resulting impacts on the receiving channels in terms of erosion, sedimentation and degradation of in-stream habitat." Draft Hydromodification Management Plan for San Diego County, page 4. <http://www.projectcleanwater.org/pdf/susmp/sd_hmp_2009.pdf> as of May 28, 2009.

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]…[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]

---

[101] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2)

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. …

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. … controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

---

[103] Government Code section 17556, subdivision (c).

[104] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[105] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures …" as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

---

[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

[108] *Kern High School Dist., supra,* 30 Cal.4th 727.

[109] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

(a) Identify a standard for channel segments which receive urban runoff discharges from Priority Development Projects. The channel standard shall maintain the pre-project erosion and deposition characteristics of channel segments receiving urban runoff discharges from Priority Development Projects as necessary to maintain or improve the channel segments' stability conditions.

(b) Utilize continuous simulation of the entire rainfall record to identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations. The lower boundary of the range of runoff flows identified shall correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches.

(c) Require Priority Development Projects to implement hydrologic control measures so that Priority Development Projects' post-project runoff flow rates and durations (1) do not exceed pre-project runoff flow rates and durations for the range of runoff flows identified under section D.1.g.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations, and (2) do not result in channel conditions which do not meet the channel standard developed under section D.1.g.(1)(a) for channel segments downstream of Priority Development Project discharge points.

(d) Include other performance criteria (numeric or otherwise) for Priority Development Projects as necessary to prevent urban runoff from the projects from increasing erosion of channel beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

(e) Include a review of pertinent literature.

(f) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects.

(g) Include a description of how the Copermittees will incorporate the HMP requirements into their local approval processes.

(h) Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations and address potential hydromodification impacts.

(i) Include technical information supporting any standards and criteria proposed.

(j) Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.

(k) Include a description of pre- and post-project monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP.

(l) Include mechanisms for addressing cumulative impacts within a watershed on channel morphology.

(m) Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other information, as appropriate.

[¶]…[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

[110] Section J.2.a of the permit requires collaborating with other copermittees to develop the HMP, and submitting it for approval by the Regional Board. Part J.2.a also includes timelines for HMP completion and approval.

(5) HMP Implementation

180 days after approval of the HMP by the Regional Board, each Copermittee shall incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. Prior to approval of the HMP by the Regional Board, the early implementation of measures likely to be included in the HMP shall be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria for Projects Disturbing 50 Acres or More

Within 365 days of adoption of this Order, the Copermittees shall collectively identify an interim range of runoff flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations (Interim Hydromodification Criteria), where the increased discharge flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in flow rates and durations. Development of the Interim Hydromodification Criteria shall include identification of methods to be used by Priority Development Projects to exhibit compliance with the criteria, including continuous simulation of the entire rainfall record. Starting 365 days after adoption of this Order and until the final Hydromodification Management Plan standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. Development Projects disturbing 50 acres or more are exempt from this requirement when:

(a) The project would discharge into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackcrete, etc.) downstream to their outfall in bays or the ocean;

(b) The project would discharge into underground storm drains discharging directly to bays or the ocean; or

(c) The project would discharge to a channel where the watershed areas below the project's discharge points are highly impervious (e.g. >70%).

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

---

[111] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra,* 124 Cal.App.4th 866, 870.

[112] The Fact Sheet/Technical Report was attached to the test claim.

[113] According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it … did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

---

[115] Government Code section 17556, subdivision (c).

[116] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[117] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

(8) Update of SUSMPs to Incorporate LID and Other BMP Requirements

(a) In addition to the implementation of the BMP requirements of sections D.1.d.(4-7) within one year of adoption of this Order, the Copermittees shall also develop and submit an updated Model SUSMP that defines minimum LID and other BMP requirements to be incorporated into the Copermittees' local SUSMPs for application to Priority Development Projects. The purpose of the updated Model SUSMP shall be to establish minimum standards to maximize the use of LID practices and principles in local Copermittee programs as a means of reducing stormwater runoff. It shall meet the following minimum requirements:

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

---

[118] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[119] Part D.1.d.(5) of the permit lists source control BMP requirements.

[120] Part D.1.d.(6) of the permit lists treatment control BMP requirements.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

(c) Within 365 days of Regional Board acceptance of the updated Model SUSMP, each Copermittee shall update its local SUSMP to implement the requirements established pursuant to section D.1.d.(8)(a). In addition to the requirements of section D.1.d.(8)(a), each Copermittee's updated local SUSMP shall include the following:

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).

ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

> (5) Sweeping of Municipal Areas
>
> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

---

[121] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564.

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[124] Government Code section 17556, subdivision (c).

[125] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[126] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

> x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
>
> xiii. Identification of the total distance of curb-miles swept.
>
> xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
>
> xv. Amount of material (tons) collected from street and parking lot sweeping.

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]…[¶]
>
> F.3.a.(4) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[129] Government Code section 17556, subdivision (c).

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

> (a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.
>
> (b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include:
>
> i. Inspection at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris. All other MS4 facilities shall be inspected at least annually throughout the year.
>
> ii. Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year.
>
> iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.
>
> iv. Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed.
>
> v. Proper disposal of waste removed pursuant to applicable laws.
>
> vi. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

> iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.
>
> v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

---

[130] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[131] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls…." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** … requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the … educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California*,[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

[132] Government Code section 17556, subdivision (c).

[133] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[134] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

Table 3. Education

Laws, Regulations, Permits, & Requirements	**Best Management Practices**
• Federal, state, and local water quality laws and regulations • Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction). • Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities • Regional Board's General NPDES Permit for Ground Water Dewatering • Regional Board's 401 Water Quality Certification Program • Statewide General NPDES Utility Vault Permit • Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits)	• Pollution prevention and safe alternatives • Good housekeeping (e.g., sweeping impervious surfaces instead of hosing) • Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste) • Non-storm water disposal alternatives (e.g., all wash waters) • Methods to minimized the impact of land development and construction • Erosion prevention • Methods to reduce the impact of residential and charity car-washing • Preventive Maintenance • Equipment/vehicle maintenance and repair • Spill response, containment, and recovery • Recycling • BMP maintenance
General Urban Runoff Concepts	**Other Topics**
• Impacts of urban runoff on receiving waters • Distinction between MS4s and sanitary sewers • BMP types: facility or activity specific, LID, source control, and treatment control • Short-and long-term water quality impacts associated with urbanization (e.g., land-use decisions, development, construction) • Non-storm water discharge prohibitions • How to conduct a storm water inspections	• Public reporting mechanisms • Water quality awareness for Emergency/ First Responders • Illicit Discharge Detection and Elimination observations and follow-up during daily work activities • Potable water discharges to the MS4 • Dechlorination techniques • Hydrostatic testing • Integrated pest management • Benefits of native vegetation • Water conservation •Alternative materials and designs to maintain peak runoff values •Traffic reduction, alternative fuel use

(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its planning and development review staffs (and Planning Boards and Elected Officials, if applicable) have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

[135] Attachment C of the permit defines grading as "the cutting and/or filling of the land surface to a desired slope or elevation."

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

> **Laws, Regulations, Permits, & Requirements:** Federal, state, and local water quality laws and regulations; Statewide General NPDES Permit for Storm Water Discharges Associated with Industrial Activities (Except Construction); Statewide General NPDES Permit for Storm Water Discharges Associated with Construction Activities; Regional Board's General NPDES Permit for Ground Water Dewatering; Regional Board's 401 Water Quality Certification Program; Statewide General NPDES Utility Vault Permit; Requirements of local municipal permits and ordinances (e.g., storm water and grading ordinances and permits).
>
> **Best Management Practices:** Pollution prevention and safe alternatives; Good housekeeping (e.g., sweeping impervious surfaces instead of hosing); Proper waste disposal (e.g., garbage, pet/animal waste, green waste, household hazardous materials, appliances, tires, furniture, vehicles, boat/recreational vehicle waste, catch basin/ MS4 cleanout waste); Non-storm water disposal alternatives (e.g., all wash waters); Methods to minimized the impact of land development and construction; Methods to reduce the impact of residential and charity car-washing; Preventive Maintenance; Equipment/vehicle maintenance and repair; Spill response, containment, and recovery; Recycling; BMP maintenance.
>
> **General Urban Runoff Concepts:** Impacts of urban runoff on receiving waters; Distinction between MS4s and sanitary sewers; Short-and long-term water , quality impacts associated with urbanization (e.g., land-use decisions, development, construction); How to conduct a storm water inspection.
>
> **Other Topics:** Public reporting mechanisms; Water quality awareness for Emergency/ First Responders; Illicit Discharge Detection and Elimination observations and follow-up during daily work activities; Potable water discharges to the MS4; Dechlorination techniques; Hydrostatic testing; Integrated pest management; Benefits of native vegetation; Water conservation; Alternative materials and designs to maintain peak runoff values; Traffic reduction, alternative fuel use.

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: [¶]…[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

> (d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development … of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

> iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
>
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
>
> v. Current advancements in BMP technologies.
>
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  > Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

- Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
    - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

[137] Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

---

[139] Government Code section 17556, subdivision (c).

[140] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[141] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

2. Each Copermittee shall collaborate with other Copermittees within its WMA(s) as in Table 4 [of the permit] to develop and implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below:
[¶]…[¶]

f. Watershed Activities[142]

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

[142] In their rebuttal comments submitted in February 2009, claimants mention part E.(3) of the permit that requires a detailed description of each activity on the Watershed Activities List. Part E.(3), however, was not in the test claim so staff makes no findings on it.

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." … Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]…[¶]

> The 2007 Permit imposes standards far beyond those listed in … the 2001 Permit …. The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

---

[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

[144] San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]…[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]…[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. …[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

---

[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions … [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

---

[149] Government Code section 17556, subdivision (c).

[150] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[151] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

---

[152] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. …" [40 CFR § 122.26 (b)(7).]

> management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 …, the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

---

[155] Government Code section 17556, subdivision (c).

[156] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[157] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I … [that] … support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

---

[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

---

> submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:
>
> (1) The status of implementing the components of the storm water management program that are established as permit conditions;
> (2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
> (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
> (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
> (5) Annual expenditures and budget for year following each annual report;
> (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
> (7) Identification of water quality improvements or degradation.

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

---

[160] Government Code section 17556, subdivision (c).

[161] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[162] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[163] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[164] See footnote 50, page 21.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;
(b) Each Watershed Education Activity implemented; and
(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

---

[165] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[166] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[167] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[168] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

(3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

(4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

(5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

(6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

(7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

[169] Section A is "Prohibitions and Receiving Water Limitations."

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

---

[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

[171] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]…[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

> 5. Long-term Effectiveness Assessment
>
> a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.
>
> b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.
>
> c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).
>
> d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

---

[173] Government Code section 17556, subdivision (c).

[174] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[175] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). … The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program … [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]…[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]…[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling … the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

---

[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[179] Government Code section 17556, subdivision (c).

[180] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[181] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

---

[182] The Principal Permittee is the County of San Diego.

[183] According to the permit: "Watershed Copermittees shall identify the Lead Watershed Permittee for their WMA [Watershed Management Area]."

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

I. Jurisdictional Urban Runoff Management Program and Reporting (Parts D & J)

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

[184] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

[185] The County and city declarations are attached to the test claim.

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency … that requested legislative authority for that local agency … to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency … that requests authorization for that local agency … to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

[187] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

---

[188] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487. Emphasis in original.

[189] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

[190] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

1. Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

---

[191] *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[192] *Id.* at page 1358-1359.

[193] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

---

[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

[195] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[196] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[197] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[198] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 875-877.

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

---

[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

[201] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[202] *Id.* at 952.

[203] *Ibid.*

[204] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[205] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

---

[206] *Id.* at page 1480.

[207] *Mills v. County of Trinity, supra,*108 Cal.App.3d 656, 662.

[208] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

[209] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830.

[210] *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

[211] *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

[212] *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

[213] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

[214] *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

[215] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court*,[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell*.

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

---

[216] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[217] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[218] *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

---

[219] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

[221] California Constitution, article XIII D, section 1, subdivision (b).

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

According to the permit, priority development projects are:

> a) all new Development Projects that fall under the project categories or locations listed in section D.1.d.(2), and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2).

---

[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v.City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except … hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

[224] Part D.1.d.(4) of the permit includes LID BMP requirements: "Each Copermittee shall require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects:" The Permit lists various LID site design BMPs that must be implemented at all Priority Development Projects, and other LID BMPs that must be implemented at all Priority Development Projects "where applicable and feasible."

[225] Part D.1.d.(5), regarding "Source control BMP Requirements" requires permittees to require each Priority Development Project to implement source control BMPs that must "Minimize storm water pollutants of concern in urban runoff" and include five other specific criteria.

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

---

[226] *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

[227] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[228] Government Code section 66000, subdivision (b).

[229] Government Code section 66000, subdivision (d).

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

> [T]o manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

---

section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

[231] Government Code section 66005, subdivision (a).

[232] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[233] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

[234] Government Code section 66000, subdivision (d).

[235] Government Code section 66000, subdivision (d).

order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause … impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

---

[236] *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

---

[240] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

[242] *County of San Diego, supra,* 15 Cal.4th 68, 81.

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

---

[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity…. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

---

[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities …. [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
>
> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

[250] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

[251] *San Diego Unified School Dist., supra,* 33 Cal.4th 859.

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;
- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Effective January 1, 2010, fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101 by developing a watershed improvement plan pursuant to Statutes 2009, chapter 577, and the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

[252] The County and city declarations are attached to the test claim.

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

I. Jurisdictional Urban Runoff Management Program and Reporting (parts D & J)

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

> Each Copermittee shall implement a program to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities. The program shall include the following measures:
>
> (a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month.
>
> (b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris shall be swept at least monthly.
>
> (c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris shall be swept as necessary, but no less than once per year.

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

---

[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection…." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

x. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating the highest volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xi. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating moderate volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xii. Identification of the total distance of curb-miles of improved roads, streets, and highways identified as consistently generating low volumes of trash and/or debris, as well as the frequency of sweeping conducted for such roads, streets, and highways.
xiii. Identification of the total distance of curb-miles swept.
xiv. Identification of the number of municipal parking lots, the number of municipal parking lots swept, and the frequency of sweeping.
xv. Amount of material (tons) collected from street and parking lot sweeping.

Conveyance system cleaning (D.3.a.(3)):

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]…[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

- Municipal Departments and Personnel
- Construction Site Owners and Developers
- Industrial Owners and Operators
- Commercial Owners and Operators
- Residential Community, General Public, and School Children

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

a.(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

(a) Municipal Development Planning – Each Copermittee shall implement an education program so that its Planning Boards and Elected Officials, if applicable, have an understanding of:

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:

[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

(b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience:

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

(c) Municipal Industrial/Commercial Activities - Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year [except for staff who solely inspect new development]. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

(d) Municipal Other Activities – Each Copermittee shall implement an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed.

(2) New Development and Construction Education

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee shall implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) and D.5.b.(1)(b) above, as appropriate for the audience being educated. The education program shall also educate project applicants, developers, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

(3) Residential, General Public, and School Children Education

Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]…[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

(1) The Watershed Copermittees shall identify and implement Watershed Activities that address the high priority water quality problems in the WMA. Watershed Activities shall include both Watershed Water Quality Activities and Watershed Education Activities. These activities may be implemented individually or collectively, and may be implemented at the regional, watershed, or jurisdictional level.

(a) Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of this Order.

(b) Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA.

(2) A Watershed Activities List shall be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter. The Watershed Activities List shall include both Watershed Water Quality Activities and Watershed Education Activities, along with a description of how each activity was selected, and how all of the activities on the list will collectively abate sources and reduce pollutant discharges causing the identified high priority water quality problems in the WMA.

(3) Each activity on the Watershed Activities List shall include the following information:

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Watershed Copermittees shall collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings.

III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

The Regional Urban Runoff Management Program shall, at a minimum:

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]…[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

IV. Program Effectiveness Assessment (parts I.1 & I.2)

1. Jurisdictional

a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

(1) Specifically assess the effectiveness of each of the following:

(a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

(c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.

(2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

---

[255] Illicit discharge, as defined in Attachment C of the permit, is "any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 C.F.R. 122.26 (b)(2)]."

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

(4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

b. Based on the results of the effectiveness assessment, each Copermittee shall annually review its jurisdictional activities or BMPs to identify modifications and improvements needed to maximize Jurisdictional Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order. The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems.

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

---

[257] Implementation Assessment is defined in Attachment C of the permit as an "Assessment conducted to determine the effectiveness of copermittee programs and activities in achieving measureable targeted outcomes, and in determining whether priority sources of water quality problems are being effectively addressed."

[258] Water Quality Assessment is defined in Attachment C of the permit as an "Assessment conducted to evaluate the condition of non-storm water discharges, and the water bodies which receive these discharges."

[259] Integrated Assessment is defined in Attachment C of the permit as an "Assessment to be conducted to evaluate whether program implementation is properly targeted to and resulting in the protection and improvement of water quality."

[260] Table 4 of the permit divides the copermittees into nine watershed management areas. For example, the San Luis Rey River watershed management area lists the city of Oceanside, Vista and the County of San Diego as the responsible watershed copermittees. Table 4 also lists where the hydrologic units are and major receiving water bodies.

(1) Specifically assess the effectiveness of each of the following:

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

(c) Implementation of the Watershed Urban Runoff Management Program as a whole.

2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.2.a.(1) above.

3) Utilize outcome levels 1-6 to assess the effectiveness of each of the items listed in sections I.2.a.(1)(a) and I.2.a.(1)(b) above, where applicable and feasible.

4) Utilize outcome levels 1-4 to assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, where applicable and feasible.

5) Utilize outcome levels 5 and 6 to qualitatively assess the effectiveness of implementation of the Watershed Urban Runoff Management Program as a whole, focusing on the high priority water quality problem(s) of the watershed. These assessments shall attempt to exhibit the impact of Watershed Urban

Runoff Management Program implementation on the high priority water quality problem(s) within the watershed.

6) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.2.a.(1) above, where applicable and feasible.

7) Utilize Implementation Assessment, Water Quality Assessment, and Integrated Assessment, where applicable and feasible.

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

[261] Section A is "Prohibitions and Receiving Water Limitations."

c. As part of its Watershed Urban Runoff Management Program Annual Reports, each watershed group of Copermittees (as identified in Table 4) shall report on its Watershed Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of section I.2.a and I.2.b above.

Long Term Effectiveness Assessment (I.5):

a. Collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).

d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

e. The LTEA shall address the jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment.

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]…[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

Further, the Commission finds the following would be identified as offsetting revenue in the parameters and guidelines for this test claim:

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

EXHIBIT E

AGREEMENT ON DIVERSION OF WATER FROM THE FEATHER RIVER, DATED MAY 27, 1969, BETWEEN THE CALIFORNIA DEPARTMENT OF WATER RESOURCES, RICHVALE IRRIGATION DISTRICT, BIGGS-WEST GRIDLEY WATER DISTRICT, BUTTE WATER DISTRICT AND SUTTER EXTENSION WATER DISTRICT

STATE OF CALIFORNIA
THE RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES

AGREEMENT ON DIVERSION OF WATER
FROM THE FEATHER RIVER

THIS AGREEMENT, made and entered into this 27th day of May, 1969, by and between the State of California, acting by and through the Department of Water Resources, hereinafter called "State"; Richvale Irrigation District, a public agency, Biggs-West Gridley Water District, a public agency, Butte Water District, a public agency, and Sutter Extension Water District, a public agency, hereinafter collectively referred to as "Districts";

WITNESSETH, That:

WHEREAS, the State is constructing or has constructed Oroville Dam and Edward Hyatt Powerplant and the Thermalito Diversion Dam, Power Canal, Forebay, Powerplant, and Afterbay, which will modify the regimen of the Feather River; and

WHEREAS, the Districts divert water of the Feather River downstream from the City of Oroville pursuant to rights which are prior in time and superior in right to the water rights of State; and

WHEREAS, an Agreement as to the operation of Oroville Dam and related facilities and diversion of water by the Districts is desirable;

NOW, THEREFORE, it is agreed as follows:

1. Definitions

When used in this agreement, the following terms have the meanings hereinafter set forth:

(a) "Afterbay Diversion Structures" means the two structures, gates and control facilities constructed by State in the Thermalito Afterbay pursuant to that certain agreement dated July 6, 1964, entered into by and between the parties hereto.

(b) "Afterbay River Outlet" means the structure, gates and control facilities constructed by State in the Thermalito Afterbay for the release of water into the Feather River.

(c) "Agricultural Use" means any use of water primarily in the production of plant crops or livestock for market, including any use incidental thereto for domestic or stockwatering purposes.

(d) "Districts' Service Area" means the lands included within the boundaries shown on Exhibit A attached hereto and made a part hereof."

(e) "Drought" occurs in any year in which the supply of State project water made available by the State for delivery to contractors under their Water Supply Contracts is less than the total of the annual entitlements of all such contractors for that year and in addition one of the following conditions exists:

(1) The April 1 through July 31 unimpaired runoff to Lake Oroville for the current water year as forecasted by the Department of Water Resources (for inclusion in its Bulletin No. 120, "Water Conditions in California") on February 1 and modified by subsequent monthly reports thereafter as conditions and information warrant, is equal to or less than six hundred thousand (600,000) acre-feet; or

(2) The total accumulated actual deficiencies of unimpaired runoff to Lake Oroville below two million five

hundred (2,500,000) acre-feet in the immediately prior water year or series of successive prior water years each of which had runoff of less than two million five hundred thousand (2,500,000) acre-feet, together with the predicted deficiency, below two million five hundred thousand (2,500,000) acre-feet, for the current water year, exceed four hundred thousand (400,000) acre-feet.

(f) "Flood Control Criteria" means the criteria governing maximum reservoir levels at Lake Oroville in order to provide flood control established pursuant to Article 1 of the contract between the Department and the United States Army Corps of Engineers dated March 8, 1962.

(g) "Irrigation Season" means the period of April 1 through October 31 of each year.

(h) "Joint Manager" means the person, and in his absence his assistant, employed by the Districts to act for them in giving diversion schedules and notices to State and receiving notices and reports to be given by the State to Districts, in accordance with this Agreement.

(i) "Limitation Period" means the period between April 1 and May 31 in all years in which the reduction of deliveries of the annual entitlement for water to be put to Agricultural Use by San Joaquin Water Supply Contractors as imposed by the State in accordance with Article 18(a) of the Water Supply Contracts does not exceed twenty-five percent (25%) or there is no such reduction and the period between March 1 and May 31 in all years in which said percentage reduction exceeds twenty-five percent (25%).

(j) "Pacific" means Pacific Gas and Electric Company and includes its predecessors, successors and subsidiaries.

(k) "San Joaquin Water Supply Contractors" means public agencies located in the San Joaquin Valley that are parties to Water Supply Contracts for delivery of water for Agricultural Use.

(l) "Sutter" means Sutter Extension Water District.

(m) "Sunset" means the Sunset Pumping Plant of Sutter, and includes both the existing plant and additional pumping facilities that may be constructed by Sutter at or near the site of its present pumping plant.

(n) "Tributaries of the Feather River" means all forks of the Feather River and streams flowing into the Feather River or any of its forks, but does not include streams, creeks or channels flowing into the Sacramento River.

(o) "Water Supply Contracts" means the long-term Water Supply Contracts that the State has heretofore entered into with public agencies for supplying water made available by Lake Oroville and other facilities of State, such as the Water Supply Contract entered into with The Metropolitan Water District of Southern California, dated November 4, 1960.

(p) "Water Year" means the period commencing with October 1 of one year and extending through September 30 of the next.

(q) "Western Canal Points of Delivery" means the structures, gates and control facilities constructed by State in the Thermalito Afterbay for delivery of water to Pacific through Western Canal outlets 1 and 2.

2. Water Diversions of the Districts

(a) Except as provided in Article 4 of this Agreement, Districts shall have the right to divert from the Feather River at the Afterbay Diversion Structures each Irrigation Season, five hundred sixty thousand (560,000) acre-feet of the water of the Feather River up to and including the year 1980 and five hundred fifty-five thousand (555,000) acre-feet each Irrigation Season thereafter: Provided, That in any year in which a temporary shortage due to Drought occurs, five hundred fifty-five thousand (555,000) acre-feet to and including 1980 and five hundred fifty thousand (550,000) acre-feet thereafter of the quantity of water Districts shall be entitled to divert under this Article 2(a) shall be reduced by a percentage not to exceed fifty percent (50%) in any one (1) year or a total of one hundred percent (100%) in any series of seven (7) consecutive years, and further not to exceed the percentage for the reduction of deliveries of annual entitlements for water to be put to Agricultural Use in that year by San Joaquin Water Supply Contractors as imposed by the State in that year in accordance with Article 18(a) of the Water Supply Contracts: Provided further, That there shall be added to such reduced amount, and Districts shall be entitled to divert, an additional quantity of water equal to the amount of such reduction but not to exceed thirty-five thousand (35,000) acre-feet. The quantities of water Districts shall be entitled to divert under this Article 2(a) computed in accordance with the foregoing provisions are as set forth in Columns 2 and 3 of Exhibit B attached hereto and made a part hereof.

Diversions under the preceding provisions of this Article 2(a) shall not exceed two hundred fifty thousand (250,000) acre-feet during the Limitation Period of all years in which Drought does not occur and either or both of the following conditions exist:

(1) The storage in Lake Oroville at any time during the Limitation Period equals or exceeds the Flood Control Criteria.

(2) Any release is made from Lake Oroville during the Limitation Period to prevent Lake Oroville from equaling or exceeding the Flood Control Criteria.

During the Limitation Period of all other years in which Drought does not occur, diversions under the preceding provisions of this Article 2(a) shall not exceed two hundred thousand (200,000) acre-feet. During the Limitation Period of all years in which Drought occurs, diversions under the preceding provisions of this Article 2(a) shall not exceed the amount set forth in Column 4 of Exhibit B opposite the percentage of reduction imposed in that year pursuant to Article 18(a) of the Water Supply Contracts on the annual entitlements of water to be put to Agricultural Use by San Joaquin Water Supply Contractors.

The Department shall operate Lake Oroville during the period of April 1 through May 31 to maintain the maximum possible stored water consistent with the Flood Control Criteria and will make no releases prior to June 1 of any year except those provided for in the contract between the Department and Pacific, Southern California Edison Company, and San Diego Gas and Electric Company, dated November 29, 1967.

(b) In addition to the water to be diverted under other provisions of this Article 2, Districts shall have the right to divert and use:

(1) During the period November 1 of each year through March 31 of the next year, such amount of water as Districts determine that they require for reasonable beneficial use but subject to the limitation of diversions during the Limitation Period in years of over twenty-five percent (25%) reduction: Provided, That the State not be estopped from asserting in any judicial or quasi-judicial proceeding that all or any portion of such use is not a reasonable beneficial use.

(2) Pursuant to existing agreements and rights between the Districts and Pacific and agreements that hereafter may be entered into, water to which Pacific is entitled under its contract with State, of which Exhibit C is a copy. State shall not change its said contract with Pacific or permit it to be changed, to diminish in any way the quantity of water Pacific will have available for sale to or use by Districts.

(c) In addition to the water to be diverted under other provisions of this Article 2, Districts shall have the right to divert an additional five thousand (5,000) acre-feet during the Irrigation Season of each year for use as carriage water in the Districts' main canal, provided it is returned to the Feather River above Yuba City as operational spill during the same Irrigation Season. Districts shall measure this return flow and furnish the measurement records to State. State shall be entitled to inspect and test the measuring devices.

(d) In addition to the water to be diverted under other provisions of this Article 2, Sutter shall have the right to divert each Irrigation Season at Sunset and use the following quantities of water:

(1) Sixty-five thousand (65,000) acre-feet in each year in which either the unimpaired runoff to Lake Oroville for the period of April 1 to July 31 as forecasted by the Department of Water Resources (for inclusion in its Bulletin No. 120 "Water Conditions in California") on May 10 is equal to or exceeds one million five hundred thousand (1,500,000) acre-feet, or such predicted runoff when added to the previous years' April 1 to July 31 runoff into Lake Oroville is equal to or exceeds three million (3,000,000) acre-feet.

(2) Fifty thousand (50,000) acre-feet in all other years: Provided, That in any year in which a temporary shortage due to Drought occurs, said amount shall be reduced by a percentage not to exceed fifty percent (50%) in any one (1) year or a total of one hundred percent (100%) in any series of seven (7) consecutive years, and further not to exceed the percentage for the reduction of deliveries of annual entitlements for water to San Joaquin Water Supply Contractors as imposed by the State in that year in accordance with Article 18(a) of the Water Supply Contracts.

Diversions of water during the Limitation Period under the preceding provisions of this Article 2(d) shall not exceed thirty-five percent (35%) of the Irrigation Season entitlement of Article 2(d) water for that year unless releases are made from Lake Oroville during the Limitation Period to prevent Lake

Oroville from equaling or exceeding the Flood Control Criteria or unless the storage in Lake Oroville equals or exceeds the Flood Control Criteria during the Limitation Period.

(e) Notwithstanding the inclusion of March in the Limitation Period, March diversions shall not be included as a part of the amount Districts are entitled to divert during the Irrigation Season.

Any water Districts obtain from Pacific, pursuant to the provisions of Article 2(b) during the Limitation Period shall be added to and increase the amount of water that may be diverted during the Limitation Period by the amount so obtained.

The State shall deliver any portion of the water to which Districts are entitled under this article to the Western Canal Points of Delivery for Pacific and shall deliver any water to which Pacific is entitled to the Districts' Afterbay Diversion Structures and the Afterbay River Outlet for Sutter in accordance with agreements between the Districts and Pacific.

On or before February 15 of each year, State shall furnish Districts a forecast as to whether Drought will occur during that year, as to whether reductions will be imposed, and the percentage of any such reductions, and as to the predicted unimpaired acre-foot runoff into Lake Oroville during the April 1 to July 31 period of that year. An unofficial forecast based on the most recent data available shall be sent to the Districts on or before April 1. An official forecast shall be furnished to Districts on or before April 10. Such forecasts shall be periodically revised as additional data become available: Provided, That the percentage of reduction shall not exceed the percentage set forth in the April 10 forecast.

(f) (1) During the term of this Agreement the Districts shall not divert any water from the Feather River or Tributaries of the Feather River except the water provided for in this Article 2. The Districts shall promptly dismiss Water Right Applications Nos. 13681, 13682, 14919, 14920, 15551, 15552, and 20308, on file with the State Water Resources Control Board and Application No. 2134 before the Federal Power Commission, and shall not file subsequent applications for a project on the Feather River or Tributaries of the Feather River that is the same or similar to the project proposed in said Application No. 2134.

(2) In furtherance of the rights of Districts under the county of origin reservation in the assignment of the State's water rights applications in accordance with Water Code Section 10505, and in furtherance of the rights of Districts under the area of origin law (Water Code Sections 11460-11463), the Districts may obtain project water from the State under the applicable terms of the Standard Provisions for Water Supply Contract approved August 3, 1962, based on the State's prototype water supply contract with The Metropolitan Water District of Southern California, subject, however, to Article 45(h) of the State's Water Supply Contract with the County of Butte dated December 26, 1963. Notwithstanding other provisions of this paragraph, nothing herein contained shall be construed as a waiver by Districts of any rights they may have under the area of origin statutes.

(g) In addition to the water or quantities of water to be diverted under other provisions of this Article 2, Districts may pump and use water obtained from wells located within

Districts' Service Area, and divert, store, and use water from streams and channels other than the Feather River and Tributaries of the Feather River and may divert and use water from drains.

(h) State shall operate Oroville Dam and Lake Oroville and Thermalito Afterbay and related facilities and the Afterbay Diversion Structures to deliver the water provided for in Articles 2(a), 2(b), 2(c), 2(d), 2(e), and Article 3 in accordance with diversion schedules and notices to be given by the Joint Manager.

3. Change in Point of Diversion of Water for Sutter

In addition to the water which may be diverted under Article 2(d) of this Agreement, Sutter may divert at Sunset such portion of the water under Article 2(a) and Article 2(b)(2) as may be designated by the Joint Manager in the diversion schedules and notices to be given under Article 5, instead of diverting it through the Afterbay Diversion Structures. A five percent (5%) reduction shall be applied to any water so designated as diverted under Article 2(a) to determine the quantities thereof that may be diverted at Sunset; no reduction shall be applied to any water purchased by Sutter from Pacific pursuant to Article 2(b)(2).

4. Deliveries During Initial Filling of Lake Oroville

Until storage in Lake Oroville first reaches, or is predicted by State to reach, two million seven hundred thousand (2,700,000) acre-feet, the deliveries of water to the Districts from the Thermalito Afterbay shall be as provided in the letter agreement between Districts, Pacific, and State, dated March 8 1968. Article 2(d) of this Agreement shall not become effective until storage in Lake Oroville first reaches or is predicted by

State to reach two million seven hundred thousand (2,700,000) acre-feet. If storage in Lake Oroville reaches, or is predicted by State to reach, said storage during the period March 1 through October 31 in any year, the rights and obligations of the parties shall be governed by this Agreement for the entire Irrigation Season during that year without regard to the limitation of this article.

5. Diversion Schedules and Notices

(a) On or before October 1 of each year, the Joint Manager shall furnish to State a delivery schedule setting forth the quantities of water to be delivered to the Districts weekly during the next year through the Afterbay Diversion Structures. Districts may revise this schedule on or about April 15 after State has furnished Districts with State's forecast of any deficiency.

(b) The Joint Manager shall submit a weekly schedule not later than 1:00 p.m. on Wednesday preceding the week in which the schedule is to take effect. Such schedule shall set forth the quantities in total acre-feet per week and rates of flow in cubic feet per second to be delivered during the week to the Afterbay Diversion Structures, to Sunset pursuant to Article 2(d), and to the Afterbay River Outlet for delivery to Sutter pursuant to Article 3. For purposes of this section, the week shall be considered as beginning at 12:01 a.m. each Sunday and continuing until 12:01 a.m. the following Sunday.

(c) The Joint Manager shall notify State no later than 4:00 p.m. each day of the rates of flow in cubic feet per second to be delivered to or for Districts during the twenty-four

(24) hour period commencing at 8:00 a.m. on the following day.

(d) Revisions in rates of flow not in excess of fifty (50) cubic feet per second shall be made by State within three (3) hours of any such revised request from Districts. Revisions in rates of flow of more than fifty (50) cubic feet per second, but less than two hundred (200) cubic feet per second, shall be made by State within twelve (12) hours of any such revised request from Districts. Revisions in rates of flow in excess of two hundred (200) cubic feet per second shall be made by State within twenty-four (24) hours of any such revised request from Districts.

Until such time as the Afterbay Diversion Structures are controlled from State's Control Center, requests for revision of rates of flow shall be made between the hours of 8:00 a.m. and 3:00 p.m. After the Afterbay Diversion Structures are controlled from State's Control Center, such requests may be made at any time.

Any request for revision may be made by telephone, or by such other means as may be agreed upon by the parties. State shall at all times make such changes as requested as soon as practicable, but in no event later than the time limits established herein.

Requests for revisions in the rate of flow shall be given to State's representatives located at State's Oroville headquarters. Initially, State's representatives shall be the Chief Operator, Monday through Friday, except state holidays, and at all other times, the operator located at State's Control Center.

(e) The water deemed delivered to Districts in any week under Articles 2(a), 2(b), 2(c), 2(d), 2(e), and Article 3

shall be the quantity of such water diverted by Districts during that week but subject to all of the following:

(1) The amount deemed delivered shall not be less than the amount ordered for that week in the Joint Manager's weekly schedule as it may be reduced pursuant to his daily notices given under Article 5(c), however, that portion of said reductions that exceeds (1) in any one day 400 acre-feet multiplied by the number of days or fractional day in the week remaining at the time the reduction is ordered to take effect; or (2) in any one week 2800 acre-feet will be deemed delivered to the extent it cannot be conserved by State in Lake Oroville and Thermalito Afterbay but to the extent such excess can be conserved by State in said facilities it shall not be deemed delivered.

(2) Notwithstanding the provisions of the next preceding paragraph, in any week during which State makes releases from Lake Oroville to prevent Lake Oroville from equaling or exceeding the Flood Control Criteria the water deemed delivered through the Afterbay Diversion Structures shall be the quantity of water delivered to the Districts during that week through such structures but not exceeding the amount ordered to be delivered through such structures by the Joint Manager pursuant to the weekly schedule as revised by his daily notices given under Article 5(c).

(3) Water received by Districts in excess of the rate of flow specified in the Joint Manager's daily notice given under Article 5(c) will not be deemed delivered except that the combined flow of water through the Afterbay Diversion Structures, up to 2 percent or 20 cubic feet per second (whichever is greater) in excess of the rate of flow so specified will be deemed

(4) Water not received by Districts due to the failure of State to comply with the Joint Manager's weekly schedule as revised by his daily notices given under Article 5(c), will not be deemed delivered.

In the event of an emergency threatening the destruction of life or property, the Joint Manager may by telephone order an immediate reduction in the releases of water through the Afterbay Diversion Structures and such changes shall be made immediately by State, or in the event of its failure to do so, the Joint Manager may change the setting of the Afterbay Diversion Structures. In such event, the Districts will be deemed to have received the full flow set forth in the latest current effective diversion schedule or notice for a period not to exceed twelve (12) hours after the reduction is made, but only to the extent that it cannot be conserved by State.

Consistent with its other requirements and contractual obligations, State will endeavor to conserve in the Oroville-Thermalito facilities, water scheduled but which Districts are unable to use during any week.

The quantity of water State is obligated to deliver to Districts during any week under Article 2(a), 2(b), 2(c), 2(d), 2(e) and Article 3 shall not exceed by more than 400 acre-feet in any day the daily quantity of water set forth in the schedule of the Joint Manager for that week: Provided, That the limitation shall not apply in any week during which the State makes releases from Lake Oroville to prevent Lake Oroville from equaling or exceeding the Flood Control Criteria.

To the extent that State can do so consistent with its other requirements and contractual obligations, the State will make available any additional quantities of water Districts may request in excess of the quantity set forth in the schedule of the Joint Manager for that week.

(f) For the purpose of ascertaining if mutually agreeable changes can be made, the terms of this Article 5 shall be reviewed by the parties after the first Irrigation Season during which Afterbay Diversion Structures are controlled from State's Control Center, and thereafter on the request of any party but not more frequently than once every five years.

6. Responsibility for Distribution of Water and Liability of State

Districts shall be responsible for the distribution of water diverted by them after it passes through the Afterbay Diversion Structures and the pumping facilities at Sunset.

Except as otherwise herein provided, neither the State nor any of its officers, agents, or employees shall be liable for the control, carriage, handling, use, disposal, or distribution of water diverted under the terms of this Agreement after it passes into Districts' canal system through the Afterbay Diversion Structures or the pumping facilities at Sunset.

State shall be solely responsible for maintaining a sufficient flow of water in the Feather River downstream from the Thermalito Diversion Dam to supply water diverted by others under rights superior to those of State or Districts.

This Agreement does not relieve State or its officers, agents or employees from liability to or from damages to Districts

or third parties arising out of failure of State at any time to comply with this Agreement or the diversion schedules or notices given by Joint Manager pursuant hereto or from injuries to crops or production of crops due to reduction in temperature of water available to Districts during any portion of any Irrigation Season or seasons as a result of water released from Lake Oroville being colder than water that would have been available in the Feather River for diversion by Districts if Oroville Dam had not been constructed. Nothing in this Agreement shall be construed as an admission by State that a reduction in the temperature of water available to Districts will in fact cause injury to crops or production of crops.

7. Districts Not to Transfer Water

Subject to the provisions of Article 2(e) Districts shall not assign or sell the right to use any of the water to be provided for their use under this Agreement, nor deliver any such water to any person or entity located outside Districts' Service Area as shown on Exhibit A without the prior written consent of State. This provision is not violated by reason of the fact that some drain water will escape Districts' Service Area and be used outside such area by third parties or by reason of the fact that water is supplied to flush industrial wastes that may flow outside the service area.

8. Measurement of Diversions

State shall measure diversions into Districts' canal system through the Afterbay Diversion Structures and telephone to the Joint Manager preliminary records of such measurements prior to Wednesday of each week covering the preceding calendar week

and confirm them in writing mailed to the Joint Manager not later than the fifteenth day of each month. The records delivered shall show quantities and average flows each day. Districts shall have the right to inspect and test such measuring devices and obtain data as to water deliveries to Districts at their expense as frequently as they deem necessary. Districts may, at their expense, install equipment at and connected with the Afterbay Diversion Structures and the measuring devices downstream therefrom to transmit, electrically or electronically, information on water deliveries, flows, guage heights, and gate openings: Provided, That the type of equipment and method of installation shall be subject to the approval of the State.

Sutter shall measure all water diverted at Sunset and through the Joint Manager shall telephone to State preliminary records of such measurements prior to Wednesday of each week covering the preceding calendar week and confirm them in writing mailed to State not later than the fifteenth day of each month. The records delivered shall show quantities and average flows each day. State shall have the right to inspect and test the measuring devices and ratings of the pumps at State's expense as frequently as State deems necessary.

9. Term of Agreement

This Agreement between State and Districts takes effect as of the date hereof and shall remain in full force and effect until terminated by the mutual consent of the parties or as provided for in Article 11(c): Provided, That this Agreement shall not be effective until Districts and Pacific have entered into an agreement which, during the period this Agreement and

Exhibit C are in full force and effect and not modified in any way or by any means unacceptable to Pacific or Districts, or any of Districts, has the effect of modifying that certain decree dated December 14, 1924, in Civil Action No. 2360 in the Superior Court of the State of California in and for the County of Sutter to permit the full performance of this Agreement.

10. Prior Agreements

During the term of this Agreement the "Agreement Concerning the Operation of Antelope Valley Unit" dated January 21, 1964, between the State and the Districts shall not be effective insofar as it restricts the operation of the Antelope Valley Unit by the State.

To the extent that provisions in the agreement between the State and the Districts dated July 6, 1964, are necessarily inconsistent with this Agreement, they shall be superseded by this Agreement. However, State shall not be relieved of obligations under said July 6, 1964, agreement not necessarily inconsistent, including, without limiting the generality of the foregoing, its obligation to design, construct, maintain and operate the facilities therein referred to and any necessary fish screens and facilities in conjunction with the construction and use of the structures provided for under paragraph 1 of said agreement and to petition to include the real property referred to in paragraph 10 of said agreement in the Districts and to support the efforts of Districts to accomplish such inclusions.

11. Water Right Controversies

(a) Districts do not surrender, modify or terminate any of their rights to divert water or change the priority of

their rights, except for the change in point of diversion agreed to in their said July 6, 1964, agreement with the State and except as to the dismissal of certain applications for the storage and diversion of water on the Middle Fork of the Feather River and for generation of electricity. Districts will protect and defend their rights to divert water from the Feather River, including the protesting of applications to appropriate water that are adverse to the rights of Districts, the prosecution of such protests before the State Water Resources Control Board and other administrative agencies, and the defense of such water rights in courts: Provided, That the failure of Districts to protest an application or otherwise defend their water rights shall not be a default under this Agreement, unless Districts fail to protest an application or otherwise defend their water rights after having been specifically requested to do so by the State, as to the specific application or court proceeding, in time for protests or defenses to be made.

(b) Water diverted by Districts under this Agreement shall be deemed diverted under Districts' water rights.

(c) All parties agree to join in resisting any attack upon this Agreement or any of its provisions by judicial, administrative, or any other bodies. If this Agreement or any part thereof is decreed unenforceable or directly or indirectly modified in any respect other than by mutual agreement, the party whose interests are adversely affected shall have the option of terminating this Agreement, in which event all rights and privileges prevailing prior to the execution of this Agreement, the agreement between Districts and Pacific referred to in Article 9 hereof,

and the agreement between State and Pacific, a copy of which is attached as Exhibit C, shall be restored, and State shall operate the Afterbay Diversion Structures to supply the yield of the rights of Districts to the same extent as if Lake Oroville were not in existence and this Agreement and the agreements between State and Pacific had not been entered into.

Nothing in this Agreement shall be construed as an admission or consent by Districts that this Agreement or any part thereof is unenforceable or may be modified either directly or indirectly by judicial, administrative, legislative or other action except by mutual agreement of the parties.

12. Inspection of Records

The proper officers or agents of either party shall have full and free access at all reasonable times to the official records of the other party insofar as the same pertain to the matters and things provided for in this Agreement with the right at any time during office hours to make copies of such records.

13. Successors and Assigns Bound

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties to it.

14. Waivers

Any waiver at any time by any party to this Agreement of its rights with respect to a default or any other matter arising in connection with this Agreement shall not be deemed to be a waiver with respect to any subsequent default or matter.

15. Notices

Except as otherwise herein expressly provided, all notices that are required either expressly or by implication to be given by one party to the other under this Agreement shall be signed for the State by its contracting officer, and for the Districts by their Joint Manager; shall be deemed to have been given at the time of delivery if delivered personally or twenty-four (24) hours after deposit in the mail if enclosed in a properly addressed envelope and deposited in a United States Post Office for delivery with postage prepaid; and unless and until formally notified otherwise shall be addressed to the State and the Districts at their addresses as shown on the signature page of this Agreement.

16. Opinions and Determinations

Where this Agreement calls for determinations, forecasts, or decisions to be made by the Department of Water Resources, or the State, they shall not be made capriciously, arbitrarily or unreasonably and Districts reserve the right to relief from and appropriate adjustment for any such arbitrary, capricious or unreasonable determination, forecast or decision.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the date first above written.

Approved as to legal form and sufficiency:

By _____
Chief Counsel
Department of Water Resources

For

STATE OF CALIFORNIA
DEPARTMENT OF WATER RESOURCES

By _____
Director
P. O. Box 388
Sacramento, California

RICHVALE IRRIGATION DISTRICT

By _____
President

By _____
Secretary

BUTTE WATER DISTRICT

By _____
President

By _____
Secretary

BIGGS-WEST GRIDLEY WATER DISTRICT

By _____
President

By _____
Secretary

SUTTER EXTENSION WATER DISTRICT

By _____
President

By _____
Secretary

Address of Districts:

Joint Water Districts
P. O. Box 425
Gridley, California 95948

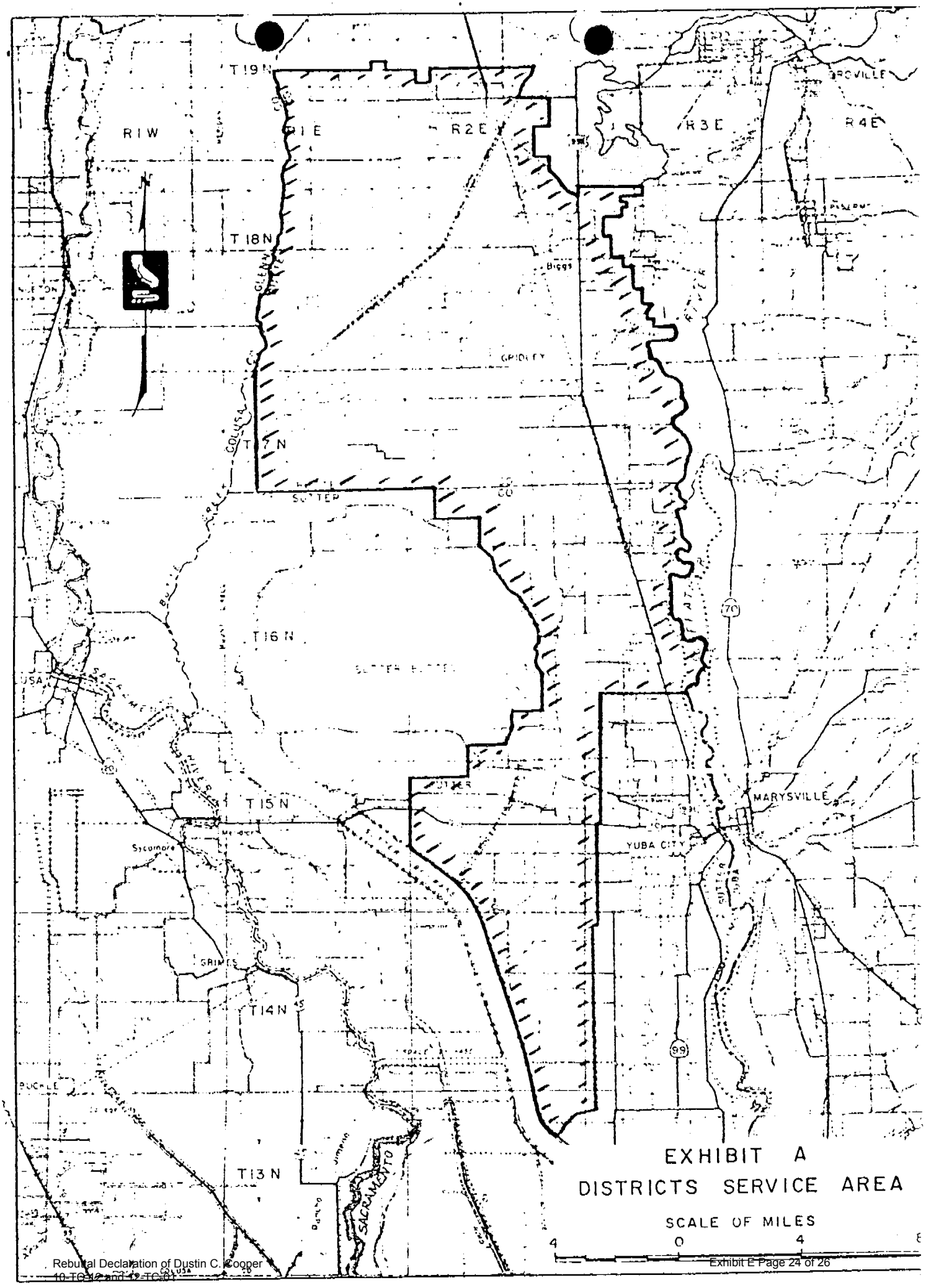

T19N
R1W
R1E
R2E
R3E
R4E
T18N
GRIDLEY
T17N
SUTTER CO
T16N
T15N
MARYSVILLE
YUBA CITY
T14N
T13N
SACRAMENTO
EXHIBIT A
DISTRICTS SERVICE AREA
SCALE OF MILES
4 0 4

EXHIBIT B
Limitations on Diversions of Article 2a Water

Column 1 % of Reduction	Column 2 During Irrigation Season in Years Prior to 1981	Column 3 During Irrigation Season after the Year 1980	Column 4 During Limitation Period	Column 5 Limitation Period
0	560,000	555,000	200,000	Apr 1 to May 31
1	560,000	555,000	197,200	
2	560,000	555,000	194,400	
3	560,000	555,000	191,600	
4	560,000	555,000	188,800	
5	560,000	555,000	186,000	
6	560,000	555,000	184,300	
7	556,150	551,500	182,600	
8	550,600	546,000	180,900	
9	545,050	540,500	179,200	
10	539,500	535,000	177,500	
11	533,950	529,500	175,800	
12	528,400	524,000	174,100	
13	522,850	518,500	172,400	
14	517,300	513,000	170,700	
15	511,750	507,500	169,000	
16	506,200	502,000	167,300	
17	500,650	496,500	165,600	
18	495,100	491,000	163,900	
19	489,550	485,500	162,200	
20	484,000	480,000	160,500	
21	478,450	474,500	158,800	
22	472,900	469,000	157,100	
23	467,350	463,500	155,400	
24	461,800	458,000	153,700	
25	456,250	452,500	152,000	Apr 1 to May 31
26	450,700	447,000	150,320	Mar 1 to May 31
27	445,150	441,500	148,640	
28	439,600	436,000	146,960	
29	434,050	430,500	145,280	
30	428,500	425,000	143,600	
31	422,950	419,500	141,920	
32	417,400	414,000	140,240	
33	411,850	408,500	138,560	
34	406,300	403,000	136,880	
35	400,750	397,500	135,200	
36	395,200	392,000	133,520	
37	389,650	386,500	131,840	
38	384,100	381,000	130,160	
39	378,550	375,500	128,480	
40	373,000	370,000	126,800	
41	367,450	364,500	125,120	Mar 1 to May 31

Column 1 % of Reduction	Column 2 During Irrigation Season in Years Prior to 1981	Column 3 During Irrigation Season after the Year 1980	Column 4 During Limitation Period	Column 5 Limitation Period
42	361,900	359,000	123,440	Mar 1 to May 3
43	356,350	353,500	121,760	
44	350,800	348,000	120,080	
45	345,250	342,500	118,400	
46	339,700	337,000	116,720	
47	334,150	331,500	115,040	
48	328,600	326,000	113,360	
49	323,050	320,500	111,680	
50	317,500	315,000	110,000	Mar 1 to May 3

EXHIBIT F

TECHNICAL INFORMATION FOR WATER TRANSFERS IN 2013, PREPARED BY DWR AND THE UNITED STATES BUREAU OF RECLAMATION

DRAFT
Technical Information for Preparing Water Transfer Proposals

Information to Parties Interested In Making Water Available for Water Transfers

January 2013

Prepared By:
CALIFORNIA DEPARTMENT OF WATER RESOURCES

AND

BUREAU OF RECLAMATION, MID-PACIFIC REGION

Table of Contents

Page

SECTION 1. GENERAL INFORMATION FOR WATER TRANSFERS 1

1.1 INTRODUCTION 1
1.2 RISKS AND CONSTRAINTS 4
1.3 PROPOSAL REVIEW 4
1.4 DEVELOPING A WATER TRANSFER PROPOSAL 5
1.5 ENVIRONMENTAL DOCUMENTATION 5
1.6 COST REIMBURSEMENT 8
1.7 CONTACTS 8

SECTION 2. WATER TRANSFERS BASED ON CROPLAND IDLING AND CROP SHIFTING 9

2.1 ESTIMATION OF CONDITIONS THAT WOULD OCCUR ABSENT THE TRANSFER 11
2.1.1 Large Water Districts 12
2.1.2 Individual Farm Operations and Small Water Districts 13
2.1.3 Eligibility of Double-Cropped Fields 13
2.2 USE OF EVAPOTRANSPIRATION OF APPLIED WATER (ETAW) 14
2.2.1 What is ETAW? 14
2.2.2 Crops Allowed for Cropland Idling or Shifting and ETAW Values 14
2.2.3 Rice Idling 16
2.2.4 Rice Straw Decomposition 16
2.2.5 Limitations on Crops and Lands 16
2.2.6 Vegetation Control on Idled Land 17
2.3 ESTIMATING WATER AVAILABLE FOR TRANSFER 18
2.3.1 Large Water Districts 18
2.3.2 Individual Farm Operations or Small Water Districts 19
2.4 POTENTIAL CROPLAND IDLING/CROP SHIFTING TRANSFERS IN THE DELTA/YOLO BYPASS REGION 19
2.5 LIMITATIONS ON WATER MADE AVAILABLE FOR TRANSFER 19
2.6 ADJUSTMENTS FOR WATER SHORTAGE YEARS 19
2.7 REPORTING 20
2.7.1 Acreage Calculation Methodology 20
2.7.2 Monitoring and Verification 21
2.8 THIRD-PARTY EFFECTS 22
2.9 ENVIRONMENTAL CONSIDERATIONS 22
2.9.1 DWR Considerations for Rice Land Idling Transfers 22
2.9.2 Reclamation's ESA Considerations for Rice Land Idling Transfers 24

SECTION 3. WATER TRANSFERS BASED ON GROUNDWATER SUBSTITUTION 25

3.1 COMPLIANCE WITH LOCAL GROUNDWATER MANAGEMENT PLANS AND ORDINANCES 27
3.2 EVALUATION OF GROUNDWATER SUBSTITUTION TRANSFER PROPOSALS 28
3.3 GROUNDWATER SUBSTITUTION WELLS 29
3.3.1 Information Requirements for Groundwater Substitution Wells 29
3.4 DETERMINING THE AMOUNT OF TRANSFERABLE WATER 31
3.4.1 Determining the Baseline Groundwater Pumping 31
3.4.2 Measuring Groundwater Pumped 32
3.4.3 Estimating the Effects of Transfer Operations on Streamflow 33
3.5 MONITORING PROGRAM 34

3.5.1 Monitoring Plan Objectives 34
3.5.2 Monitoring Program Elements 35
3.6 MITIGATION PROGRAM 37
3.6.1 Objectives 38
3.6.2 Mitigation Plan Elements 38
SECTION 4. RESERVOIR STORAGE RELEASE 40
4.1 REFILL CRITERIA 40
APPENDIX A. POTENTIAL WATER TRANSFER EFFECTS ON THE PROJECTS 42
APPENDIX B. WELL ACCEPTANCE CRITERIA 43

List of Tables

TABLE 1-1 TRANSFERS CONSIDERED FOR 2013 3
TABLE 2-1 ESTIMATED ETAW VALUES (IN ACRE-FEET/ACRE) FOR CROPS SUITABLE FOR SHIFTING 15
TABLE 2-2 ESTIMATED ETAW VALUES (IN ACRE-FEET/ACRE) FOR CROPS SUITABLE FOR IDLING 15
TABLE 2-3 CROPS NOT SUITABLE FOR SHIFTING OR IDLING 17
TABLE 3-1 DESCRIPTION OF COUNTY ORDINANCES RELATED TO GROUNDWATER TRANSFERS 27
TABLE B-1 WELL ACCEPTANCE CRITERIA 43

List of Figures

FIGURE 1-1 WATER TRANSFER PROCESS FLOWCHART 7
FIGURE 2-1 CROPLAND IDLING/CROP SHIFTING TRANSFERS PROCESS FLOW CHART 10
FIGURE 2-2 CROP IDLING TECHNICAL INFORMATION SUBMITTAL PROPOSAL CHECKLIST 11
FIGURE 3-1 GROUNDWATER SUBSTITUTION TRANSFER TECHNICAL INFORMATION — PROPOSAL CHECKLIST 26

List of Acronyms and Abbreviations

µS/cm	micro Siemens/centimeter
af	acre-feet
bgs	below ground surface
BMPs	best management practices
CEQA	California Environmental Quality Act
CESA	California Endangered Species Act
CDFW	California Department of Fish and Wildlife
COA	Coordinated Operating Agreement
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act
D-1641	State Water Resources Control Board Decision 1641
Delta	Sacramento-San Joaquin River Delta
DWR	California Department of Water Resources
FESA	Federal Endangered Species Act
ETAW	evapotranspiration of applied water
GIS	geographic information system
GPS	global positioning system
NAD83	North American Datum 1983
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PG&E	Pacific Gas and Electric
POC	point of contact
Projects	Central Valley Project and State Water Project
Project Agencies	California Department of Water Resources and Bureau of Reclamation, Mid-Pacific Region
Reclamation	Bureau of Reclamation, Mid-Pacific Region
SDF	streamflow depletion factor
SWP	State Water Project
SWRCB	State Water Resources Control Board
TDS	total dissolved solids
USFWS	U.S. Fish and Wildlife Service

Section 1. General Information for Water Transfers

1.1 Introduction

The California Department of Water Resources (DWR) and Bureau of Reclamation, Mid-Pacific Region (Reclamation), referred to collectively as Project Agencies, prepared this technical information to help facilitate temporary water transfers (duration of up to 1 year) in 2013 that require conveyance through Project Agencies' facilities or otherwise require Project Agency approval.

While the technical information contained in this document may be used to inform the development of longer-term transfer proposals, multi-year or long-term transfers typically require the transfer proponents to provide a more rigorous analysis than that requested for temporary transfers, and the Project Agencies may require additional information beyond that specified in this document. The Project Agencies evaluate each transfer on a case-by-case basis considering the specific conditions for each individual transfer.

Any transfer of non-project water requiring conveyance through Project Agencies' facilities will require a "conveyance agreement" or a "letter agreement" with the water transfer proponent, the buyer, and either DWR or Reclamation. Water transfer proponents who provide the technical information requested in this document will help Project Agencies review transfer proposals and develop their respective "conveyance contracts" or "letters of agreement." Project Agencies will review each water transfer proposal using the information provided by the water transfer proponents and other available information.

The basis upon which transfer approval is made by the Project Agencies and to which the information in this technical document relates are principally Project Agency water rights, Project Agency water supply, water service and/or repayment contracts, Section 3405(a) of the Central Valley Project Improvement Act (CVPIA), Water Code Section 1810, the Coordinated Operating Agreement (COA)[1], and other State Water Project (SWP) contracts. Other legal requirements, such as the National Environmental Policy Act (NEPA) and the California Environmental Quality Act

[1] This an agreement between the United States of America and the State of California for coordinated operations of the Central Valley Project and the State Water Project. This agreement is known as the Coordinated Operating Agreement (COA).

(CEQA) may also apply to water transfers; however, their internal requirements are not addressed by this technical document.[2]

The approval criterion to which the information in this document chiefly pertains is the avoidance of legal injury, through the determination of whether the water proposed for transfer is legally transferable. Much of the information required in this document is necessary for the Project Agencies to determine if the proposed transfer would cause legal injury to downstream water users. This determination, frequently referred to as a "real water determination," is the net addition of water to the downstream system that would not be available but for the transferor's concurrent reduction of his own consumptive use of that water. Only that portion of the proposed transfer that is determined to represent real water is transferrable. Depending on the measures used to make water available for transfer, real water consists primarily of the transferor's reduction in the evapotranspiration of applied water (ETAW), reduction in applied water lost to saline sinks or to other unusable sources, or increased releases from storage reservoirs. The amount of real water savings is the amount of water under the transferor's right that can be transferred from the system without injuring other users. As the above discussion demonstrates, real water determinations and legal injury determinations are essentially interchangeable terms.[3]

Real water determinations by the Project Agencies are required, in the first instance, to protect their own water rights from infringement. The Project Agencies are the last diverters in the Sacramento-San Joaquin river system. They have shared responsibility for meeting Sacramento-San Joaquin River Delta (Delta) water quality and environmental requirements, and their water rights are junior to all lawful in-basin water diversions of natural flow under the watershed protection statutes. To the extent that water other than real water is transferred out of the system when the Delta is in balanced conditions — i.e., when Project operations are ensuring that Delta regulatory requirements are being met — it is water that is unlawfully taken from Project supply (see Appendix A).

Real water determinations are also needed to satisfy the legal criteria under Water Code Section 1810(d) that require the owner of conveyance facilities to ensure that the transfer will not cause legal injury to other water users; and to satisfy requirements for water accounting under the COA between DWR and Reclamation when one of the Projects either conducts or facilitates a water transfer — again, to ensure no legal injury. Real water criteria are also used by DWR for the same purpose

[2] Short-term transfers of post-1914 appropriative water rights require approval by the SWRCB under Water Code Section 1725 et seq. The approval criteria are virtually identical to those in Section 1810, so the information gathered here should also be helpful to transferring parties in that approval process.

[3] Real water determinations and legal injury from water transfers are further discussed in the article located on the DWR Water Transfer website, "Approving Water Transfers: Assuring Responsible Transfers." http://www.water.ca.gov/watertransfers/docs/responsible_water_transfers_2012.pdf

in reviewing and approving transfers under specific provisions of its various water rights settlement agreements.

A second set of approval criteria relate to the other two Section 1810(d) legal requirements: that the transfer result in (1) no unreasonable impacts on fish and wildlife and instream uses, and (2) no unreasonable economic or environmental impact on the area in which the transfer water originates.[4]

Although this document seeks to identify in the best and most complete way possible the information needed for transfer approval, to both expedite that approval and to reduce participant uncertainty, each transfer is unique and must be considered on its individual factual merits, using all the information that is available at the time of transfer approval and execution of the conveyance or letter of agreement with the respective Project Agency in accordance with the applicable legal requirements. This document does not pre-determine those needs or those facts and does not foreclose the requirement and consideration of additional information. The general types of transfers that will be considered for proposals requiring the use of Project facilities are listed in Table 1-1.

Table 1-1 Transfers considered for 2013

Transfers considered in 2013	Transfers not considered in 2013
Stored water — Release of stored water that would remain in storage in the absence of the water transfer. Storage reduction caused by a transfer must be refilled at a time when downstream users would not have otherwise captured the water.	**Direct pumping of groundwater** — The Project Agencies will not approve the direct transfer of groundwater from one area to another. Water Code Section 1220 establishes significant barriers to the export of groundwater outside the Sacramento Delta-Central Sierra Basins.
Cropland idling/crop shifting — Reduction in surface water use resulting from reduced ETAW[1] of agricultural crops that would have been planted in the absence of the water transfer (see Section 2).	**Transfers that injure legal users of water or cause unreasonable effects on the environment** — Water transfers that simply reclassify existing stream flows from one category to another, making these flows no longer available to historic downstream users, have the potential to injure other legal users of water and cause harm to the environment.
Groundwater substitution — Reduction in surface water use that is offset with additional groundwater pumping (see Section 3).	

[1] ETAW = evapotranspiration of applied water.

[4] To support the finding required under Water Code Section 1810(d) of no reasonable impact on fish and wildlife, DWR has required that measures patterned upon the Conservation Measures developed by the U.S. Fish and Wildlife Service for the giant garter snake under its most recent consultation with the Reclamation on water transfers be included in transfer proposals seeking to use State Water Project (SWP) conveyance facilities.

1.2 Risks and Constraints

Buyers and sellers should be aware of the uncertainty and risk associated with water transfers. The Project Agencies cannot guarantee that a particular transfer will be successful even with adequate planning, regulatory approval, and monitoring due to the uncertainties related to California's hydrologic conditions, regulatory restrictions on Project Agencies' operations, and the availability of Project Agencies' facilities. As the hydrology gets wetter, there is typically less available capacity to export transfer water through the Delta. Buyers and sellers located in the Delta or the Yolo Bypass should contact the Project Agencies for specific risks that may affect their transfer proposal.

Project Agencies' operations are governed by a number of regulatory restrictions, including State Water Resources Control Board (SWRCB) Decision 1641 (D-1641), the 2008 U.S. Fish and Wildlife Service (USFWS) biological opinion for the coordinated operations of the Central Valley Project (CVP) and State Water Project (SWP) and its effects on the listed Delta smelt, and the 2009 National Marine Fisheries Service (NMFS) biological opinion for the coordinated operations of the CVP and SWP and its effects on listed anadromous fish and marine mammals. Current federal Endangered Species Act (ESA) consultations for export of transfer water through Banks and Jones Pumping Plants covers the period of July through September, and transfers will be limited to this interval. Limitations on CVP and SWP Delta operations in the early winter and spring months often result in the need to maximize Project exports during July through September, which can further limit the available export capacity for water transfers. The water transfer proponents assume the risk that all, or a portion of, the water made available from the water transfer cannot be exported and may be lost.

Generally, CVP power will not be provided for transfers of non-project water utilizing CVP facilities. The parties are required to provide any energy required to convey non-project water through CVP facilities or replace the value of the energy used to store and/or convey the non-project water.

1.3 Proposal Review

Figure 1-1 outlines the process for determining which agencies have review authority over the water transfer proposal. The Project Agencies work cooperatively to review water transfers requiring conveyance through SWP or CVP facilities.

Water transfers involving SWP facilities or SWP water supplies are subject to DWR's consent. Reclamation has approval authority over water transfers involving CVP water supplies. DWR and Reclamation must coordinate their accounting and operations for any transfer that involves use of Banks Pumping Plant or Jones Pumping Plant. Public Law 102-575, the CVPIA, Section 3405(a) outlines the conditions under which CVP water may be transferred. Reclamation has developed interim implementing guidelines for the water transfer provisions of the CVPIA.

These interim guidelines can be found at http://www.usbr.gov/mp/cvpia/3405a/docs/int_guide_imp_water_trans.pdf.

Depending on the nature of the water right, the seller may be required to file a petition for change with the SWRCB. Individual water right holders are responsible for obtaining changes to water rights from the SWRCB as needed. If a transfer requires SWRCB approval, the water transfer proponent should submit a petition for change to the SWRCB as soon as possible. SWRCB approval must be obtained before any water can be transferred.

1.4 Developing a Water Transfer Proposal

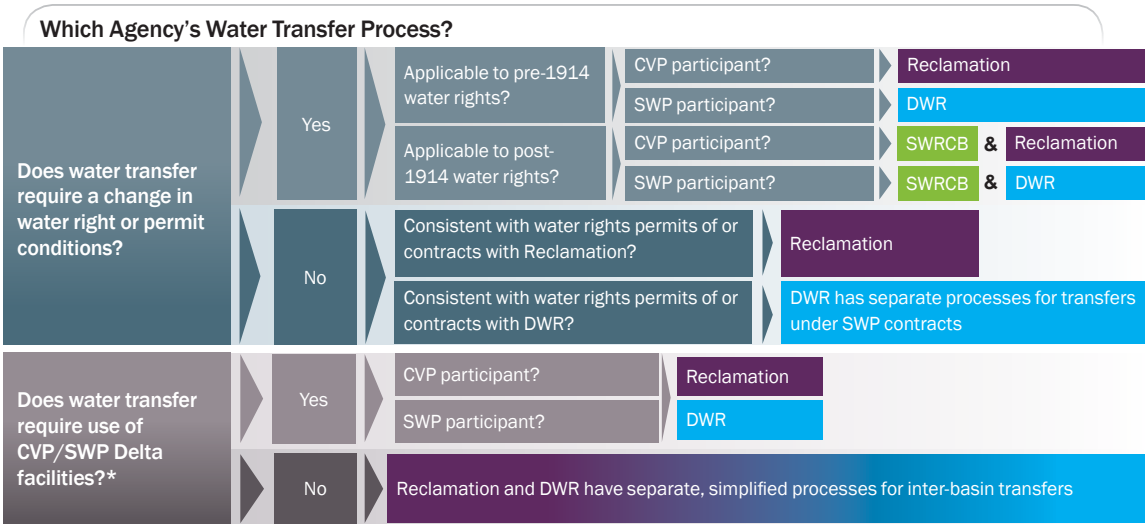
Water transfer proponents are encouraged to work with local water agencies and districts to develop coordinated water transfer proposals capable of providing substantial quantities of water. The following should be considered in developing a water transfer proposal requiring conveyance through SWP or CVP facilities:

- The types of water transfers that the Project Agencies will consider in 2013 are shown in Table 1-1. The water transfer proponents should ensure that the transfer proposal is described in sufficient detail to allow for proper review by the Project Agencies, California Department of Fish and Wildlife (CDFW), USFWS, and NMFS, as appropriate.
- The agencies that may need to be consulted are shown in Figure 1-1.
- The amount of water made available for transfer by the seller is usually determined at the most downstream point of control of the water transfer proponent. Losses beyond this point, including Delta carriage water losses and conveyance losses, affect the total amount of transfer water delivered and are determined by the Project Agencies.
- Proposals, contract negotiations, and CEQA/NEPA documentation (if required) must be completed before the water can be transferred. Water transfers involving CVP water supplies or CVP facilities (or both) require the approval of Reclamation, and water transfers involving SWP water supplies or facilities (or both) require the approval of DWR.
- If SWRCB approval is required, sellers should obtain this approval as soon as possible.

1.5 Environmental Documentation

In addition to requirements listed in Figure 1-1, for 2013, water transfer proponents must complete any required CEQA documentation and obtain all necessary California Endangered Species Act (CESA) and federal ESA compliance and any other regulatory approval for transfers related to State actions. Temporary transfers (one year duration or less) based on post-1914 appropriative water rights are required to obtain SWRCB approval consistent with the requirements of Water Code Section

1725 et seq. For transfers requiring Reclamation approval, NEPA documentation and ESA compliance for through-Delta transfers is required. Reclamation will need to complete additional environmental analysis and documentation prior to providing contractual approvals for the transferred water to be conveyed in federal facilities to the appropriate turnouts of the identified water users.



** DWR and Reclamation work cooperatively to approve all transfers that use SWP/CVP facilities*

Agency Water Transfer Processes

AGENCY	DWR	Reclamation	SWRCB
How to start agency process?	• Contact DWR with transfer proposal and request conveyance through SWP • Agree to cost reimbursement	• Send letter of request for transfer with information on seller, buyer, type, amount, and timing of transfer • Reclamation sends letter back with cost reimbursement requirements • Agencies agree to move forward	File petition for temporary water transfer (1 year or less) or for long-term transfer under the aplicable provisions of the Water Code.
What technical information is required in submittal packages?* **See checklists for data requirements*	Information as listed in Water Transfer Technical Information (crop shifting/cropland idling and groundwater substitution)	Information as listed in • CVPIA Criteria Checklist for a complete written Transfer Proposals • Water Transfer Technical Information (crop shifting/cropland idling and groundwater substitution)	Information as required for the type of transfer being sought by the appropriate SWRCB form.
What regulatory compliance is required?	CEQA, ESA, CESA, local and regional requirements, depending on the location of the proposed transfer	NEPA and ESA	Approval of Petition for Change for transfer of post 1914 appropriative water right.
What is acceptance of transfer proposals based on?	• Complete Submittal Package • Determination of real water and Project operation considerations • Water Code Section 1810 - use of a water conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses; the overall economy; or the environment of the transferor area • CEQA	• Complete Submittal Package • Determination of real water and Project operation considerations • CVPIA section 3405(a) – No adverse impacts on CVP contractors, water supply or operations, fish and wildlife obligations, and groundwater conditions in the transferor area • NEPA	Transfer shall not injure any legal user of the water and not unreasonably affect fish, wildlife, or other instream beneficial uses.

Figure 1-1 Water transfer process flowchart

1.6 Cost Reimbursement

Project Agencies will require water transfer proponents to reimburse the costs incurred by the Project Agencies to review and approve the transfer proposal, and administer their respective water transfer "conveyance contract" or "letter of agreement." These costs will vary depending on the size and complexity of the transfer proposed.

1.7 Contacts

Parties with general questions on water transfers may contact:

Tom Filler
Chief, Water Transfer Program
DWR (916) 653-5272
TFiller@water.ca.gov

Brad Hubbard
Program Manager
Reclamation (916) 978-5204
BHubbard@usbr.gov

Parties interested in developing water transfer proposals that require conveyance through SWP facilities may contact:

Nancy Quan
Chief, Program Development and Water Supply Branch
DWR (916) 653-0190
nquan@water.ca.gov

Section 2. Water Transfers Based on Cropland Idling and Crop Shifting

This section provides a discussion of the information needed by DWR and Reclamation for the review of transfer proposals based on cropland idling/crop shifting that require conveyance through SWP or CVP facilities. Cropland idling includes the idling of land that would have been planted during the transfer period in the absence of the transfer. Crop shifting is the shifting from historically planted higher-water-intensive crops to lower-water-using crops. It does not include land fallowed as part of normal farm operations, which does not make water available for transfer. Cropland idling or crop shifting water transfers make water available by reducing the consumptive use of surface water applied for irrigation. Each proposal needs to contain sufficient information to support the claimed reductions in consumptive use of applied surface water upon which the transfer is based. Figure 2-1 shows the overall cropland idling/crop shifting transfer information required, which is summarized in the subsequent sections.

Figure 2-1 Cropland idling/crop shifting transfers process flow chart

Figure 2-2, summarizes the information requested for a cropland idling/crop shifting water transfer proposal. This information will help Project Agencies review the water transfer proposal and develop the appropriate conveyance contract or letter of agreement between the transfer proponents, buyers, and Project Agencies. Sellers are encouraged to work with their water purveyor (e.g., water district) to develop joint water transfer proposals.

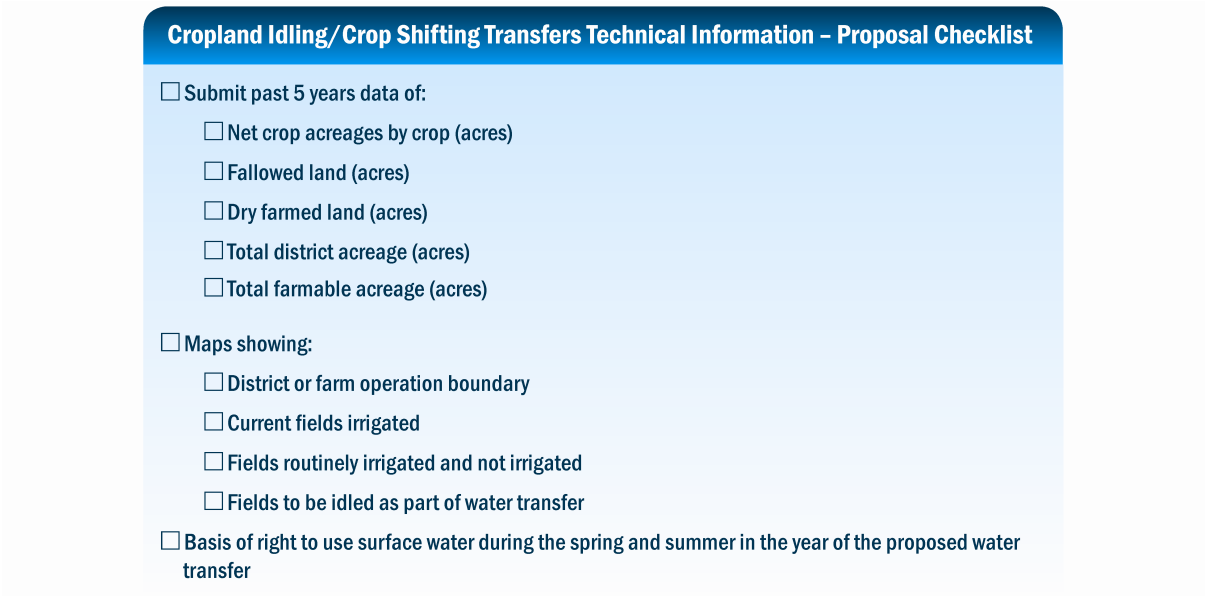


Figure 2-2 Crop idling technical information submittal proposal checklist

2.1 Estimation of Conditions That Would Occur Absent the Transfer

A key element to the evaluation of a cropland idling and crop shifting water transfer is the determination of the conditions that would exist without the transfer. Predicting such conditions accurately is often difficult. The use of historical cropping patterns is currently the best method to estimate conditions that would exist absent the cropland idling/crop shifting transfer. The crop history identifies the type of crops typically grown, the degree of land fallowing that typically takes place, and the crop rotation practices that typically occur.

To estimate conditions that would occur without a transfer, water transfer proponent must provide the following information:

- Accurate crop records for the five years preceding the year of the proposed transfer unless otherwise coordinated with the Project Agencies. Crop acreage should be reported in net field acres of the actual farmed and irrigated acres. If only gross field acres are known (i.e., the county parcel acres), then multiply the gross acres by 0.95 to estimate net acres. Crop acreage needs to be included for each crop (include fallowed lands, non-irrigated crops, and total farmable acres) for the water district or individual farm operation.
- Maps showing district or farm operation boundary, current fields irrigated, fields routinely fallowed or not irrigated, and fields to be idled as part of the proposed water transfer, in a format acceptable to the Project Agencies. The Project Agencies will consider information and maps submitted by a water transfer proponent as well as other available information to independently

determine field acreage. Project Agencies' determined acreages will be used to calculate water made available for transfer.

- The basis of right (water right or contract supply) for use of surface water during the transfer period.

The following sections further describe how this information will be used to determine conditions without the transfer.

2.1.1 Large Water Districts

The term "water district" is used in this document as shorthand to include any water company, district, agency, or other entity that provides water service to a group of landholders and can enter into a binding contract with a buyer. "Large water district" is defined as a legal entity serving multiple landowners. If only a few individual landowners within the water district wish to participate in the transfer, they should coordinate with their water district and refer to section 2.1.2 on methods to calculate expected water savings.

A water district's previous year's crop acreage is typically the best indication of the next year's crop patterns, provided the market for the particular crops grown remains relatively stable, the water supply has not been affected by droughts, and the acreage of the one or two crops with highest water use is typical of past years. The average acreages for these high-water-use crops in each district needs to be reviewed as follows:

- If acreage values for the crops with the highest water use for the immediate prior year are within 5 percent of the five-year average for these crops and there have been no significant market changes for the crop, then the last year's cropping patterns will be used as the base for calculating changes due to the cropland idling and crop shifting transfers.
- If acreage values for the crops with high water use fall outside this range, then another, more typical, year or an average of cropping patterns and acreages will be used, as mutually agreeable between the applicable Project Agency and the party proposing the water transfer.
- Fallowing a percentage of the total crop acreage is a normal agricultural practice. A significant shift in market prices, as has been seen in the rice market in recent years, can temporarily alter the typical fallowing pattern, resulting in a higher percentage of total acreage in production. The use of the prior year's crop acreage as the baseline in this situation may not be appropriate after a series of consecutive years of elevated production. After a series of years, the Project Agencies may elect to use an alternate method to calculate baseline to account for the need to fallow a percentage of the total acreage as part of normal farming practices. Absent a change in market conditions, prior year cropping pattern will be used in 2013 as the baseline if the acreage meets the conditions noted previously in this section. The issue of baseline will be reevaluated in 2013.

The previous year's data may also be used if additional explanation is provided to the Project Agencies and if the parties proposing the transfer and the Project Agencies agree that this is the best representation of conditions that would exist absent the cropland idling and crop shifting transfer. In this case, five years of crop data may not be needed. If the Project Agencies and the water district cannot reach agreement on an estimate of the conditions that would likely exist absent the cropland idling or crop shifting transfer, then the Project Agencies will not consider the water transfer proposal based on cropland idling or crop shifting.

2.1.2 Individual Farm Operations and Small Water Districts

"Small water district" is defined as a legal entity that serves one or few landowners. For individual farm operations or small water districts, last year's cropping patterns may be an inappropriate measure of likely future conditions absent the cropland idling/crop shifting transfer because of crop rotation patterns.

Small water districts and individual operations must provide the previous five years of crop history for their entire district or operation to identify significant crop rotation cycles. Where crop rotation cycles are evident for the whole of the farm operation or small water district, either (1) a repeating crop pattern or (2) the five-year average should be used. In these cases, the potential participant has to identify specific fields to be enrolled in the transfer and provide the five-year crop history for these fields, at a minimum. Use of a repeating pattern to characterize routine land idling and crop rotation practices requires the proponent to provide an exact repeating pattern of cropland idling practices for the fields to be involved in the transfer. The lands considered routinely idled would correspond to those in the subsequent year of the pattern. The Project Agencies must agree to use of a repeating pattern.

From this crop history, the proponent must calculate the five-year average of crop evapotranspiration of applied water (ETAW) values, as indicated below, for each field. The five-year average ETAW values for each field would be used as the base for determining changes due to the proposed cropland idling/crop shifting transfer in the year of the transfer. Individual farms or small water districts must provide a statement that the land idled for water transfer is not "shifted" to other operations under their control.

2.1.3 Eligibility of Double-Cropped Fields

If the seller has historically practiced double cropping of a winter crop such as wheat and a second crop grown during the transfer period, the seller may cultivate that winter crop and idle the field for transfer in that transfer year. The water transfer proponent will need to provide evidence to the Project Agencies of the double cropping history verifiable by Farm Service Agency (FSA) acreage consistent with section 2.1 above, including a five-year crop history. The history needs to indicate which crop(s) were historically the second crop (thus assigning the appropriate ETAW) in order to determine the water available for transfer. Refer to Table 2-2 for crops suitable for idling.

2.2 Use of Evapotranspiration of Applied Water (ETAW)

2.2.1 What is ETAW?

ETAW is defined as the portion of applied water that is evaporated from the soil and plant surfaces and actually used by the crop. The portion of the crop evapotranspiration met by precipitation during the growing season or stored as soil moisture within the root zone before the growing season does not qualify as transferable water. ETAW does not include applied water lost as deep percolation to groundwater or conveyance losses. Unless the acreage overlies an unusable groundwater basin or discharges to a saline sink, these depletions contribute to the overall water supply and are excluded from the calculation of transferable water.

Actual crop water requirements vary from one year to the next due to changing climatic conditions. It is not currently feasible to calculate ETAW for the specific conditions of each transfer year; therefore, ETAW values used for water transfer calculations are based upon crop water requirements reflecting average rainfall and evaporative demand. The calculation of water made available for transfer is based upon the quantity of surface water conserved for each qualifying idled acre of cropland and the appropriate ETAW associated with changes in the specific crops idled.

2.2.2 Crops Allowed for Cropland Idling or Shifting and ETAW Values

Tables 2-1 and 2-2 show the allowable crop ETAW values for the Sacramento Valley for use in 2013 water transfers.

Table 2-1 Estimated ETAW values (in acre-feet/acre) for crops suitable for shifting

Crop	ETAW (in af/acre)
Alfalfa[1]	1.7 (July-Sept.)
Bean	1.5
Corn	1.8
Cotton	2.3
Melon	1.1
Milo	1.6
Onion	1.1
Pumpkin	1.1
Rice	3.3
Sudan grass	3.0
Sugar beets	2.5
Sunflower	1.4
Tomato	1.8
Vine seed/cucurbits	1.1
Wild rice	2.0

[1] Only alfalfa grown in the Sacramento Valley floor north of the American River will be allowed for transfers. Fields must be disced on, or prior to, to the start of the transfer period. Alfalfa acreage in the foothills or mountain areas is not eligible for transfer.

Table 2-2 Estimated ETAW values (in acre-feet/acre) for crops suitable for idling

Crop	ETAW (in af/acre)
Alfalfa[1]	1.7 (July-Sept.)
Bean	1.5
Corn	1.8
Cotton	2.3
Melon	1.1
Milo	1.6
Onion	1.1
Pumpkin	1.1
Rice	3.3
Safflower	0.7
Sudan grass	3.0
Sugar beets	2.5
Sunflower	1.4
Tomato	1.8
Vine seed/cucurbits	1.1
Wild rice	2.0

[1] Only alfalfa grown in the Sacramento Valley floor north of the American River will be allowed for transfer. Fields must be disced on, or prior to, the start of the transfer period. Alfalfa acreage in the foothills or mountain areas is not eligible for transfers.

2.2.3 Rice Idling

Rice idling has accounted for the majority of cropland idling transfers in recent years. Through 2012, the quantity of transfer water made available has been calculated based on the pattern of ETAW. In the absence of technical information supporting an alternate method, the quantity of transfer water will continue to be calculated based on ETAW for any rice idling transfers in 2013. Acreage eligible for inclusion in a rice idling program is limited to that acreage that would have been planted to rice in the absence of the proposed transfer.

Rice fields and irrigation/drainage ditches can provide temporary or permanent forage and habitat for terrestrial wildlife and waterfowl species, including the giant garter snake. Section 2.9.1 lists conservation measures for rice idling to protect the giant garter snake.

2.2.4 Rice Straw Decomposition

The Project Agencies are not currently considering transfer proposals based on potential water savings from rice straw decomposition, including the use of groundwater substitution for rice straw decomposition water or using mechanized or other removal methods.

2.2.5 Limitations on Crops and Lands

Some crops are not eligible for idling or shifting transfers because it is too difficult to determine the real water savings because of a lack of authoritative ETAW values, substantial variability in cultural practices, and other crop-specific reasons. Table 2-3 lists the crops that are not acceptable to Project Agencies for idling or shifting transfers. The Project Agencies will not consider water transfers that propose idling or shifting of these crops.

Table 2-3 Crops not suitable for shifting or idling

Crop
Pasture
Mixed grasses
Miscellaneous grasses including Bermuda grass
Alfalfa (in the Delta region)
Orchard
Vineyard

Some specific practices and proposals will not be considered for water transfers due to the difficulty in determining the amount of water made available or the uncertainty in what would have happened absent the transfer. These include:

- Removal of permanent crops.
- Fields historically irrigated by groundwater.
- Cropland idling on lands where groundwater is within 5 feet of the land surface or where the crop root zone may extend into the groundwater table. In these areas, cropland idling transfers may be considered if additional monitoring is conducted to determine the water savings and ensure the projected water savings are achieved. Any monitoring program must be approved by the Project Agencies.
- A shift in cropping pattern resulting in an increase in cropped acreage in other portions of the water agency or transferring party's holdings that would result in no net reduction in consumptive use within the water agency.

2.2.6 Vegetation Control on Idled Land

In order to get full credit for the expected water savings, idled land cannot be irrigated during the transfer season. The calculation of consumptive use savings for crop idling assumes that the idled field will be kept dry and free of vegetation that is actively evapotranspiring. Seepage from adjacent irrigation and drainage canals or areas with high groundwater can result in consumption of applied water by vegetation growth on idled fields and bare soil evaporation, thus reducing effective water savings from cropland idling.

Remnant vegetation (weeds or native vegetation, cover crops, and winter crops) in fields that are idled as part of a water transfer has the potential to consume a portion of the estimated transfer water if that vegetation has access to seepage from adjacent canals or flooded fields, or shallow groundwater, and is actively growing during the transfer period. Consumptive use by remnant vegetation from the above sources will be considered excessive vegetation and will affect the amount of transferrable water and must be avoided or accounted for. Below are recommendations for managing remnant vegetation in fields idled for a water transfer:

- Idled land cannot be irrigated during the transfer season.

- The grower must be able to control excessive seepage on the fields to be idled. Fields subject to excessive seepage or high groundwater will be acceptable only if the grower implements supplemental measurement and monitoring efforts to quantify the water made available for transfer.
- Remnant vegetation (weeds, cover crop, and over-winter crop) should not be actively transpiring and should have begun to senesce (have begun to or have already lost color) by the beginning of the transfer period. The onset of senescence may be delayed by late season rains. Precipitation will be considered in evaluating whether remnant vegetation would affect the quantity of transfer water.
- Two weeks prior to the start of the transfer period, Project Agencies will conduct inspections of participating fields to determine whether abatement of remnant vegetation is necessary.
- Remnant vegetation may be considered excessive vegetation if it is determined to be supported by seepage from irrigation supplies or shallow groundwater that has the potential to affect the amount of transfer water made available. If remnant vegetation is deemed to constitute excessive vegetation and abatement is determined to be necessary, Project Agencies will provide water transfer proponents with notice and sufficient time to implement abatement measures.
- Excessive vegetation not abated may result in a reduction in the verified quantity of water made available for transfer. The reduction in quantifiable water made available for the transfer will be cumulative ET from the beginning of the transfer period to the date that the excessive vegetation was abated or the date that the remnant vegetation has senesced and is no longer consuming water.

2.3 Estimating Water Available for Transfer

2.3.1 Large Water Districts

Large water districts need to evaluate the crop acreage that would have existed absent the transfer using the methods presented in section 2.1.1, including the acreage for each crop, idled lands, and all other district lands. Base-year ETAW values can be calculated using the baseline crop acreages and ETAW values in Tables 2-1 and 2-2. The district should then determine the acreages of each crop, fallowed lands, and other lands expected in the coming year with the water transfer. Using these acreages, the ETAW for the coming year is calculated by the same method used for the base year. The base-year and expected current-year crop acreages for the district should be checked to make sure they match. The difference between the base-year and current-year ETAW is used to estimate the water made available by the cropland idling/crop shifting transfer. Final eligible crop acreage will be determined by the Project Agencies.

2.3.2 Individual Farm Operations or Small Water Districts

As stated in Section 2.1.2, individual farm operations and small water districts may exhibit significant crop rotation sequences and may wish to simply enroll specific land parcels into a cropland idling/crop shifting program. For these cases, section 2.1.2 describes the method to establish a baseline cropping pattern that will allow calculation of the baseline ETAW for each parcel. The ETAW for the parcel for the current year with the water transfer is then established. The difference between the base-year and current-year ETAW is used to estimate the water made available by the cropland idling/crop shifting transfer. Final eligible crop acreage will be determined by the Project Agencies.

2.4 Potential Cropland Idling/Crop Shifting Transfers in the Delta/Yolo Bypass Region

The Project Agencies are working to increase options for transferable water via cropland idling/crop shifting, if options result in real water savings that can be made available at times and locations such that it can be exported by the Project Agencies. The Project Agencies will evaluate proposals for transfers originating in the Yolo Bypass/Tule Canal or Delta areas on a case-by-case basis. Many uncertainties exist with transfers originating from the Yolo Bypass/Tule Canal or Delta, including how much water can be made available and whether the transfer water can be exported by the projects. The SWRCB must concur in writing that the transfer water can be accounted for separately as meeting the flow-related compliance objectives in D-1641. The Project Agencies must also be assured that hydraulic connectivity with the Delta exists at all times during the transfer period. If written concurrence is obtained from the SWRCB, measurement, monitoring, and reporting requirements, acceptable to the Project Agencies and paid for by the transfer proponents, will be required for all Delta region transfers to determine and verify transferable water. Sellers must contact the Project Agencies for minimum measurement and monitoring requirements. The Project Agencies will work with each seller on a case-by-case basis for any transfers from the Delta region.

2.5 Limitations on Water Made Available for Transfer

See section 1.2 (Risks and Constraints).

2.6 Adjustments for Water Shortage Years

The baseline to determine water available for transfer is typically based on prior-year or five-year average cropping patterns within the water district or individual seller's service area. If hydrologic conditions are sufficiently dry, sellers' water supply allocations may be reduced, making it difficult to establish what the cropping pattern would have been in the absence of the transfer. The following approach will be used

to determine baseline acreages; however, the Project Agencies will analyze the baseline for all transfers based on their unique circumstances.

Is the Seller Facing a Reduced Surface Water Supply During 2013?

1. No: If no, and the seller transferred water in 2012, the baseline for the 2013 transfer is the 2012 baseline unless there are circumstances, such as substantial changes in market conditions that would suggest a change in cropping patterns. If the seller did not transfer water in 2012, an appropriate baseline must be determined. Methods to determine the baselines are described in the previous sections.

2. Yes: If yes, will the reduced supply require reduced consumptive use?

If no, the water transfer proponent will submit data to the Project Agencies to illustrate how the seller will accomplish meeting full consumptive use with reduced surface water supply; include historical diversion data, additional recycling, or other conservation measures. Additional groundwater pumping is an increase to the groundwater baseline for transfer purposes.

If yes, then the baseline for the seller will be based on a calculated ratio of the "district efficiency" or ETAW/diversions.

Under no circumstances will a seller be allowed to transfer more water through cropland idling/crop shifting than the difference between their 2013 surface water allocation and its 2013 actual diversions.

2.7 Reporting

Accurate reporting of the activities undertaken as part of a cropland idling/crop shifting transfer is an essential provision of any water transfer proposal. Reporting is the responsibility of the water transfer proponent and needs to be acceptable to the Project Agencies.

2.7.1 Acreage Calculation Methodology

Current-year Farm Service Agency (FSA) acreage will be used unless water transfer proponents do not provide FSA acreage for the year of the water transfer. In the 2010 water transfers, sellers provided FSA acreage for years ranging from 2002 to 2010, with acreage discrepancies occurring between the older and more recent FSA acreage. These discrepancies resulted in incorrect acreages of fields included in the 2010 water transfer program. In order to be consistent, water transfer proponents are required to provide FSA acreage for the year of the actual water transfer within two weeks of request by Project Agency staff. If FSA acreage for the year of the water transfer is not provided, the Project Agency will provide delineation of the seller's property. Water transfer proponents must reimburse Project Agencies for their costs incurred in delineation of field boundaries, in addition to other reimbursable costs.

2.7.2 Monitoring and Verification

Verification of the actions taken to make water available in a cropland idling/crop shifting transfer will be conducted by the water transfer proponents with the oversight of the Project Agencies. In addition to crop mapping, the following information or actions will need to be provided or completed by the water transfer proponents.

Elements in a cropland idling/shifting monitoring program are listed below.

- Past-year(s) and current-year cropping data.
- Map showing lands participating in the water transfer.
- Verification that there is a reduction in soil moisture and no water leakage onto idled lands.
- Field checking for excessive vegetation on idled fields. Water transfer proponent shall notify the applicable Project Agency staff if areas of excessive vegetation are observed, to request an assessment of the field. Final determinations and need for grower notification and/or abatement shall be made by the Project Agency.
- If, during the transfer period, excessive vegetation is identified, abatement efforts are to be undertaken within two weeks.
- Confirmation of correct crop shift as specified in the proposal.
- Previous and current-year diversions for district programs.
- In areas subject to high groundwater or excessive seepage, instrumentation adequate to determine soil evaporation and weed transpiration necessary to calculate reductions in conserved water savings and acceptable to the Project Agencies.
- For fields with remnant vegetation and that are actively evapotranspiring (i.e., excessive vegetation; see Section 2.2.6) during the typical irrigation season due to such causes as canal seepage or access to groundwater, excessive vegetation abatement measures will be required to prevent loss of transfer water. An alternative to conducting excessive vegetation abatement measures would be the use of instrumentation adequate to determine the cover crop's transpiration and calculate reductions in conserved water savings as noted above.
- For areas or crops where calculation of transferable water may require in-field instrumentation, field data that can be used to verify how much water was actually made available by the transfer action(s) and to modify future proposals if warranted.

The water transfer proponent will provide access to the fields that are part of the cropland idling/shifting transfer so that the Project Agency can perform field checks and determine soil moisture depletion if necessary. The Project Agencies will coordinate verification activities. Water transfer proponents must reimburse Project

Agencies for their costs incurred in monitoring and verification, in addition to other reimbursable costs.

2.8 Third-Party Effects

Cropland idling/crop shifting transfers have the potential to affect the local economy. Parties that depend on farming-related activities can experience decreases in business if land idling becomes extensive. Limiting cropland idling to 20 percent of the total irrigable land in a county should limit economic effects. To minimize the socioeconomic effects on local areas and to minimize effects on special status species, Project Agencies will not approve water transfers via cropland idling if more than 20 percent of recent harvested crop acreage in the county for each eligible crop, including rice, would be idled.

Water transfer proponents and others participating in cropland idling/crop shifting transfers need to be sensitive to the possible economic impacts of their actions on their business partners and their neighbors and of potential cumulative effects from water transfers in neighboring districts. Geographically distributing the acres that are idled can avoid or minimize possible economic effects.

Water Code Section 1745.05 (b) provides that if the amount of water made available by land fallowing (idling) exceeds 20 percent of the water that would have been applied absent the proposed water transfer, a public hearing by the water supply agency is required. In the past, cropland idling programs have stayed well below the 20 percent water delivery threshold for a hearing. Water supply agencies interested in participating in cropland idling/crop shifting transfers need to be aware of this Water Code section and conduct a public hearing if they propose a transfer in which cropland idling would exceed the 20 percent threshold.

2.9 Environmental Considerations

2.9.1 DWR Considerations for Rice Land Idling Transfers

Rice fields and irrigation/drainage ditches can provide temporary or permanent forage and habitat for terrestrial wildlife and waterfowl species, including the giant garter snake, which is considered a threatened species under both the ESA and CESA". Idling land dedicated to rice production for the purpose of water transfers has the potential to negatively impact the giant garter snake by removing important habitat. Accordingly, the issuance of a conveyance agreement by DWR will therefore be conditioned on the development of a transfer proposal that does not unreasonably impact the wildlife or environment of the area from which the transfer originated, among other criteria (see Section 1.1). In order for DWR to make a determination that the proposed transfer does not unreasonably impact these resources, the water transfer proponent from rice land idling must incorporate conservation measures that minimize the impacts on the giant garter snake. It is DWR's judgment that the conservation measures outlined in the USFWS biological opinion for Reclamation's

2010-2011 Water Transfer Program[5] represent the most current and best scientific information on protective measures for the giant garter snake. Accordingly, DWR will require transfer proponents to incorporate in their transfer proposals those conservation measures from the biological opinion relevant to crop idling (listed below).

Adoption of these measures will be required of all rice-land-idling-based water transfer proponents to minimize impacts on the giant garter snake from rice idling. Adoption of these measures, however, does not constitute compliance with the federal ESA and CESA. It is the responsibility of water transfer proponents to secure compliance with all local, state, and federal laws and regulations.

Conservation Measures

- The block size of idled parcels will be limited to 320 acres in size. The 320-acre blocks will not be located on opposite sides of a canal or other waterway and will not be immediately adjacent[6] to another fallowed parcel (a checkerboard pattern is the preferred layout).
- No more than 20 percent of rice fields may be idled cumulatively (from all sources of fallowing) in each county.
- Parcels participating in cropland idling will not include lands in the Natomas Basin.
- Water transfer proponents will continue to voluntarily perform giant garter snake best management practices, including educating all district personnel to recognize and avoid contact with giant garter snakes, clean only one side of a conveyance channel per year, and raise flail mower blades to at least 6 inches above the canal operation and maintenance road surfaces.
- A depth of at least two feet of water will be maintained in the major irrigation and drainage canals to provide movement corridors.
- A field proposed for a cropland idling transfer cannot be fallowed more than two irrigation seasons in a row.
- Water transfer proponents must provide the Project Agencies access to land being idled to verify the implementation of Conservation Measures and other monitoring and verification activities as noted in Section 2.7.2.

[5] U.S. Fish and Wildlife Service, March 2, 2010. Memorandum: From Susan Moore, USFWS Sacramento, to Richard Woodley, U.S. Bureau of Reclamation, Sacramento — Endangered Species Consultation on the Bureau of Reclamation's Proposed Central Valley Project Water Transfer Program for 2010-2011.

[6] For the purpose of complying with conservation measures, parcel adjacency is not negated by any natural or artificial feature that a giant garter snake could traverse. Features that do not constitute barriers include but are not limited to roads, railroad tracks, levees, berms, and any open air waterways other than large rivers (e.g., Sacramento River).

2.9.2 Reclamation's ESA Considerations for Rice Land Idling Transfers

Reclamation must consider the effects of idling rice acreage for the purpose of a water transfer on ESA-listed species, as terrestrial wildlife and waterfowl species may use irrigated croplands or water infrastructure for temporary or permanent forage and habitat. Specific practices that may need to be implemented to transfer water in 2013 would be similar to those found in the USFWS biological opinion issued to Reclamation for the 2010 and 2011 water transfers, and those summarized above.

Section 3. Water Transfers Based on Groundwater Substitution

This section provides technical information to prospective water transfer proponents who wish to transfer water through groundwater substitution. Groundwater substitution transfers make surface water available for transfer by reducing surface water diversions and replacing that water with groundwater pumping.

The rationale behind a groundwater substitution transfer is that surface water demands are reduced because a like amount of groundwater is used to meet the demands. The resulting increase in available surface water supplies can be transferred to other users. The net amount of additional surface water supply, or transferable water, created through groundwater substitution transfers must account for: (1) the amount of increased pumping that occurs in support of the transfer during the time that export facilities can convey the water, (2) the extent to which transfer-related groundwater pumping decreases streamflow (resulting from surface water-groundwater interaction), and (3) the timing of those decreases in available surface water supply.

A groundwater substitution transfer proposal generally consists of the following components:

- Documentation of surface water rights and the method used to quantify the amount of surface water available for the transfer.
- The location and characteristics of the wells proposed for use in pumping groundwater.
- The proposed volume and schedule of transfer-related groundwater pumping.
- A monitoring plan designed to assess the effects of the transfer.
- A mitigation plan designed to alleviate possible third-party impacts.

An overview of the requirements for a groundwater substitution proposal is included in Figure 3-1, the details of which are discussed later in this section.

Figure 3-1 Groundwater substitution transfer technical information — proposal checklist

3.1 Compliance with Local Groundwater Management Plans and Ordinances

Compliance with local requirements (including ordinances relating to well drilling, well spacing, and groundwater extraction) and local groundwater management plans, as well as compliance with Water Code Section 1745 et seq., will be the responsibility of the entity proposing the groundwater substitution transfer.

The approval process associated with a proposed groundwater substitution transfer varies by county and may take a significant amount of time. Table 3-1 provides brief descriptions of the water transfer requirements for individual counties, in geographic order from north to south. Potential sellers are advised to contact the counties early to discuss the requirements for water transfer approval.

Table 3-1 Description of county ordinances related to groundwater transfers

County	Description	Sources for more information
Shasta	Ordinance pertaining to the Redding Groundwater Basin portion of Shasta County requires a permit for extraction and export of groundwater, either directly or indirectly, for use outside the county. Application for a transfer permit should be submitted to the chief engineer of the Shasta County Water Agency.	Shasta County Water Agency (530) 225-5181 http://www.co.shasta.ca.us/index/pw_index/engineering/water_agency.aspx
Tehama	Ordinance requires a permit to extract groundwater for off-parcel use, prohibits mining of groundwater, and restricts the radius of influence associated with the operation of a well participating in transfer operations to the parcel on which the well is located, among other requirements.	Tehama County Health Agency, Environmental Health Division (530) 527-8020 http://www.tehamacountypublicworks.ca.gov/Flood/
Butte	Ordinance requires permits for groundwater extraction for use outside the county, and requires a permit for groundwater substitution pumping. Butte County also has a well spacing ordinance. The Butte County Water Commission advises the Board of Supervisors with technical information from the Butte County Water Advisory Committee and Technical Advisory Committee.	Butte County Department of Water and Resource Conservation (530) 538-4343 http://www.buttecounty.net/Water%20and%20Resource%20Conservation.aspx
Glenn	Ordinance uses basin management objectives of groundwater levels, groundwater quality, and land subsidence to help define safe yield and overdraft of the basin. The ordinance is enforced by the Glenn County Board of Supervisors.	Glenn County Department of Agriculture (530) 934-6501 http://www.glenncountywater.org/about_us.aspx

County	Description	Sources for more information
Colusa	Ordinance requires a permit for extraction and export of groundwater, either directly or indirectly, for use outside the county. Application for a transfer permit is filed with Colusa County Groundwater Commission, through the director of the Planning and Building Department.	County Director of Planning and Building (530) 458-0480 http://www.codepublishing.com/CA/colusacounty/ http://colusagroundwater.ucdavis.edu/index.htm
Sutter	Sutter County has no ordinance governing the extraction and export of groundwater. According to its general plan, Sutter County has a long-term interest in discouraging water transfer/export sales if they result in long-term supply losses.	Chief of Water Resources (530) 822-3299 http://www.co.sutter.ca.us/doc/government/depts/cs/ps/gp/gp_home
Yolo	Ordinance (Title 10, Chapter 7, Groundwater) requires a permit for extraction and export of groundwater, including the extraction of groundwater to replace a surface water supply. Application for a permit should be filed with the Director of Community Development.	Director of Planning and Public Works (530) 666-8775 http://www.yolocounty.org/Modules/ShowDocument.aspx?documentid=1899
Sacramento	Ordinance (Title 3 section 3.40.090, Ground and Surface Water Export) requires a permit for groundwater or surface water to be transported in any manner outside the county. Application for a permit must be filed with the director of the Sacramento County Department of Water Resources.	Sacramento County Department of Water Resources (916) 874-6851 http://www.countycounsel.saccounty.net/Documents/sac_017441.pdf
Solano	At this time, Solano County has no ordinance governing the extraction and export of groundwater.	Solano County Water Agency (707) 451-6090

3.2 Evaluation of Groundwater Substitution Transfer Proposals

Before beginning transfer operations, the water transfer proponent will need to develop a groundwater substitution transfer proposal and provide it to the Project Agencies for evaluation.

The Project Agencies will review groundwater substitution transfer proposals to determine whether they meet the following objectives.

- Transfer will result in providing the agreed-upon amount of transfer water.

- Transfer will not unreasonably affect fish, wildlife, other instream beneficial uses, or the environment and will have no significant unmitigated environmental effects.
- Transfer will not injure other legal users of water.
- Proposal shows that a monitoring and mitigation plan is in place prior to the transfer.

The Project Agencies need sufficient information to determine whether the transfer will meet the desired objectives. The following sections describe the information to be submitted with the proposal.

3.3 Groundwater Substitution Wells

The Project Agencies will conduct a review to determine whether the proposed well(s) are suitable for use in a water transfer operation and meet the above objectives.

Water transfer proponents must provide sufficient information, described below, to assist the Project Agencies conducting the well review. Wells may be considered ineligible for transfer pumping if a review of location and construction or other data demonstrates that either of the below is true:

- A well is completed in an unconfined aquifer that is likely to be hydrologically connected to a streambed or other surface water feature.
- Sufficient information is not available to estimate a well's potential effects.

3.3.1 Information Requirements for Groundwater Substitution Wells

The Project Agencies need the information listed below to evaluate a groundwater substitution transfer proposal. Refer to Appendix B for a listing of the current well acceptance criteria. In 2013, water transfer proponents can resubmit data for wells used for transfers in 2009 through 2011, for Project Agency consideration, if there have been no changes to the wells. However, certification of proper flow meter installation and calibration must be submitted for each well every two years. Water transfer proponents should consult with Project Agencies prior to submitting their proposal. The following information should be included in the water transfer proposal.

1. Well identification: The well owner's name, the well owner's identification number, the water district or agency where the well is located, and the water district or agency's well identification number (if different from the well owner's identification number).
2. Well location:
    a. Latitude and longitude and the township, range and section. The location can be determined with a hand-held global positioning system (GPS) unit

or instrument with greater measuring accuracy. GPS coordinates should be given using the current DWR standard coordinate system and datum: latitude/longitude in decimal degrees, using North American Datum 1983 (NAD83).

b. A map, with at least as much hydrologic and physical detail as that of a 7.5-minute U.S. Geological Survey quadrangle sheet, showing the location of all production and monitoring wells that will be involved in the transfer and the location of all surface water features within two miles of the district service area boundary.

3. Historic operations: Operation records indicating the volume of water pumped from each participating transfer well during 2012. Records of power consumption along with a well pump efficiency test conducted within the last two years may be submitted in place of flow measurements from a totalizing flow meter.

4. Proposed operations:

   a. Description of the wells' projected operations (e.g., is groundwater to be applied to surrounding land, or is groundwater to be pumped into district canals) and the projected beneficial use of pumped water.

   b. Verification that a totalizing flow meter has been installed and calibrated.

5. Well construction: Provide total well depth, depth of annular surface seal, gravel pack intervals, casing size, casing perforation intervals (or open hole interval), and well's construction method (cable tool, rotary gravel pack well, etc.).

6. Geologic log: Details of geologic materials described on the well log.

7. Estimated well capacity: Estimate well capacity and describe method of determination.

8. Additional information: If available, provide results of a Pacific Gas and Electric (PG&E) (or equivalent) well pump efficiency test, independent well drawdown tests, water quality data, and site-specific studies that document aquifer properties surrounding the well or the extent of the well's hydrologic connection with any surface waters.

9. Pump power: Wells powered by an electric source are eligible for use in transfers. Wells powered by diesel or natural gas engines are eligible for use in the transfer if applicable air quality and other environmental laws and regulations are complied with and appropriate mitigation is provided.

The amount of information submitted for each well will depend on its location relative to surface water features and other areas that may be sensitive to groundwater pumping effects. The Project Agencies will require site access for field verification of the above information and collection of additional data during the program.

3.4 Determining the Amount of Transferable Water

Transferable water equals the incremental increase in Sacramento River flow to the Delta created by transfer operations during balanced Delta conditions. Balanced Delta conditions occur when the Project Agencies agree that releases from upstream reservoirs plus unregulated flow approximately equal the water supply needed to meet Sacramento Valley in-basin uses plus exports. Sacramento River flow increases as sellers use groundwater pumped from wells to replace surface water provided by river diversions. The resulting increase in streamflow is reduced by varying degrees as transfer-related groundwater pumping affects streamflow.

Information provided in the water transfer proposal will be used in conjunction with monitoring report data to calculate the amount of water the transfer operations make available. The amount of transferable water credited to a groundwater substitution water transfer operation in 2013 will be determined as follows.

1. Establish the baseline groundwater pumping for the transfer operation.
2. Determine the difference between the proposed groundwater substitution pumping in 2013 and the baseline.
3. Determine the reduction in streamflow during balanced Delta conditions resulting from pumping groundwater to make surface water available for transfer.
4. Calculate the difference between 2 and 3, above.
5. The following formula summarizes the above four steps: (2013 Groundwater Substitution Pumping) – (Baseline Groundwater Pumping) – (Estimated Streamflow Reduction) = (Surface Water Made Available for Transfer).

The following sections describe these steps.

3.4.1 Determining the Baseline Groundwater Pumping

The baseline is the amount of groundwater pumping that would have occurred during the transfer period without the transfer. For water transfers in 2013, the Project Agencies will use the 2012 records of groundwater pumping submitted by the water transfer proponents to establish the baseline. Water transfer proponents are requested to submit the following information for non-transfer pumping years.

- Identify all wells that discharge to the contiguous surface water delivery system within which a well is proposed for use in the transfer program.
- The amount of groundwater pumped monthly during 2012 for each well that discharges to the contiguous surface water delivery system.

The Project Agencies will calculate baseline groundwater pumping based on the total volume pumped in non-transfer years from all proposed participating transfer wells (typically July through September) that discharge to a contiguous surface water delivery system. Newly participating sellers may be allowed to use records of

electrical power consumption along with well pump efficiency test data (from a test conducted within the past two years) to estimate baseline groundwater pumping.

To participate in future groundwater substitution transfers, transfer and non-transfer wells that discharge to a contiguous surface water delivery system should be metered and recorded on a monthly basis during both transfer and non-transfer years so that the baseline can be properly established.

If sellers experienced cutbacks to their normal surface water allocation in 2012, the amount of baseline groundwater pumping will be determined on a case-by-case basis after consultation with the seller.

3.4.2 Measuring Groundwater Pumped

Sellers should provide pumping records from all wells that discharge to a contiguous surface water delivery system used in groundwater substitution transfers. An instantaneous reading and totalizing flow meter shall be installed on each well participating in groundwater substitution water transfers. The flow meter shall be installed such that:

- Each flow meter is in good working order and properly sized, positioned, and oriented on the discharge piping to ensure accurately measured flows.
- Discharge piping is configured to ensure that full pipe flow conditions are met where the meter is installed.
- The manufacturer's standards for sizing, positioning, orientating, and calibrating of the meter are followed.

Sellers must have a qualified professional engineer or professional geologist certify that each well's flow meter installation and calibration conforms to the manufacturer's specifications prior to use. Sellers shall provide a photograph of each participating well showing the flow meter installation and associated plumbing. Project Agencies may conduct independent field checks of flow meter installations to verify the information provided.

An exception to the above accounting method for groundwater substitution transfers applies to districts that can provide water from their own reservoir(s) and replace it with groundwater pumping. If a reservoir controls flow to a stream where gages or weirs are sufficiently accurate, and streamflow is sufficiently low that the Project Agencies can use stream gage or weir data to determine how much water is being provided for transfer, the stream gage or weir data may be used in place of totalizing flow meters on individual wells. In these cases, additional analysis of reservoir operations may be required to determine whether transfer operations must consider reservoir refill criteria (see Section 4). Data requirements for transfer proponents that can operate a groundwater basin in conjunction with their own reservoir will be determined on a case-by-case basis.

The development of a water transfer proposal must take into account that a district's total diversion of surface water during the year shall not exceed the maximum amount provided under its water service or settlement contract with the United States, or its water service contract with DWR, or their appropriative water rights, less the total quantity of groundwater provided by wells within a district pumping under a groundwater substitution transfer agreement.

3.4.3 Estimating the Effects of Transfer Operations on Streamflow

Groundwater pumping for transfer operations will yield water at the expense of current and future streamflow. Flow reduction in a river, stream, canal, or drain could injure other legal users of water if it occurs when the Delta is in balanced conditions (see section 1.1) or there is limited streamflow in the channel from which the water is being transferred. However, if transfer-related streamflow losses occur when the Delta is in excess conditions and there is sufficient flow in the stream channel from which the water is being transferred, the streamflow depletions should not impact the water supply available to other legal users.

Although real time streamflow depletion due to groundwater substitution pumping for water transfers cannot be directly measured, impacts on streamflow due to groundwater pumping can be modeled. Project Agencies have applied the results from prior modeling efforts to evaluate potential groundwater transfers in the Sacramento Valley to establish an estimated average streamflow depletion factor (SDF) for transfers requiring the use of Project Facilities. To account for the anticipated streamflow depletion, Project Agencies will apply an SDF to the amount of water pumped pursuant to each transfer proposal in the Project Agency's respective conveyance contract or letter of agreement.

Project Agencies will evaluate transfer proposals along with any available monitoring data. Project Agencies will apply a 12 percent SDF for each project meeting the criteria contained in this chapter unless available monitoring data analyzed by Project Agencies supports the need for the development of a transfer proposal site-specific SDF. Transfer proponents may submit site-specific technical analysis supporting a proposed SDF for review and potential approval by Project Agencies, in the event Project Agencies determine that a site-specific SDF is required for the proposed transfer proposal. It is recommended that water transfer proponents provide Project Agencies with adequate time to review proposed data supporting an alternate SDF.

Project Agencies are developing tools to more accurately evaluate the impacts of groundwater substitution transfers on streamflow. These tools may be implemented in the near future and may include a site-specific analysis that could be applied to each transfer proposal.

3.5 Monitoring Program

Groundwater substitution transfers have the potential to cause injury to local groundwater users due to the additional groundwater pumping needed to allow the substitution transfer to take place. Injury to other surface water users could also occur if the additional groundwater extraction results in a significant reduction in streamflow when those users need it.

Water transfer proponents transferring water via groundwater substitution transfers must establish a monitoring program capable of identifying any adverse transfer-related effects before they become significant. The Project Agencies will evaluate the monitoring program for its ability to meet the objectives listed below. The regional extent and frequency of monitoring necessary to meet objectives will depend on site-specific factors. For instance, areas that are susceptible to land subsidence may require land surface elevation surveys, while areas with groundwater quality concerns may require a more comprehensive suite of water quality testing.

In order to provide adequate review time, water transfer proponents should provide a monitoring plan to the Project Agencies along with the transfer proposal. In order to properly establish baseline groundwater levels, the groundwater level monitoring program should begin in March 2013.

3.5.1 Monitoring Plan Objectives

The monitoring plan needs to describe how the water transfer proponent will collect, evaluate, and report the monitoring data in order to meet the following objectives.

- Accurately account for the quantity of groundwater pumped to replace surface water diversions.
- Determine the extent of surface water-groundwater interaction in the areas where groundwater is pumped for the transfer.
- Determine the direct effects of transfer pumping on the groundwater basin, observable until March of the year following the transfer.
- Assess the magnitude and potential significance of any effects on other legal users of water, instream beneficial uses, the environment, and the economy.
- Comply with federal and State laws and local ordinances.
- Coordinate the transfer monitoring program with other established groundwater monitoring programs in the area.

Water transfers may not cause significant adverse effects on nearby federally reserved Indian Trust Assets. Proposed transfers near Indian Trust Assets may require additional monitoring commitments, such as increased groundwater level measurements or additional groundwater quality sampling.

3.5.2 Monitoring Program Elements

To meet the objectives, a monitoring program will contain (at a minimum) the following elements.

Monitoring Well Network

The monitoring well network shall include a sufficient number of monitoring wells to accurately characterize groundwater levels in the area before, during, and after transfer-related groundwater pumping. Water transfer proponents will submit detailed information for monitoring wells, which includes:

- The location and construction of both proposed transfer wells and monitoring wells, and third party wells.
- Identification of known contaminated areas that could be affected by transfer pumping.

Groundwater Pumping Measurements

All wells pumping to replace surface water designated for transfer shall be configured with an instantaneous and totalizing flow meter (capable of measuring well discharge rate and volume) as described in section 3.4.2 of this document. Flow meter readings will be recorded just prior to initiation of pumping and at designated times, but no less than monthly and as close as practical to the last day of the month, throughout the duration of the transfer. The seller will report the readings and calculate and report the quantity of water pumped between successive readings. In addition, the seller will record electric meter readings (or diesel or natural gas engine hours, as applicable) and report them to the Project Agencies as requested.

To participate in future groundwater substitution transfers, participating wells should be metered, and pumping rates and volumes should be recorded during both transfer and non-transfer years so that the baseline groundwater pumping can be accurately established.

Groundwater Levels

Sellers will collect groundwater level measurements in both participating transfer wells and monitoring wells. Groundwater level monitoring will include measurements before, during, and after transfer-related pumping. The water transfer proponent will measure groundwater levels as follows:

- Prior to transfer: Groundwater levels will be measured monthly from March 2013 until the start of transfer.
- Start of transfer: Groundwater levels will be measured on the same day that the transfer begins, prior to the pump being turned on.
- During transfer: Groundwater levels will be measured weekly throughout the transfer period.

- Post-transfer: Groundwater levels will be measured weekly for one month after the end of transfer pumping, after which groundwater levels will be measured monthly until March 2014.

Sellers will submit a proposed monitoring schedule to the Project Agencies.

Groundwater Quality

Groundwater pumped by municipal water transfer proponents must meet water quality requirements of the California Department of Public Health under the California Code of Regulations, Title 22. Project Agencies may request that water transfer proponents provide a three-year summary of all specific conductance and total dissolved solids (TDS) results for water samples from each proposed transfer well for review prior to acceptance.

Water transfer proponents with an agricultural groundwater source shall measure the field parameter specific conductance in samples from each participating transfer well. Samples shall be collected as follows.

- When pumping is first initiated and no later than the day the pump starts.
- Monthly during the transfer period.
- On the day that transfer pumping is terminated.

Specific conductance measurements should be collected at the same time that groundwater level measurements are collected. The water transfer proponent shall record water quality meter calibration information, water quality measurements, and other site-specific information relevant to water quality on the field log provided by DWR.

Some wells may require a more comprehensive suite of water quality testing. These include wells in areas with known groundwater quality problems, municipal wells producing water exceeding specific conductance of 900 microSiemens/centimeter (µS/cm), (California Secondary Maximum Contaminant Level [Recommended][7]) or agricultural wells producing water exceeding specific conductance of 700 µS/cm (Water Quality for Agricultural [8]). Where applicable, water transfer proponents should provide a brief discussion of local groundwater quality issues to Project Agencies. Project Agencies and the seller will determine the appropriate level of groundwater quality monitoring prior to the start of transfer pumping in these areas.

[7] CA Dept. of Public Health website: http://www.cdph.ca.gov/certlic/drinkingwater/pages/chemicalcontaminants.aspx

[8] 1985. Water Quality for Agriculture: http://www.fao.org/docrep/003/T0234E/T0234E00.htm .

Land Subsidence

The extent of required monitoring will depend on the susceptibility of the area to land subsidence. Areas with documented land subsidence will require more extensive monitoring than areas with no documented land subsidence. The Project Agencies will work with the water transfer proponent to develop a mutually agreed upon subsidence monitoring program. Monitoring could include periodic determination of land surface elevation in strategic locations throughout the transfer area and installing and monitoring extensometers.

Coordination Plan

The monitoring program will include a plan to coordinate the collection and organization of monitoring data and will identify the water transfer proponent's point of contact (POC). The POC will be responsible for communication with the well operators and other decision makers The POC will be responsible for the monitoring and reporting of transfer-related data. The POC should be available to meet with the Project Agencies before the start of the transfer. Together, these parties may visit the participating transfer wells and monitoring wells at least one month prior to the start of pumping to measure pre-transfer groundwater levels, inspect flow meter installations, and record pre-transfer meter readings. Water transfer proponents should coordinate their monitoring efforts with other local groundwater monitoring programs.

Evaluation and Reporting

The proposed monitoring program will describe the method of reporting monitoring data. At a minimum, water transfer proponents will provide data summary tables to the Project Agencies, both during and after transfer-related groundwater pumping. Post-transfer reporting will continue until groundwater levels recover to seasonal highs in March 2014. Water transfer proponents will provide a final summary report to the Project Agencies evaluating the effects of the water transfer program. The final report will identify program-related impacts on groundwater and surface water (both during and after pumping), and the extent and significance, if any, of impacts on local groundwater users. It should include groundwater elevation contour maps for the area in which transfer operations are located, showing pre-transfer groundwater elevations, groundwater elevations at the end of the transfer, and recovered groundwater elevations in March 2014.

3.6 Mitigation Program

A mitigation plan is needed to ensure that groundwater pumping to support water transfers is conducted in a manner that does not injure other legal users of water or unreasonably affect the environment and economy of the county from which water is being transferred. Groundwater substitution transfer proponents need to mitigate any local impacts caused by their transfer operations. A mitigation plan must be included in the water transfer proposal.

3.6.1 Objectives

The water transfer proponent must implement an effective mitigation program to evaluate and correct problems that could arise due to transfer-related groundwater pumping. Potentially significant impacts identified in a water transfer proposals must be avoided or mitigated for a proposed water transfer to continue, including:

- Contribution to long-term conditions of overdraft.
- Dewatering or substantially reducing water levels in non-participating wells.
- Land subsidence.
- Degradation of groundwater quality that impairs beneficial uses or violates water quality standards.
- Affecting the hydrologic regime of wetlands or streams to the extent that ecological health is impaired.

The water transfer proponent will design and implement a mitigation plan and will be responsible for mitigating any significant third-party and environmental impacts that occur. Mitigation actions could include:

- Curtailment of pumping until natural recharge corrects the issue.
- Lowering of pump bowls in third-party wells affected by transfer pumping.
- Reimbursement for significant increases in pumping costs due to the additional groundwater pumping to support the transfer.
- Other actions as appropriate.

3.6.2 Mitigation Plan Elements

To ensure that mitigation programs will be tailored to local conditions, the mitigation plan must include the following elements.

1. A procedure for the water transfer proponent to receive reports of purported environmental or third-party effects.
2. A procedure and schedule for investigating any reported effect.
3. A procedure for developing mitigation options for legitimate effects and schedule for implementing those options in cooperation with the affected third parties, including a strategy for conflict resolution.
4. Assurances that adequate financial resources are available to cover reasonably anticipated mitigation needs.

Water transfer proponents will submit a mitigation plan to the Project Agencies at least two months prior to the start of the groundwater substitution transfer.

If an effect is reported, the description of the effect and the water transfer proponents' proposed response will be submitted to the Project Agencies and, as required, to local agencies within five business days.

Mitigation measures will be funded by the transfer proponents, unless an agreement is made otherwise. Water transfer proponents will provide assurance that adequate financial resources are available to accomplish any required mitigation.

Section 4. Reservoir Storage Release

Water is made available for transfer by reservoir release when the project operators release water in excess of what would be released annually under normal operations. The water must also be released at a time when it can be captured and/or diverted downstream. Each storage facility is unique, and, therefore, each reservoir storage release (or reservoir reoperation) proposal must be evaluated on a case-by-case basis. Sufficient information must be provided to establish normal operating conditions and normal end-of-season storage as well as typical release patterns. Definitively establishing the without-transfer proposal conditions for a reservoir reoperation is difficult because normal conditions can vary substantially, depending on things such as annual hydrology, agency demand, and instream requirements. Sufficient information must be provided to ensure the water transfer proposal is providing additional storage withdrawal. Data spanning a variety of hydrologic conditions is necessary to develop without transfer proposal or "normal" operating conditions.

At a minimum, the following information is needed to evaluate the without-transfer operating conditions:

- A minimum of five years' reservoir operating data, including end-of-month storage.
- End-of-season reservoir storage.
- Historic and forecast inflows with monthly updates.
- Historic and forecast water demands with monthly updates.
- Historic reservoir releases.
- Instream requirements.
- Flood control diagram.
- End-of-season target carryover storage, if any.

In addition to the information necessary to establish the without-transfer conditions, information will be required during the transfer period to verify delivery of the transfer water. Such information would include independent gage information downstream of the reservoir as well as reservoir release and storage data.

4.1 Refill Criteria

Refill of the reservoir storage space vacated by the water transfer can affect downstream water users if it is done at a time when downstream legal users could have utilized reservoir releases. Refill criteria are required for all reservoir release water transfers to ensure that the transfer does not injure other legal users of water. The refill period can span a number of years if the hydrology in subsequent years is insufficient to allow refill. In general, the refill of vacated space from a water transfer will be restricted to periods when the refill quantity is in excess of the needs of any

legal user of water downstream of the point of diversion. For example, if a transfer of reservoir storage originates above another reservoir, refill will not be considered to occur until the downstream reservoir goes into flood control operations. Alternately, if a transfer source directly affects the inflows to the Delta, refill will not be considered to occur until the Delta is declared to be in excess conditions as defined in the COA between Reclamation and DWR. Each transfer proposal is unique; thus, refill criteria must be developed for each proposal and must be tailored to these unique circumstances. The refill criteria are typically developed in coordination with the SWP and CVP operations staff.

Appendix A. Potential Water Transfer Effects on the Projects

Apart from the interest of the Project Agencies in promoting responsible water transfers, they have another important interest in transfers: one that underlies much of what this technical document is about. Transfers through the Delta or affecting Delta water supply in the summer and fall have the inherent potential to adversely affect the SWP and the CVP physically and from a water accounting perspective. If water that is transferred by others is not new water to the system, it will necessarily come instead out of Project supply. As described more generally below, that is impermissible "legal injury."

The Projects together have the shared responsibility for meeting Delta water quality requirements and are junior to all lawful in-basin water diversions of natural flow under the watershed protection statutes. Because the Projects only export natural flow after all in-basin uses have been met, and must operate to meet Delta flow-related standards, transfers that do not provide new water to the system (or insufficient new water) will require the SWP and CVP to release water from storage or curtail diversions in order to maintain regulatory compliance. This is why the Projects must be assured that the water made available for transfer is new water that would not be in the system but for the transfer activity.

When the Projects contract to convey transferred water through their facilities, or otherwise weigh in on proposed transfers, they must be sure that the water supply to which their Project contractors are legally entitled is not unlawfully diminished by the transfer. If it is diminished, it is effectively an involuntary and uncompensated transfer of someone else's water and constitutes legal injury.

Appendix B. Well Acceptance Criteria

Table B-1 Well acceptance criteria

Well location	Criteria for acceptance **Note: In addition to the well acceptance criteria documented below, wells may be considered ineligible for transfer pumping based on the requirements documented in Section 3.3.**
Between one and two miles from a **major** [1] surface water tributary to the Delta or a delineated wetland	Well(s) may be accepted if: • Sufficient information is submitted to demonstrate that the well likely does not have a significant hydraulic connection to the surface water system tributary to the Delta, or • The well's uppermost perforations start deeper than 50 feet below ground surface (bgs), or • The well does not pose a risk of adversely affecting groundwater quality.
Within one mile of a **major** surface water tributary to the Delta or a delineated wetland	Well(s) may be accepted if: • The uppermost perforation starts below 150 feet bgs; or • The uppermost perforations start between 100 and 150 feet bgs and the well has a surface annular seal to at least 20 feet bgs, a total of at least 50 percent fine-grained materials in the interval above 100 feet bgs, and at least one fine-grained layer that exceeds 40 feet in thickness in the interval above 100 feet bgs; or • Sufficient information is submitted to demonstrate that the well likely does not have a significant hydraulic connection to the surface water system tributary to the Delta.
Between one-half and one mile away from a **minor** [2] surface water tributary to the Delta or a delineated wetland	Well(s) may be accepted if: • Sufficient information is submitted to demonstrate that the well likely does not have a significant hydraulic connection to the surface water system tributary to the Delta, or • The well's uppermost perforations start deeper than 50 feet bgs, or • The well does not pose a risk of adversely affecting groundwater quality.
Within one-half mile of a **minor** surface water tributary to the Delta or a delineated wetland	Well(s) may be accepted if: • The top of the uppermost perforations start below 150 feet bgs; or • The uppermost perforations start between 100 and 150 feet bgs and the wells has a surface annular seal to at least 20 feet bgs, a total of at least 50 percent fine-grained materials in the interval above 100 feet bgs, and at least one fine-grained layer that exceeds 40 feet in thickness in the interval above 100 feet bgs; or • Sufficient information is submitted to demonstrate that the well likely does not have a significant hydraulic connection to the surface water system tributary to the Delta; or • Sufficient information is submitted to demonstrate that the surface water feature does not flow during times when the Delta is in balanced conditions.

[1] **Major** surface water features tributary to the Delta affected by groundwater pumping are: Sacramento River, Feather River, Big Chico Creek, Cottonwood Creek, Stony Creek, Yuba River (including the Yuba Gold Fields), American River, and Cosumnes River.

[2] **Minor** surface water features tributary to the Delta potentially affected by groundwater pumping are: Colusa Basin Drain, Tule/Toe Canal, and Natomas Cross Canal.

EXHIBIT G

FINAL STATEMENT OF REASONS DATED MAY 18, 2012,
PREPARED BY DWR IN SUPPORT OF AGRICULTURAL
WATER MEASUREMENT REGULATIONS

FINAL STATEMENT OF REASONS

Pursuant to Administrative Procedures Act Government Code Section 11346.9

TITLE 23. WATERS
DIVISION 2. DEPARTMENT OF WATER RESOURCES
CHAPTER 5.1 WATER CONSERVATION ACT OF 2009
ARTICLE 2. Agricultural Water Measurement

Table of Contents

Section	Item	Page
A	Update on Initial Statement of Reasons	2
B	Important Dates of Notices and Rulemaking Activities	2
C	Public Comments Received During the Comment Periods	3
D	Description of Regulatory Action	4
E	Statutory Provisions Mandating Changes to the Regulation	4
F	Changes to the Text Of Regulation	4
G	Summary and Responses from the noticed 45-day public comment period (July 22, 2011 through September 6, 2011, first 15-day public comment period (September 23, 2011 to October 7, 2011), second 15-day public comment period (October 20, 2011 to November 3, 2011), third 15-day public comment period (February 28 to March 14, 2012, fourth 15-day public comment period (March 26 – April 11, 2012, and fifth 15-day public comment period (April 18-May 3, 2012.	6
H	Authority and Reference	33
I	Determinations	33
I.1	Local Mandate, Gov. Code, 11346.5 (a) (5)	33
I.2	Estimate of Cost and Savings, Gov. Code, 11346.5 (a) (6)	33
I.3	Economic Impact on Small Business, Gov. Code, 11346.5 (a) (8)	34
I.4	Assessment of Cost Impacts By Private Sector	34
I.5	Assessment of Effect on Jobs/Business	34
I.6	Reports Required From Business	35
I.7	Significant Effect on Housing Cost	35
I.8	Small Business Determination	35
I.9	Alternative Determination	35
J	Updated Informative Digest	35

FINAL STATEMENT OF REASONS

TITLE 23. WATERS
DIVISION 2. DEPARTMENT OF WATER RESOURCES
CHAPTER 5.1 WATER CONSERVATION ACT OF 2009
ARTICLE 2. Agricultural Water Measurement

A. UPDATE ON INITIAL STATEMENT OF REASONS

The Final Statement of Reasons, pursuant to Administrative Procedures Act Government Code Section 11346.9, is an update of information contained in the Initial Statement of Reasons. Consistent with Government Code Section 11347.3, the Department of Water Resources (the Department) has made a copy of its file of rulemaking in this matter available for public inspection.

B. IMPORTANT DATES OF NOTICES AND RULEMAKING ACTIVITIES

Date of Notice of Proposed Rulemaking:	July 12, 2011
Date of Initial Statement of Reasons:	July 12, 2011
Date of Notice of Modifications to the Proposed Regulation and Modified Text of Regulation:	September 22, 2011
Date of Notice of Addition of Documents and Information to Rulemaking File:	None added
Statement of First 15-Day Notice of Availability of Documents and Information:	September 22, 2011
Statement of Second 15-Day Notice of Availability of Documents and Information:	October 19, 2011
OAL Disapproval of Regulatory Action	February 2, 2012
Statement of Third 15-Day Notice of Availability of Documents and Information	February 28, 2012
Statement of Fourth 15-Day Notice of Availability of Documents and Information	March 26, 2012
Statement of Fifth 15-Day Notice of Availability of Documents and Information	April 18, 2012
Date of Notice on Status of Proposed Rulemaking:	None required

Date of Final Statement of Reasons: May 18, 2012

Dates of all public participation events (comment periods and hearings):

The mandatory 45-day public comment period on the Agricultural Water Measurement regulation was held July 22, 2011 to September 6, 2011. The Department also conducted two public hearings on the proposed regulation on August 24, 2011 in Sacramento, and September 8, 2011 in Fresno. DWR modified the proposed text of regulation in response to comments received during the 45-day comment period. DWR provided a Notice of changes on September 22, 2011, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the first 15-day public comment period between September 23, 2011 and October 7, 2011. DWR modified the proposed text of regulation in response to comments received during the first 15-day comment period and provided a Notice of changes on October 19, 2011, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the second 15-day public comment period between October 20, 2011 and November 3, 2011. On February 2, 2012, the Office of Administrative Law (OAL) disapproved the above-referenced regulatory action because the proposed regulations failed to comply with the clarity, consistency, and necessity standards contained in Government Code section 11349.1, the agency failed to adequately summarize and respond to each comment made regarding the proposed action, and the rulemaking file failed to contain all required documents or required documents included in the file were defective. DWR modified the proposed text of regulation in response to comments received during the second 15-day comment period and the OAL disapproval of regulatory action and provided a Notice of changes on February 28, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the third 15-day public comment period between February 29, 2011 and March 14, 2012. DWR modified the proposed text of regulation in response to comments received during the third 15-day comment period and provided a Notice of changes on March 26, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the fourth 15-day public comment period between March 27, 2012 and April 11, 2012. DWR modified the proposed text of regulation in response to comments received during the fourth 15-day comment period and provided a Notice of changes on 18, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the fifth 15-day public comment period between April 19, 2012 and May 3, 2012.

C. PUBLIC COMMENTS RECEIVED DURING THE COMMENT PERIODS

During the mandatory 45-day public comment period, the Department received five written comments and one oral comment. During the first 15-day public comment, the Department received eight written and no oral comments. During the Second 15-day comment period, the Department received one written comment and no oral comments. During the third 15-day comment period, the Department received five written and no oral comments. During the fourth 15-day comment period, the Department received two written comments and no oral comments. During the fifth 15-day comment period, the Department received three written comments and no oral comments. Please refer to the Department's rulemaking file for copies of these comments. Pursuant to Government Code Section 11346.9 (a) (3) and (a) (5), the Department has summarized and responded to the comments beginning on page 5.

D. DESCRIPTION OF REGULATORY ACTION

"Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:"

This statement remains unchanged from the Initial Statement of Reasons.

E. STATUTORY PROVISIONS MANDATING CHANGES TO THE REGULATION

No change made

F. CHANGES TO THE TEXT OF REGULATION

Changes made to the regulation consist of the following sections (with ~~strike-out~~ for deletions and underscore for additions):

(Sections 597.1(c), (g) and (h) were modified with the insertion of "water code" before the section number for clarification. Section 591.1(i) was deleted due to public comment and disapproval from OAL.)

c) A water supplier providing water to wildlife refuges or habitat lands where (1) the refuges or habitat lands are under a contractual relationship with the water supplier, and (2) the water supplier meets the irrigated acreage criteria of *Water Code* §10608.12(a), is subject to this article.

g) Pursuant to *Water code* §10608.8(d), an agricultural water supplier "that is a party to the Quantification Settlement Agreement, as defined in subdivision (a) of Section 1 of Chapter 617 of the Statutes of 2002, during the period within which the Quantification Settlement Agreement remains in effect," is not subject to this article.

h) Pursuant to *Water Code* §10608.12(a), the Department is not subject to this article.

~~*i) An agricultural water supplier subject to Central Valley Project Improvement Act (CVPIA) (Public Law 102-575) or the Reclamation Reform Act (RRA) of 1982 shall be deemed in compliance with this article if all irrigation water delivered by that water supplier to each customer is delivered through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation's Conservation and Efficiency Criteria Standards of 2008.*~~

(Sections 597.3(b)(1)(A) has been modified to delete redundant language. The phrase "downstream of the point of measurement" has been deleted as it is redundant to similar language appearing in paragraph 597.3(b)(1).) Section 597.3(b)(1)(B) has been modified in response to comments received from stakeholders and OAL to address comments regarding ambiguity of the cost effectiveness and in response to comments received from stakeholders and the California Water Commission decision on April 18, 2012 and on May 8, 2012.

b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers

1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers ~~downstream of the point of measurement~~ needed to install, measure, maintain, operate, and monitor a measurement device.

Or,

B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of ~~When T~~the measurement options in §597.3(a) cannot be met~~, as approved determined by an engineer,~~ by installing ~~a~~ measurement device or devices ~~commercially available~~ (manufactured or on site built or in-house built ~~measurement~~ devices) with or without additional components (such as gauging rod, water level control structure at the farm-gate, etc).~~, that is comparable in cost to other measurement devices commonly in use,~~ ~~at each~~ of the downstream ~~individual customer's delivery points because small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at those delivery points exceed the device accuracy standard. When a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and~~ ~~When~~ If conditions ~~at the delivery points~~ change such that ~~can meet~~ the accuracy standards of measurement options in §597.3(a)(2) at the ~~individual customer's delivery points~~ farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, as specified in §597.4, a schedule, budget and finance plan to ~~measure water at the individual customer delivery points in compliance with §597.3(a)(2) of this Article. Agricultural water supplier shall report in its Agricultural Water Management Plan schedule, budget, and plan and~~ demonstrate progress ~~over time~~ to measure water at ~~all~~ the farm-gate~~s using a commercially available or on site built measurement device consistent~~ in compliance with §597.3(a)(2) of this Article.

(Section 597.3(b)(2) has been modified to add the word 'current' to ensure that up-to-date documentation gets submitted in the Agricultural Water Management Plans.)

2) An agricultural water supplier choosing an option under paragraph (b)(1)of this section shall provide the following current documentation in its Agricultural Water Management Plan(s)submitted pursuant to Water Code §10826:

(Section 597.3(b)(2)(A) has been modified to require suppliers claiming the lack of access to customers delivery points to make a certification through their legal counsel.)

A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall ~~self-~~certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those ~~customer delivery~~ points.

(Section 597.3(b)(2)(B) has been modified to require documentation of device unavailability and water level conditions to be consistent with the reasons described in section 597.3(b)(1)(B).)

B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the ~~field~~ water level or flow conditions described in §597.3(b)(1)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(The title for Section 597.4(b) was modified with "of Existing Devices" for clarification.)

b) Protocols for Field-Testing and Field-Inspection and Analysis *of Existing Devices*

(Section 597.4(e)(4) has been modified to specify the Plan submittal date as specified in Water Code Section 10820(a).)**e) Reporting in Agricultural Water Management Plans**

4) If an existing water measurement device is determined to be out of compliance with §597.3(a), and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

G. Summary and Responses from the noticed 45-day public comment period (July 22, 2011 through September 6, 2011, first 15-day public comment period (September 23, 2011 to October 7, 2011), second 15-day public comment period (October 20, 2011 to November 3, 2011), third 15-day public comment period (February 28 to March 14, 2012, fourth 15-day public comment period (March 26 – April 11, 2012, and fifth 15-day public comment period (April 18-May 3, 2012).

G0: (8/8/2011 Public Hearing) Because Section 531 of the Water Code requires reporting of aggregated farm gate deliveries, I would like DWR to consider accepting an average accuracy of all devices across the turnouts of a district instead of requiring every single device to meet the accuracy requirement as proposed in this regulation.

Department Response: Reject. See responses to G 9, G10 and G21.

G1: Oppose to the use of years 2012 and 2015 as two Agricultural Water Management Plan records retention cycles since a cycle is 5 years.

Department Response: Reject - Agricultural Water Management Plans submittal years 2012 and 2015 are set by the SBx7-7 legislation.

G2: At the July 25, 2011 Ventura County Waterworks District No. 8 (City of Simi Valley) Board of Directors meeting, 2010 meter service charges were rescinded for former Agricultural customers. Those were placed into the Commercial category because the Agricultural category was eliminated. This led to astronomical financial impacts on the former Agricultural customers because many of them put in larger meters which increased the cost considerably.

Department Response: Reject - Comment outside the scope of this regulation.

G3: Comment related to components of Agricultural Water Management Plans and the Draft Agricultural Water Management Planning Guidebook.

Department Response: Reject - Comment outside the scope of the agricultural water measurement regulation.

G4: Comment related to the decrease in agricultural water accounts.

Department Response: Reject – Comment of general nature and outside the scope of this regulation.

G5: Add a definition for "Agricultural Water Users" and delete "Customer".

Department Response: Reject - The SBx7-7 legislation specifically uses the term "Customer" and specifically requires the agricultural water suppliers to "measure the volume of water delivered to customers" and "adopt a pricing structure for water customers based at least in part on quantity delivered."

G6: the proposed regulation will add to the volumetric water pricing structure. Decisions like the Calleguas Municipal Water District to no longer offer Agricultural Water Rates, and the Ventura County Waterworks District No. 8 (City of Simi Valley) eliminating the "Agricultural" rate category, speak volumes of impacts not foreseen by the DWR.

Department Response: Reject – Comment of general nature and outside the scope of the regulation.

G7: Add definitions.

Department Response: Reject - Some of the terms mentioned ('In-House Built Devices' and 'On-Site Built Devices') were used in previous drafts of the regulation and are no longer included in the current text of the regulation. Other terms were defined as needed.

G8: Same as comment G1.

Department Response: Reject.

G9: Allow supplier-wide averaging of device accuracies to comply with the proposed accuracy standard.

Department Response: Reject - This alternative has been discussed and deemed not meeting the intent of the law to achieve sufficient accuracy of the measurements. Consider the example of two flow measurement devices being evaluated in a district. One is +30% accurate and the other is -35% accurate. Evaluated individually, they are both quite inaccurate and would certainly not meet the proposed regulation, but measured in the aggregate they would be -5% accurate and meet the regulation. This simple example illustrates the basis for not allowing an average or aggregate accuracy for compliance where an aggregate or average accuracy could be shown to meet the requirements when in fact individual devices are well out of compliance. As a result, averaging device accuracies is not an acceptable method and is deemed unable to provide sufficiently accurate measurements of water deliveries to individual customers.

G10: The District operates and maintains over 700 propeller type meters to serve 90,000 acres of irrigated farm lands. At the time of installation, all of these met the requirements of §597.3(a)(2)(A). Since these meters are used for volumetric billing of water to its customers, the District has an active monitoring, repair, replacement and accuracy verification program. The accuracy verification is implemented by comparing the District's aggregate metering records to upstream metering conducted by DWR (using venturi rather than propeller meters - a different device type). Such comparisons are made monthly and consistently show values within the metering accuracy standards described in §597.3(a). Such comparisons effectively test 100% of the District meters in use in a given month (rather than 10% of meters over a year). This achieves a much higher standard than contemplated in §597.3(a). Therefore, the District has an effective accuracy verification system already in place that far exceeds the intent of §597.4(a)(1). However, it could be argued that because the District does not perform individual field meter tests as suggested in §597.4(a)(l), it would not comply with said section. Therefore, an additional paragraph (C) should be added to §597.4(a)(l), and read as follows *(added language in italics):*
"§597.4(a)(1)(C) Field testing wherein the aggregate accuracy of multiple devices can be verified via comparison with a set of upstream or downstream devices may be used to identify compliance provided that all farm gates within the reach being evaluated are metered. "

Department Response: Reject - Verification of aggregate accuracy of multiple devices via comparison with a set of upstream or downstream devices would only show that the accuracies of individual devices are within acceptable range on an aggregate basis. This is similar to showing compliance based on average accuracies of multiple devices described in 'Comment #G 0, G 9 and G 21' and deemed not meeting the requirements. However, since the accuracies of all individual devices at time of installation have already met the accuracy requirements of §597.3(a)(2)(A), these devices will be deemed in compliance with the accuracy requirements as long as they are field-inspected and analyzed as required by §597.4(a)(1)(B). The verification of aggregate accuracy can be part of the field-inspection and analysis approach that would also include inspection of individual devices performed by trained individuals.

G11: The appropriate standard is critically dependent on various factors including whether the standard is locally cost-effective. The District supports the standard in California Water Code §531.1O (b) which should be included or referenced in the proposed regulation: *"Nothing in this article shall be construed to require the implementation of water measurement programs that are not locally cost effective."*

Department Response: Reject - The legislation (SBx7-7) explicitly included the 'cost-effectiveness' condition for the implementation of other efficient water management practices listed under section 10608.48(c). The 'cost-effectiveness' condition was however left out from the water measurement requirement in section 10608.48(b) for agricultural water suppliers with irrigated acreage greater than 25,000 acres (the subject of this regulation).

G12: Section 597.3(b)(1)(A) impermissibly exempts water suppliers from measuring water deliveries at the farm gate if they lack legal access to the farm gate. Some water suppliers may have never needed legal access to the farm gate and may not currently have such access, but are authorized by law to acquire such access. In addition, urban water agencies have successfully implemented a similar statutory mandate to install meter waters on the private property of their urban customers, without resorting to this kind of exception.

Department Response: Accept in part - Measurement at laterals upstream of multiple farm-gates will be accepted only for special cases as specified in Section 597.3(b)(1) and a supplier has to demonstrate that measurement under section 597.3(a) is not legally accessible by demonstrating the lack of legal access as outlined in Section 597.3(b)(2)(A). Language pertaining to the certification of the lack of legal access has been strengthened.

Changes to the language of the regulation: Section 597.3(b)(2) has been revised as follows:

An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall ~~self-~~certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those ~~customer delivery~~ points.

G13: Section 597.3(B)(1)(A) is overbroad and may allow water suppliers to avoid measurement at the farm gate, without even requiring the water supplier to ask for permission to access the private canal. For instance, this exception may prevent measurement at the farm gate if water is delivered through canals owned by mutual water companies, which could affect significant numbers of water suppliers.

Department Response: Reject - As mandated by the legislation, the regulation requires that suppliers measure water they deliver to their customers. Mutual Water Companies are considered as customers to the agricultural water supplier. Therefore the agricultural water

supplier is only required to measure the water it delivers to its customer (in this case the Mutual Water Company (MWC) and not the MWC's customers). Similarly, if a MWC is an agricultural water supplier, it will be required to measure water deliveries to its own customers (provided it meets the applicability thresholds as required by the legislation and outlined in Section 597.1).

G14: The Department has not provided a rationale why section 597.3(b)(1)(B) is limited to a single measurement device, particularly when two devices may effectively and accurately measure water deliveries at the farm gate. The obvious, albeit unstated, reason for this exception is the cost of requiring more than one measurement device. However, as we have previously noted, two provisions of SB 7X 7 conclusively demonstrate that a "locally cost effective" exemption does not apply to the measurement requirement. First, the Act includes explicit cost effectiveness exemptions for other efficiency practices in section 10608.48(c), but not with respect to water measurement and volumetric pricing requirements in section 10608.48(b).

In response to OAL decision of February 2, 2012 Department Response is updated. See "Department updated Responses G57, G58, and G59"

Department Response: Reject – DWR believes that requiring more than one measurement device to be installed at each farm-gate is not practical, technically challenging, and imposes undue hardship to the agricultural water supplier. The regulation does however require that suppliers measure water deliveries at farm-gate when a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and that can meet the measurement options in §597.3(a)(2).

G15: Section 597.1 of the draft regulation would provide that certain CVP and RRA contractors "are deemed in compliance" with the requirements of SB 7X 7, and thus exempts such contractors from having to comply with the measurement requirement of Section 10608.48(b). However, all Agricultural Water Suppliers subject to SB 7X 7, including CVP contractors, must meet the measurement requirement of Section 10608.48, and the proposed exemption is unlawful. SB 7X 7 specifically excludes certain CVP contractors from having to prepare and submit Agricultural Management Plans, permitting certain CVP contractors to instead submit the water conservation plan that has been accepted as adequate by the U.S. Bureau of Reclamation (Reclamation).

Department Response: Accept in part - The Regulation did not exempt the CVP and RRA contractors. However, Water Code section 10608.48(b)(1)(i) limits the DWR's regulatory authority to the following:

> "[P]roviding a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in [section 10608.48(b)(1)]."

Water Code section 10608.48(b)(1) requires agricultural water suppliers to measure the volume of water delivered to customers with sufficient accuracy to comply with section 531.10 and nothing more. *See Barton v. Napa Co. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1480. The statute's clear and unambiguous regulatory authority to the Department to provide a range of

water measurement requirement options does not extend to interpreting section 10828, the so-called CVP water supplier statutory exemption. That section describes a possible exemption for certain federal water suppliers from state water plan requirements and falls outside of section 10608.48's regulatory charge to the Department. Affected water suppliers may interpret that provision's language as they see fit.

The U.S. Constitution's Supremacy Clause in Art. IV, could also affect whether the Department can interpret the CVP provision. A state regulation that conflicts with a federal statute, making compliance with the state law in effect impossible, would be pre-empted by the federal statute and a barrier to implementing the state regulation. *See Louisiana Public Service Comm'n v. F.C.C.* (1986) 476 US 355, 366.

Though the CVP provision's language is ambiguous, DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements.

In response to OAL decision of February 2, 2012 Department Response is updated. See "Department updated Response G47"

G16: The proposed accuracy standard should be revised downward from 12% to 10% so not to conflict with the statutory requirement that suppliers "Measure the volume of water delivered to customers with sufficient accuracy."

Department Response: Reject - Accuracy Standards in paragraph (1) of Section 597.3(a) are for existing devices installed in the field. The standard (12%) is slightly higher than that of new devices (10%) so that suppliers who already have measurement devices installed prior to the effective date of this regulation will not need to immediately replace those devices that are already meeting the slightly lower standard of 12% that is also deemed acceptable and meeting the statutory requirement of 'sufficient accuracy'. Furthermore, given the life cycle of measurement devices, existing devices will eventually need to be replaced and meet the 10% accuracy standard.

In response to OAL decision of February 2, 2012 Department Response is updated.

Updated Department Response: Section 597.4(b) title was modified in later drafts as "Protocols for Field-Testing and Field-Inspection and Analysis of existing Devices". The ±12% by volume accuracy pertains only to existing devices. As devices are replaced, the required accuracy will be ±5% by volume for laboratory certified devices, or ±10% by volume for in-field, non-laboratory certified devices.

G17: the Department has provided no explanation for what constitutes field inspection as a methodology for determining the accuracy of measuring devices, as provided for in section 597.4 of the draft regulation. To the contrary, the regulation appears to allow field inspection to certify the accuracy of all measurement devices without testing even a single measurement device, nor does the regulation provide any standard or criteria for assessing the accuracy of field inspections. Because nothing in the record explains how field inspections will determine the "sufficient accuracy" of the measurement of water deliveries, the draft regulation should be

revised to eliminate field (testing)*.
** We believe the commenter meant '…regulation should be revised to eliminate field inspection'.*

Department Response: Reject - To avoid having a regulation that is too prescriptive, and given that testing protocols are device specific (agricultural water measurement devices include a vast array of device types including: propeller meters, acoustic meters, differential head meters, meter gates, slide or sluice gates, constant head orifices, weirs, flumes, radial gates, ...etc.), suppliers are required to use best professional practices and follow device manufacturers' recommendations as stated in 597.4(b). In addition, the proposed regulation requires that field inspection and analysis shall be approved by a California Registered Professional Engineer. Deletion of field inspection and requiring field testing of water measurement devices would be very onerous. DWR believes that field inspection of devices, certified by a registered professional engineer, ensures compliance with the regulation. Additionally, field testing is an option that suppliers can always use to certify their device accuracy.

G18: The regulation must be consistent with applicable law including Proposition 218, which divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval. The erroneous assumption that local public agencies can simply pass through the costs of the regulation through to their customers is inconsistent with Proposition 218.

Department Response: Reject - DWR, in its document of April 13, 2011 "Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement" recognized that many categories of costs might be imposed on agricultural water suppliers. The major categories would include:

- Initial assessment of measurement devices
- Installation of new devices or repair/adjustment of existing devices, as needed
- On-going O&M of upgraded measurement devices (the incremental change in cost compared to what the supplier would have spent in the absence of the regulation)
- Periodic re-testing and certification
- Record-keeping, training, other administrative costs.

DWR recognizes that agricultural water suppliers may need to hold a Proposition 218 vote, and other costs to them may also include the cost of holding an approval vote for increased rates or assessments as may be required by Proposition 218 process. This however, does not mean that those fees and assessments won't be eventually passed to the rate payers.

G19: Because the regulations result in costs imposed on local agencies estimates must be prepared in accordance with Department of Finance instruction. Gov Code § 11346.5, sub. (a)(6); State Administrative Manual § 6601-6616). The regulation applies to local public agencies including the mandate to measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. However, the language of STD 399 conflicts with the regulation by stating that the regulation does not affect any Local entity or program.

Department Response: Reject – The regulation applies to agricultural water suppliers, which recuperate any cost incurred in relation to delivering water from the agricultural water users (farmers). The agricultural water users are therefore deemed to be the entity economically impacted. Form 399 and the accompanying economic analysis document "Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement" reflect the above.

G20: The Department of Water Resources must obtain the concurrence of the Department of Finance in its findings and conclusions contained in STD 399.

Department Response: Reject - Finance approval and signature is only required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399. As noted in the responses to G18. and G19., DWR believes that costs are eventually passed to the rate payers, and as a result, SAM sections 6601-6616 does not apply and the 'Fiscal Impact Statement' section of Form 399 did not need to be completed. Furthermore, DOF review interest is when there is cost incurred by the State.

G21: Department has ignored a reasonable and less costly alternative consisting of permitting supplier-wide averaging of device accuracies to comply with the accuracy requirements.

Response: Reject - This alternative has been discussed and deemed not meeting the intent of the law to achieve sufficient accuracy of the measurements (see response to Comment G9). Allowing an average or aggregate accuracy for compliance will result in an average accuracy that could be shown to meet the requirements, when in fact individual devices are well out of compliance. As a result, averaging device accuracies is not an acceptable method to measure water deliveries to individual customers with sufficient accuracy.

G22: The proposed regulation requires the use of specific technologies or equipment namely water measurement devices that measure water within 12% accuracy by volume for existing devices, 10% by volume new device with non laboratory certification, or 5% by volume (new device with laboratory certification). Despite this requirement, the Initial Statement of Reasons does not include the reason why the specific technology or equipment is required.

Department Response: Reject - DWR, with input from the Agricultural Stakeholder Committee and the Measurement Subcommittee, considered three alternative frameworks for developing a range of options for measuring agricultural water deliveries: (1) develop a regulation that includes a list of acceptable measurement devices maintained in defined manners to achieve desired accuracy; (2) develop a regulation setting a performance standard that defines minimum benchmarks for device accuracy that could be met or bettered by a range of devices; or (3) develop a regulation that provides a process for suppliers to assess and report their own locally-determined standards for measurement accuracy.

Option (2) specifying a performance standard that defines minimum device accuracy benchmarks – provided the most appropriate framework and flexibility to establish a range of measurement options. A performance standard meets the intent of the legislation in the most flexible and cost-effective manner. No specific technology is required and no specific device is required. The only requirement is to use a device that meets an acceptable minimum accuracy

standard. The Department did not recommend adopting a specific technology or a list of acceptable measurement devices for the following reasons:

- Dictating specific devices can unintentionally constrain suppliers or impose unreasonable or unnecessary costs to accommodate the defined devices.
- Measurement technology changes over time, so a list of approved devices would need frequent review and modification.
- Measurement requirements are to assure agricultural water suppliers are able to meet 10608.48(b), which states "Measure the volume of water delivered to customers with sufficient accuracy…" The paragraph is stated in terms of measurement accuracy, not specific devices or technologies.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FIRST 15-DAY PUBLIC COMMENT PERIOD (SEPTEMBER 23 THROUGH OCTOBER 7, 2011)

G23: Treat sub-laterals similar in size and operation to improvement districts and community service ditches/pipelines where the flows are certifiable at the headgate. The District can likely justify measurement improvements at the head of sublaterals, but we clearly cannot justify the high costs for improvements at every one of these turnouts, especially in the case of "dead-end systems" (those laterals that do not spill to a drain). If improvements are required at every turnout, the result could conceivably be that the District and other similar agencies will be situated like an improvement district, and practice a rotation style delivery like an improvement district, then it should be treated like an improvement district.

Department Response: Reject-All sub-lateral water delivery farm-gates are subject to the regulation. If conditions of Section 597.3 (b) apply, then the water supplier may use option b and install measurement devices upstream of multiple customers.

G24: Exempt turnouts servicing Garden-head acreage, usually less than 5 acres gross. Turnouts that serve these parcels are usually ranchet-type gates that are owned by individuals whose concern is not agricultural or farming, but rather landscaping or growing self consumed crops. These parcels tend to be located on small laterals which are hardly accessible. Should service be discontinued due to lack of funds needed to upgrade the turnouts, the District has no means of continually patrolling for illegal acquisition of water where accounting for water is totally lost.

Department Response: Accept in part - Turnouts that serve parcels owned by individuals whose purpose is not agricultural or farming, but rather landscaping or growing self-consumed crops are not subject to this regulation.

G25: Exempt or allow more lenient measures for measuring small acres (usually less than 10 acres gross) which irrigate infrequently. The District will be hard-pressed to justify necessary improvements on systems that have infrequently irrigated and may stay dry for years to come.

Department Response: Reject- Any water supply delivered to agricultural irrigated land is subject to the regulation regardless of frequency of irrigation.

G26: Consider adding definitions for: Accuracy Certification, Agricultural Water Management Plan, Agricultural Water Management Plan Cycle, Agricultural Water Measurement, Efficiency Water Management Practices, In-House Built Devices, and On-Site Built Devices.

Department Response: Reject - Some terms are already defined in other sections of the Water Code, others are included as needed.

G27: In 1992, the Central Valley Project Improvement Act (CVPIA) passed, supplementing the water conservation provisions of RRA. CVPIA required Reclamation to establish Best Management Practices (BMPs) and criteria (known herein after as Standard Criteria) for evaluating the adequacy of all water conservation plans developed by CVP contractors, including those plans required by RRA. Further, CVPIA required that all contracting districts or agencies entering into, renewing, or amending water service or repayment contracts for Central Valley Project water shall ensure that all surface water delivery systems within its boundaries are equipped with water measuring devices or water measuring methods of comparable effectiveness acceptable to the Secretary within five years of the date of contract execution, amendment or renewal. CVPIA also required that any new surface water delivery systems installed within its boundaries, on or after the date of contract renewal, also be equipped with measurement devices.

The requirements for water conservation Plans under CVPIA are much more rigorous and prescriptive than those in Section 210(b) of RRA. CVPIA changed the landscape of water conservation in the Central Valley and accelerated the water use efficiency efforts of CVP contractors. In creating the BMPs and Standard Criteria, water measurement became critical BMP 1 (non-exemptible). The BMP states that CVP contractors must measure the volume of water delivered by the contractor to each customer, except Class II water, with devices that are operated and maintained to a reasonable degree of accuracy, under most conditions, to +/- 6 percent by volume. The reporting of this is encompassed within a District's Plan that is submitted under the Standard Criteria. To date, all districts submitting Plans under the Standard Criteria are held to the +/- 6 percent in field accuracy. This represents 2,132,561 irrigable acres within the Central Valley, of which 2,045,999 acres have the potential to be affected by this regulation.

Plans submitted under the Standard Criteria contain the measurement compliance information. These Plans undergo a multi-tiered review and acceptance process that is different and much more rigorous than typical RRA Plans. The following process is specific to Plans submitted under the Standard Criteria.

At minimum, two technical staff members review each Plan for adequacy in meeting the Standard Criteria and proper implementation of the BMPs. Often times, there is considerable communication back and forth for clarifications and supporting documentation between districts and Reclamation before Plans are deemed adequate. Once the Plan is deemed adequate by the technical staff, the Plan is listed in the Federal register and the Plan is released for a 30-day public review and comment period. If no comments are received (which is most often the case), the Plan is considered accepted. If public comments are received, the comments are addressed,

and depending on the significance of required changes based on comments, the Plan may or may not be sent out for another public review. Reclamation tracks Plan compliance carefully and implements several strategies to deal with non-compliance. These strategies include, but are not limited to the following:

- Restrictions on contract renewals or assignments
- Ineligibility for any Reclamation grant program
- Restrictions on rescheduling
- Restrictions on water banking
- Restrictions on inclusion and exclusion requests

Department Response: Comment consists of a statement and not a request for change. However, including the CVP provision in the regulation (the deleted previous section 597.1 (i)) would, in the Department's view, improperly alter and enlarge the statute's scope, and it would extend the Department's statutory authority beyond what section 10608.48(i)(1) allows. Federal water suppliers that comply with the Reclamation Criteria (stated in the comment) and measure water using devices that are maintained and calibrated to meet the more stringent federal standards would easily meet the accuracy standards of this regulation. See also response to G15.

G28: Valley Ag Water Coalition (VAWC) has always maintained that the Department is incorrect in its assertion that the locally cost effective standard does not apply to agricultural water measurement requirements as codified by SB X7-7. While measurement must occur under the mandate of SB X7-7, it must be held to a locally cost effective standard. The Department errs in reading the provisions of Section 10608.48(b)(1) to the exclusion of the locally cost effective standard set forth in subdivision (b) of Section 531.10. Reference only to subdivision (a) of Section 531.10 is merely appropriate statutory reference to the measurement requirement. The provisions of subdivision (b) of that section cannot be ignored or else a plain reading of the statute—and the clear intent of the Legislature—is turned on its head. The Department must balance achievement of the measurement mandate.

Department Response: Reject - The Water Code section 10608.48(a) requires implementation of efficient water management practices (EWMPs) in accordance to sections 10608.48(b) and (c). Section 10608.48(b) refers to two critical EWMPs, water measurement and adoption of a volumetric pricing structure. Section 10608.48(c) requires implementation of other EWMPs when locally cost effective. As such, the local cost effectiveness does not apply to the critical EWPMs, including water measurement.

G29: The proposed permanent regulation relies on the "Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement," dated April 22, 2011. Yet, for purposes of that economic and fiscal impact analysis, suppliers subject to CVP Water Management Plans were excluded. Therefore, the estimated statewide costs to comply with the proposed agricultural water measurement regulation are not accurate within a reasonable range of direct costs. The Department, for example, estimated that nearly 21,000 current measurement sites statewide would require modification, repair or a new device and that the mid-range estimates of total present value of costs would be $333 million over 20 years, and $420 million over 40 years. These estimates are no longer valid with the elimination of the exemption for federal water contractors.

VAWC asserts that the record of the regulatory proceeding includes sufficient expert opinion to establish that it is neither necessary nor cost effective to require federal contractors to comply with a new state-imposed regulation that essentially duplicates federal requirements. VAWC does not believe it is in the public interest to create a duplicative requirement regarding agricultural measurement for federal water contractors.

Department Response: Reject - Federal water suppliers that currently comply with the Reclamation Criteria and measure water using devices that are maintained and calibrated to meet the more stringent federal standards would easily meet the accuracy standards of this regulation. Federal suppliers already meeting the Reclamation Criteria would only incur minimal additional costs, if any, to comply with the State's regulation. Like any other agricultural water supplier, federal water suppliers will need to provide initial certification that their devices meet the accuracy standards. The certification can be done through field testing which is voluntary, alternatively they can perform field inspection of their devices by trained individuals and approved by a Professional Engineer. Any associated certification cost will be minimal given the fact that federal suppliers have already device inspection and calibration programs in place. (See also Response to Comment G27 & G 15)

G30: A significant change in the proposed permanent measurement regulation now requires an agricultural water supplier's legal counsel to certify to the Department that the supplier does not have legal access to measure water at a customer's delivery point. This change requires legal certification where the previous version required a supplier to "self certify." The addition of a legal certification requirement will necessarily impose significant legal expenses that VAWC does not believe were subjected to cost impact analysis. Self-certification by the governing body of a water supplier should be sufficient to address the matter of access to private property. Requiring the services of legal counsel will create an unnecessarily time consuming and very expensive mandate that will not likely result in better information.

VAWC asserts that the record of the regulatory proceeding includes sufficient expert opinion to establish that it is neither necessary nor cost effective to require a legal certification regarding access to private property.

Department Response: Reject - The clarification added does not change the regulation, it only requires that the water supplier's legal counsel to certify a matter that has legal implications to ensure that the claim is prepared by a subject matter expert and is legally defensible. The cost effectiveness claim does not apply as certification was already a requirement and the cost effectiveness criterion does not apply to water measurement provisions of SBX7-7. See also Department Response to G28.

G31: The proposed permanent regulation would require that all measurement devices be brought into compliance within three years of December 2012 instead of within three years of determining that they are out of compliance. This creates a conflict for devices that are found to be out of compliance after the December 2012 deadline. The previous three-year compliance schedule for devices found to be out of compliance provides a logical and cost-effective method for dealing with devices that are found to be out of compliance after 2012.

VAWC is unaware of any information in the record of the regulatory proceeding that addresses the cost impact of such a change. VAWC believes such a change is unnecessary, burdensome and not locally cost-effective.

Department Response: Reject – the inclusion of 2012 deadline to demonstrate compliance of existing devices with the regulation is a clarification. Section 597.4(d)(2) requires all devices installed to be in compliance at all times. Section 597.4(e)(4) requires existing devices that are not in compliance before 2012 shall be brought into compliance within three years after submittal of the 2012 plan. DWR recognized that requiring compliance of all existing devices that do not meet the regulation accuracy standards by 2012 might not be reasonable; thus allowed three-years beyond 2012 to bring noncompliant devices into compliance by Plan submittal date of 2015. All plan submittal dates are established by the statute. After 2012, if any device no longer meets the accuracy requirements, appropriate corrective actions has to be taken (597.4(d)(2) and after 2015 there is no reason for the device to not be compliant for three years. The inclusion of the 2012 date is not a change in the regulation; it only adds clarification to ensure that section 597.4(e)(4) is consistent with 597.4(d)(2).

G32: Section 597.4, d, 1 and elsewhere in the document it is implied that water measurement devices operation and maintenance are addressed. We suggest the group consider adding a subsection that explicitly discusses operation and maintenance (i.e. the need for an O&M plan, regular recertification, etc.) beyond the initial certification of existing and new devices.

Department Response: Reject – The regulation is already requiring reporting in §597.4(d)(1) that: All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices. To avoid having a regulation that is too prescriptive, and given that maintenance protocols are device specific (agricultural water measurement devices include a vast array of device types including: propeller meters, acoustic meters, differential head meters, metergates, slide or sluice gates, constant head orifices, weirs, flumes, radial gates, etc.), suppliers are required to use best professional practices and follow device manufacturers' recommendations.

G33: The law describes water measurement as needed to facilitate volumetric pricing. We suggest the group consider the appropriateness of adding language to add value to farm delivery water measurement by providing water volume data to the farmer at the times and units they can use for on-farm water management.

Department Response: Reject - The comment is beyond the scope of this regulation. The regulation is for setting accuracy standards and giving a range of measurement options that suppliers may use to comply with the measurement requirements. Suppliers' compliance with the volumetric pricing requirement is outside the scope of this regulation. It is the responsibility of the suppliers to adopt a volumetric pricing structure as required of them.

G34: As we have previously noted, SBX7-7 reauthorized the Agricultural Water Management Planning Program. (Sen. Bill No. 7X (2009-2010 Ex. Sess.) § 7.) Subdivisions (d) and (e) of Water Code section 10608.48 reauthorized the agricultural water management plan requirements

under Water Code sections 10800, et seq. While subdivision (d) requires that a contractor's plan include a report on which of the Efficient Water Management Practices (EWMPs) listed under Section 10608.48 have been or will be implemented, subdivision (f) provides that a CVP contractor "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to [BOR] that meets the requirements described in Section 10828." Section 10828, in turn, provides that water conservation plans submitted to the United States Bureau of Reclamation under the CVPIA or the RRA satisfy the requirements of the Agricultural Water Management Planning Program as long as: (1) the plan was adopted and submitted within the previous four years, and (2) the Bureau of Reclamation has accepted the water conservation plan as adequate. Thus, under Water Code section 10608.48(f), a plan that was adopted and submitted under the CVPIA or the RRA within the previous four years and was accepted by the Bureau of Reclamation as adequate is deemed to meet the EWMPs requirements of Water Code section 10608.48(d).

Throughout this regulatory process, we have been urging the Commission to adopt a regulation that reaffirms that agricultural water suppliers who prepared accepted water management plans under the CVPIA or the RRA that satisfy the requirements of Water Code section 10828 have fully complied with Water Code section 10608.48. Whether or not the Commission ultimately decides to adopt a regulation specifically reaffirming this point, the plain text of Section 10608.48(f) provides that federal water contractors "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to [BOR] that meets the requirements described in Section 10828."

Department Response: See response to Comment G27.

G35: The language in SBx7-7 requires water suppliers serving 25,000 irrigated acres or more to measure the volume of water delivered to customers. Affected federal water contractors are already required to measure water deliveries and utilize a pricing structure that is at least in part based on the volume delivered. Without adequate clarification these contractors may unnecessarily be required to comply with two sets of regulations.

Department Response: See response to Comment G27

G36: Federal water contractors that are in compliance with federal water conservation criteria are already measuring water deliveries in compliance with 531.10(a).

Department Response: See response to Comment G27.

G37: Legal certification limiting access to private ditches – 597.3 (b) (2) (A). Additional changes in the measurement regulation now require "…agricultural water suppliers legal counsel to certify to the Department that it does not have legal access to measure water as a customer's delivery points…" This change requires legal certification where the previous version allowed a district to "self certify." If enacted with the new requirement of "legal certification," it will be necessary to engage in a host of title search processes that will be unnecessarily time consuming and very expensive. Self-certification by the elected Board of a water supplier should be sufficient to accommodate questions about access to private property.

To complicate the issue further, the new requirement conflicts with Water Code Section 22234 where the responsibility of engaging with the District for improvements clearly falls on the landowner:

Part 5, Chapter 2, Article 1 Sec. 22234. A district may contract to operate, maintain, or improve ditches and laterals not owned by the district upon petition of at least two-thirds of the owners of land served by such ditches or laterals.

Department Response: Reject - the comment that the land owners may have a contract with the water supplier supports the proposed regulation. When land owners have a contract with the supplier to manage and operate the private ditch, the supplier will have legal access to install and manage the water measurement device. See also Department Response to G30.

G38: This change in the regulation requires that all measurement devices be brought into compliance within three years of December 2012 instead of within three years of determining that they are out of compliance. This creates a conflict for devices that are found to be out of compliance after the December 2012 deadline. It is also unlikely that districts have accommodated for water measurement device assessments in their 2012 budgets in order to comply with the new water management plan deadline of December 2012. The previous three-year compliance schedule for devices found to be out of compliance more provides a logical method for dealing with devices that are found to be out of compliance after 2012.

Department Response: Reject. See response to G31.

G39: However, as noted in our prior comment letters, the proposed regulation allows measurement upstream of the farm gate if the supplier lacks legal access to the farm gate (§ 597.3(b)(1)(A)) or if the supplier cannot measure deliveries with a single measurement device "comparable in cost to other measurement devices commonly in use" (§ 597.3(b)(1)(B)). These exceptions are overbroad and are inconsistent with the mandate of the Water Conservation Act of 2009. We have repeatedly provided alternative language for these regulatory sections that are consistent with the requirements of the statute.

These exceptions have the potential to exempt a significant proportion of the water suppliers covered by the statute from measurement at the farm gate. For instance, the Department's economic analysis estimates that, "half of the potentially affected irrigated acreage in the Sacramento Valley region would be measured at the lateral level."3 That economic analysis further assumes that all other suppliers would measure at the turnout 4 but this assumption is arbitrary in light of the breath of these two exceptions and the failure to consider whether other suppliers would utilize these exceptions. Thus it is likely that an ever greater proportion of affected water deliveries will not be measured at the farm gate.

Department Response: Reject - Measurements at locations upstream of farm gates are accepted only for restricted and special cases where farm-gate measurement is not technically or legally feasible. Suppliers can use this option only if they can demonstrate that measurement at farm gate is not legally accessible or technically feasible and cannot meet the required level of accuracy required. Section 597.3(b)(2) lists documentation that suppliers have to provide in order to use this option. Having a regulation that accommodates special cases and conditions that exist in the real world will ensure compliance by all suppliers. It is also an attempt to provide a range

of options as directed by the legislation to help agricultural water suppliers comply with the measurement regulation.

G40: Section 597.3(b)(1)(A) While the language proposed to be stricken appears to be merely redundant, the remaining language continues to be flawed. Some water suppliers may have never needed legal access to the farm gate in the past, but are authorized by law to acquire such access. This exception is overbroad and is inconsistent with the intent and requirements of the Act, and the language should be revised to provide a more narrowly drawn exception that is consistent with the intent of the law. We recommend that the language be amended to read: "The agricultural water supplier does not have, and lacks the legal authority to obtain, legal access ..."

Department Response: Reject - Agricultural water suppliers claiming lack of legal access are required to certify through their legal counsel that they do not have legal access to measure water at a customer's delivery point. Requiring such certification to be made through the supplier's legal counsel ensures that the claim is legally defensible. Additionally, those suppliers are required to document that they have sought and been denied access to measure water at customer farm-gates.

G41: Section 597.3(b)(1)(B) Similarly, the language proposed to be stricken appears redundant, but the remaining language provides an impermissibly broad exemption from measurement at the farm gate. The language of the Act does not support an exemption that turns on whether a measurement device is not simply "commercially available", but "comparable in cost to other measurement devices" as well. Even if the cost of commercially available devices were a permissible consideration under the statute, the lack of guidance on making cost comparisons between measurement devices renders the provision unworkable.

We believe that a more narrowly drawn exemption, coupled with a reporting requirement that would document the specific field conditions where measurement accuracy could not be achieved with commercially available measurement devices, would strike the appropriate balance. We recommend that the language be amended to read:

"The agricultural water supplier has determined that the applicable accuracy standard of 597.3(a) cannot be met with commercially available measurement devices, where the agricultural water supplier provides documentation of the flow rates, elevations, and operating conditions that make it impossible to measure volume at each customer delivery point for which the measurement exemption is claimed, and these data and the finding have been reviewed, signed and stamped by a registered Professional Engineer."

Department Response: Reject - DWR believes that requiring more than one measurement device to be installed at each farm-gate is not practical, technically challenging, and imposes undue hardship to the agricultural water supplier. The regulation does however require that suppliers measure water deliveries at farm-gate when a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and that can meet the measurement options in §597.3(a)(2). If the supplier cannot meet the conditions stated in 597.3(a)(2) the supplier shall measure at the farm-gate.

G42: Section 597.3(b)(2)(A) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(A) should be limited to water suppliers that lack the legal authority to obtain sufficient access to customer delivery points.

Department Response: Reject – see response to G39.

G43: Section 597.3(b)(2)(B) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(B) should not be based upon the lack of availability a single measurement device (as contrasted with two devices, for high and low flows respectively) nor be based upon an vaguely stated standard of cost comparability.

Department Response: Reject – see response to G39.

G44: Section 597.4(e)(4) The Act requires that water suppliers "shall implement" the critical efficient management practices (volumetric pricing and water measurement) on or before July 31, 2012. Cal. Water Code § 10608.48(a). However, this section of the regulation provides a limited exception that allows certain water suppliers to avoid implementing the accuracy standards for water measurement by this statutory deadline. This exception applies only for agricultural water suppliers that are "unable to bring [an existing water measurement device] into compliance," allowing them until 2015 to comply. It appears unclear what "unable to bring into compliance" means under the regulation (presumably this would not include cost-effectiveness, given the statutory scheme and structure of cost-effectiveness exceptions), and the December 2012 date appears inconsistent with the statutory requirement (as may this entire section). This section provides the only guidance on the implementation timing, and because the regulation provides this timing provision for existing devices, under accepted principles of regulatory and statutory construction the reasonable inference from the regulatory scheme is that all new devices must be installed and certified by the statutory deadline.

Department Response: Reject - DWR recognizes that requiring compliance of all existing devices that do not meet the regulation accuracy standards by 2012 might not be reasonable; thus allowed three-years beyond 2012 to bring noncompliant devices into compliance, by the 2015 water management plan submittal date, provided that the supplier provide in its water management plan a schedule, budget, and finance plan to bring those devices into compliance. However, after 2012, if any device no longer meets the accuracy requirements, and as stated in section 597.4(d)(2), appropriate corrective actions have to be taken that may include repair or replacement of the device.

G45: Nevertheless, NRDC recognizes that fully complying with new measurement requirements will take time, and at several stages in the stakeholder process we have noted that the lack of clarity on the timing of implementing the measurement standard has created unnecessary uncertainty for agricultural water suppliers and frustrated attempts at consensus on the language of the rule. The lack of guidance on the time available for completion has hardened the demands of the regulated community for the regulation to require as little change as possible from the status quo. It was clear from the outset of the stakeholder process in the summer of 2010 that full implementation of farm gate measurement for some districts would require a multiyear process at best, and with significant issues pending in a protracted rulemaking, little time would be left to fully "implement" the required measures before the date of July 31, 2012 contained in

the act. Unfortunately, the Department has failed to provide much guidance to water suppliers as to the deadlines for implementation, and we believe the Department has missed an opportunity to reach consensus on stronger regulations that more fully comply with the Act's requirements while also providing a more realistic schedule for full implementation.

Department Response: Reject – the deadline for compliance with the regulation has been set by the SBx7-7 legislation. Although the scope of this regulation is to provide a range of measurement options that agricultural water suppliers may use; phasing the implementation schedule is outside the scope of the regulation. DWR believes that the regulation text, which is the culmination of over a year long process with participation and input from stakeholders, meet the intent of the legislation in putting forth a range of measurement options that provide for a reasonable and effective way to comply with the measurement requirements.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED SECOND 15-DAY PUBLIC COMMENT PERIOD (OCTOBER 20 THROUGH NOVEMBER 3, 2011)

G46: The Department and Commission lack statutory authority to approve section 597.1(i) as part of the regulation. Although the statute exempts certain contractors of the Bureau of Reclamation from having to submit agricultural water management plans to report compliance, see Water Code §§ 10608.48(f), 10828, there is no similar exemption from the requirements for all agricultural water suppliers to measure the volume of water delivered to customers and implement volumetric pricing, see Water Code § 10608.48(b). The statute requires all agricultural water suppliers to implement these two critical water management practices, and the statute provides no exemptions from these requirements, whether based on cost-effectiveness, or for Bureau of Reclamation contractors. Water Code §10608.48(b). However, Section 597.1(i) effectively exempts certain contractors of the U.S. Bureau of Reclamation from the requirements of the regulation, including the requirement to verify the accuracy of measurement devices. In response to prior comments, the Department had removed this provision from the draft regulation, essentially conceding that it lacked statutory authority for this provision and that the provision violated the requirements of SB 7x7. In the Final Statement of Reasons distributed at the October 19, 2011 meeting of the California Water Commission, the Department acknowledged in responses to comments that:

- "… DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements." (page 12) (emphasis added)
- "… including the CVP provision in the regulation (the deleted previous section 597.1 (i)) would, in the Department's view, improperly alter and enlarge the statute's scope, and it would extend the Department's statutory authority beyond what section 10608.48(i)(1) allows." (page 17) (emphasis added)

The Department's responses to comments in the Final Statement of Reasons makes clear that the Department has concluded that it lacks statutory authority for this provision. The Department has previously explained that this provision is unlawful, as we noted in our prior comments. We strongly agree that section 597.1(i) is unlawful and should be removed from the regulation.

Department Response: Reject- The California Water Commission (CWC) considered all arguments and voted to reinsert the CVP provision indicating that section 597.1(i) of the regulation is a minimum requirement for federal water suppliers. The Reclamation's 2011 criteria are not effective until January 2012, so the CWC may be required to modify the

regulation at that time since the 2011 criteria requirements will supersede the 2008 criteria requirements.

Updated Department Response: Accept – 597.1(i) was deleted in future 15-Day Notices due to public comments.

G47: Section 597.1(i) would unlawfully exempt some Bureau of Reclamation contractors from verifying the accuracy of measurement devices, without valid justification.

Department Response: Reject – The Bureau of Reclamation's 2011 Criteria require documentation verifying the accuracy standards of the measurement devices used. Given the fact that the 2011 Criteria will not be in effect until January 2012, the Commission decided to move forward with the agricultural water measurement regulation referencing the 2008 Bureau criteria. Once the new criteria are in place, DWR will have to amend its regulation to incorporate the 2011 criteria.

Updated Department Response: Accept – 597.1(i) was deleted, including the 2008 reference, in future 15-day Notices due to public comments.

G48: Because the scope of the exemption provided in Section 597.1(i) is unclear, the provision fails the Clarity Standard of the APA.

Department Response: Reject – See response to G46, above.

Updated Department Response: Accept – See updated responses to G46-G47.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED THIRD 15-DAY PUBLIC COMMENT PERIOD (FEBRUARY 28, 2012 THROUGH MARCH 14, 2012)

G49: The new regulation seems fare to all users and the large special interest loopholes for big agribusiness are gone. This new regulation will go a long way to ensure the human right to water for all water users in our state.

Department Response: Comment noted.

G50: Argues in support of aggregated farm gate measurements to satisfy the agricultural water measurement regulation accuracy requirements.

Department Response: Reject – See response to comments G10 and G21.

G51: As currently drafted, the draft regulation appears consistent with SB 7x 7 and is necessary to implement the requirements of section 10608.48(b) of the Water Code.

Department Response: Comment noted.

G52: In addition, we recommend that the Department and Commission consider three minor changes to clarify awkward and potentially confusing language in section 597.3(b)(1)(B). We have included a redline of these proposed clarifying changes. These changes do not change the substance of the regulation, but instead fix grammatical errors and clarify what we understand to be the intent of the regulation.

Finally, we believe there may be value in better clarifying what constitutes compliance with respect to the timing and extent of implementation of the measurement and volumetric pricing requirements of SB 7x 7. *See* Water Code §§ 10608.48(b), 10608.56(d).

Department Response: Comment Noted.

G53: Necessity issue as required by OAL is not resolved.

Department Response: Reject – The regulation is necessary to provide information to agricultural water suppliers to meet the intent of the Water Code and to implement the requirements of the various sections of the Water Code listed here:

1. Water Code declares under section 10608 (e) "The success of state and local water conservation programs to increase efficiency of water use is best determined on the basis of ***measureable outcomes*** related to water use or efficiency" [emphasis added]
2. Water Code Section 10608.4 declares the intent of the Legislature and under section 10608.4(e) states "Establish consistent water use efficiency planning and implementation standards for urban water suppliers and agricultural water suppliers"
3. Water Code Section 10608.48 (b) states "Agricultural water suppliers shall implement all of the following critical efficient water management practices"
4. Water Code Section 10608.48(i) requires DWR to adopt a regulation and develop a range of options the agricultural water suppliers may use or implement to comply with the measurement requirement in paragraph (1) of subdivision (b) of Water Code Section 10608.48.
5. Paragraph (1) of subdivision (b) of Water Code Section 10608.48 requires certain water suppliers to "Measure the volume of water delivered to customers with sufficient accuracy to comply with Water Code Section 531.10 and implement paragraph (2)". See item 7 below.
6. Water Code Section 531.10 requires water suppliers to report aggregated farmgate delivery to DWR. Section 531.(a) defines "aggregated farmgate delivery to mean "information reflecting the total volume of water an agricultural water supplier provides to its customers and is calculated by totaling its deliveries to individual customers".
7. Paragraph (2) of subdivision (b) of Water Code Section 10608.48 requires agricultural water suppliers "Adopt a pricing structure for water customers based at least in part on quantity delivered".
8. Water Code Section 10608.48(d) requires agricultural water suppliers to report estimate of efficiency improvements in the agricultural water management plan.

Therefore, the regulation is necessary in order to comply with the measurement requirement in paragraph (1) of subdivision (b) of Water Code Section 10608.48 and to give agricultural water suppliers the necessary options for them to be consistent with the statute policy declarations and to comply with its requirements. Item (1) above justifies the need for water measurement. So it is

necessary to measure volume of water delivered to customers to assess water use and water use efficiency.
Item (2) above justifies the necessity of a regulation with consistent standards and terms for implementation.
Items (2) and (4) above, require adoption of the regulation by DWR for consistency, therefore, the development of the accuracy standards and other requirements of the regulation cannot be delegated to local agencies.

Furthermore, the regulation is necessary due to the extraordinary circumstances of water management in the State. The State is frequently water short due to limited or unreliable supplies and this regulation is a continuance of a long history of adopting newer management and technologies that aid the State water managers to better able manage water. This effort began in 1928 with the amendment to the State Constitution and continued with the Urban Water Management Planning Act of 1983 and the Agricultural Efficient Water Management Act of 1990. This most recent SBX7 7 Act and this resulting regulation is a revision and continuation of the two aforementioned Acts.

G54: Regulation need revision because requirements are overly burdensome, expensive, and inconsistent; DWR can decide to include cost effectiveness as a factor of "sufficient accuracy" really means; the numerous changes to 597.3(b)(1)(B)… has ballooned into 15 separate changes… have done nothing to clarify the regulation and have increased the level of confusion for the parties responsible for implementation.

Department Response: Reject- Regarding consistency, see response to G53 above and the Supplemental Initial Statement of Reasons.

Regarding cost effectiveness, see response to G28.

Regarding clarity, Section 597.3(b)(1)(B) and other sections were modified under this notice to improve clarity and implementation.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FOURTH 15-DAY PUBLIC COMMENT PERIOD (MARCH 26, 2012 THROUGH APRIL 11, 2012)

G55: Continue to be very concerned that Department has not adequately responded to OAL Feb 8, 2012 decision ("why" regulations are needed).

Department Response: Reject- See response to G53 above and the Supplemental Initial Statement of Reasons.

G56: Regulation lacks sufficient necessity to justify numeric accuracy standards (±5%, ±10% or ±12%); Dept has not established why this language necessitates or justifies levels of accuracy established by regulation; why wouldn't sufficient accuracy be determined by the local water supplier… if the water users are comfortable with an accuracy of ±15%?

Department Response: **Reject -** See response to G53. In addition, the statute requires sufficient accuracy for water measurement as required in Items (5 in Response to G53) and necessary for items (6) & (7) above, in Response to G50. DWR's proposed accuracy standards are +/-% 5, ±10%, and +/-12%. These accuracy standards are in line with current industry standards as reported in water measurement device manufacturers' specifications. Also, the federal 2011 criteria require federal water suppliers in California to measure water with accuracy of +/-6%. DWR also consulted with subject matter experts on the reasonable accuracy standards and were advised the regulation's ranges of accuracy standards are within an acceptable and achievable range.

The inclusion of the accuracy standards as specified in the regulation is justified to provide for sufficient accurate measurement of water deliveries to customers and for reporting aggregated farm-gate deliveries to DWR. The reason for individual device compliance with the accuracy standard is to ensure compliance with Water Code 531 (a) that requires measurement of water deliveries to individual customers (see item 6 above, in Response to G53)

The accuracy standards are to be applied to individual water measurement devices, as compared to aggregated accuracy (or average accuracy) of all the water supplier's devices. For example; where one device may report accuracy of 20 percent and the other device 4 percent, the average of the two is 12 but one of the devices is not in compliance.

Furthermore, the accuracy standards are necessary to ensure that the water supplier individual customers' water measurement devices are meeting the accuracy standards so that customers are able to be billed for volume of water delivered to them based on readings of their respective individual measurement devices and to provide equitable pricing and billing of all customers. The pricing structure (see item 7 above, in Response to G53) to be developed outside this regulation is required to be at least in part on the ***quantity*** [emphasis added] delivered. Therefore, measurement of water volume delivered to a customer is necessary to bill the customer on the quantity delivered.

Regarding why wouldn't sufficient accuracy standards be determined by the local water supplier, items (2) and (4) above (in response to G53) require adoption of the regulation by DWR for consistency of implementation statewide, therefore, the development of the accuracy standards and other requirements of the regulation cannot be delegated to local agencies.

G57: Support striking "or devices" in 597.3(b)(1)(B) because it helps to clear up what requirement regulated entities will be expected to meet.

Department Response: Reject- Department modified the text of section 597.3(b)(1)(B) for this notice to add "or devices, with or without additional components] for the purposes of clarity and consistency. More than one measurement device at a particular farm-gate or lateral may be necessary to accurately measure the volume of water delivered.

In response to Comment G58 and in response to OAL decision of February 2, 2012 regarding Consistency Standards, Department modifies the text of regulation section 597.3(b)(1)(B) and issued a 15-day public comment period.

G58: : Section 597.3(b)(1)(B) of the proposed regulation would allow water suppliers to measure upstream of the farm gate if a single measurement device cannot meet the accuracy

standard. Both OAL and DWR have acknowledged that cost considerations are not a valid basis for an exemption from the statutory requirement to measure at the farm gate. 597.3(b)(1)(B) of the proposed regulation is not consistent with the statute… improperly allows water suppliers to measure at the lateral, rather than at the farm gate, if suppliers cannot meet the accuracy standard using a single measurement device. While DWR may be less explicit regarding cost considerations in this version of the regulation, there is not valid basis for limiting measurement at the farm gate to a single measurement device. The statute requires "measurement" of water deliveries in order to obtain accurate farm gate delivery data and to be able to implement volumetric pricing.

The Department has failed to adequately respond to comments regarding section 597.3(b)(1)(B) and its explanations fail to meet the clarity standard of the APA. Since May 2011, NRDC and others have repeatedly submitted written and oral comments that section 597.3(b)(1)(B) should not be limited to a single measurement device. Equally important, there is no basis in the statute for allowing measurement at the lateral instead of the farm gate based on DWR's anticipation that farm gate measurement for some suppliers "is not practical, technically challenging, and imposed undue hardship." March 26, 2012 Supplement to the Initial Statement of Reasons… fails to respond to comments, and this justification of "unusual" circumstances is belied by the fact that DWR's economic analysis expects that half of all acreage subject to the regulation in the Sacramento Valley will not be measured at the farm gate. DWR has failed to respond to repeated comments that Section 597.3(b)(1)(B) should not be limited to a single measurement device, and DWR's limited explanations and justifications for this section are inconsistent, without statutory authority, and support the conclusion that more than one measurement device is not required because of DWR's conclusions regarding cost and cost-effectiveness. As such, OAL should reject the draft regulation as failing to meet APA requirements.

Department Response: Accept in part – In response to these issues raised, DWR will amend the rule language and issue another 15-day Notice that will address these concerns.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FIFTH 15-DAY PUBLIC COMMENT PERIOD (APRIL 18, 2012 THROUGH MAY 3, 2012)

G59: Section 597.3(b)(1)(B) does not meet the Clarity Standards

Department Response: Reject. DWR modified this Section directly in response to comments received in prior 15-day notices, and to the OAL decision regarding Clarity and Consistency Standards.

For additional information on clarity and consistency for implementation of the regulation the following specific criteria are necessary and have been included in the applicability section of the regulation:

a) Clarifies applicability to wholesale agricultural water suppliers that may deliver or supply water to other agricultural retail water agencies, through their facilities and do not have control of the delivery of water to their retail customers. This clarification is necessary because the Statute did not address this circumstance of wholesale water suppliers where an agency is simply transporting water to another supplier and not delivering it to the retail supplier's customers.

b) Clarifies applicability to suppliers providing water to wildlife refuges by determining that they pertain to this Article and to the acreage provisions in Water Code Section 10608.12(a). Many stakeholders were uncertain about the applicability of wildlife refuges and whether or not they are considered a customer of a water supplier as defined in the Statute and regulation. This statement clarifies the definition of customer by including wildlife refuges as a type of customer.

c) Excludes agricultural water suppliers providing water to less than 10,000 irrigated acres as specified by Statute.

d) Excludes agricultural water suppliers providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, unless funding is provided as specified by Statute.

e) Clarifies applicability to canal authorities and entities that only deliver water through federal facilities to other water agencies that then deliver the water to customers. This clarification is necessary because the Statute did not address this circumstance where an agency is simply transporting water and not delivering it to the retail supplier's customers.

f) Excludes suppliers that are part of the Quantification Settlement Agreement as specified in the Statute.

g) Excludes the Department of Water Resources as specified in the Statute.

G 60: Department has done nothing to establish its Necessity

Department Response: Reject. This comment does not pertain directly to the 15-Day Notice, and was addressed in previously. See Response to G53, G56

G61: The inclusion of the language would eliminate the "range of options" required by the legislation.

Department Response: Reject. The inclusion of the language would not eliminate the range of options. It provides clarity on the conditions for using section 579.3(b)(1)(B) and makes the regulation consistent with DWR legal analysis that water measurement is not subject to local cost effectiveness.

G62: We are writing with qualified support for the modifications to the proposed agricultural water measurement regulation, as adopted by the California Water Commission ("Commission") for public comment on April 18, 2012. We urge the Commission to approve the modified proposed regulation and submit it to the Office of Administrative Law (OAL) for review.

The current version of Section 597.3(b)(1)(B) of the draft agricultural water measurement regulation is facially consistent with the requirements of SB 7x 7 (the Water Conservation Act of 2009).

We encourage quick and decisive action on behalf of the Commission to approve the regulation without any changes and submit it to OAL for review.

Department Response: Comment noted.

G63: In the statement of reasons, the Department equates implementing this measurement regulation to the "measurable outcomes" in Water Code section 10608(e) which references water use or efficiency. The Department has not stated how this regulation would result in measurable outcomes in water use or efficiency. The Department, in order to comply with OAL's order, must document in this Statement of Reasons how measurement within this regulation, in and of itself, will reduce water use or increase water use efficiency.

Department Response: Reject. DWR has documented that the water measurement as defined by section 10608.48 is one of the two critical Efficient Water Management Practices. The law requires implementation of EWMPs to increase water use efficiency. The regulation directly affects one of the two critical EWMPs, the water measurement. Water measurement in accordance to the terms of the regulation would give water suppliers a consistent method to show the supplier has met the implementation of the critical EWMP. While pricing structure is not contained in the regulation, t it is required by Statute and is a second critical EWMP which is is dependent upon the measurement EWMP. Water measurement would lead to better water management, provides a necessary tool for volumetric billing, which in turn would increase water use efficiency and save water. By analogy, and similar to the urban sector, metering has been shown to further water use efficiency and conservation.

G 64: On page 3 of the Statement of Reasons, the Department equates range of options in the legislation, *[the Department is required to adopt regulations that provide for a range of options to comply with the measurement regulation"]* to a "range of accuracy options" which is clearly a misrepresentation of the legislation.

Department Response: Reject in part. The "Range of options" available to water suppliers by the regulation include the followings: installing water measurement devices at the farm-gate, installing water measurement devices at the lateral (upstream of multiple farm-gates) if certain technical conditions are met, installing water measurement devices upstream of multiple farm-gates when water supplier demonstrates it has no legal access to individual farm-gates, suppliers may certify their measurement devices using either lab accuracy or field accuracy determinations certifying water measurement devices by inspection, certifying water measurement devices by testing , using manufactured or onsite built devices, and an additional option is to allow for slightly less accurate pre-existing devices. The Accuracy levels provided in the regulation are performance measures to ensure that measurement is sufficiently accurate. The set of accuracy numbers (±5%, ±10%, and ±12%) are indeed another way of providing agricultural water suppliers with a range of options to comply with the measurement requirement.

G65: The Department claims that cost effectiveness cannot be used to guide the establishment of this regulation because the legislation is silent on the issue of placing a condition of cost effectiveness on water devices. It is the Department, in its stated effect of the regulation that claims that it cannot be used. OAL points out this discrepancy in the February 8 Decision of Disapproval and provides the Department with options to address it, "To resolve this issue, the Department needs to either [emphasis added] modify the text of section 597.3(b)(1)(B) in a 15-day notice of modified text so that section 597.3(b)(1)(B) is consistent with the stated effect of the regulations, i.e., no exemption to water measurement devices may be based on cost effectiveness, or provide a different legal analysis in the rulemaking file that supports the notion that cost effectiveness is allowed as a consideration is allowed as a condition to the water measurement requirement of Water Code section 10608.48(b)(1) [emphasis added]. This would not be without precedent.

As mentioned above, the revised regulation will have a significant impact on the cost of this regulation and its burden on the regulated entities. A new cost estimate will need to be developed for this regulation and the Department will need to justify why the regulation is not subject to section 11340.1 of the Government Code, which states that "agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process [emphasis added]."

Department Response: Reject. In response to comments by stakeholders (See G58), DWR modified section 597.3(b)(1)(B) to ensure consistency with the effect of the regulation. Cost effectiveness is not a condition or factor for water measurement and therefore for eligibility for section 597.3(b)(1)(B).

G66: Department has stated that it cannot include cost effectiveness, however, Department in the development of methodology for quantifying the efficiency of agricultural water use (required by section 10608.64) has, using its own discretion, included "performance indicators" such as economic production that do not quantify the efficiency of agricultural water use, while there was no language in section 10608.64 regarding economic production. The inconsistent and opposite approaches to the interpretation of the legislation is an abuse of the Department's authority.

Department Response: Reject. Comment is a general objection not applicable to the statute's charge to the Department as described in section 10608.48(i). Section 10608.64 is a different part of the statute with different requirements.

G67: Compare aggregated farm-gate delivery calculated from water balance with the deliveries from billing records, instead of requiring individual device accuracy standards. Revise the regulation, making the +/-12% accuracy standard apply to the aggregated farm-gate deliveries, not the individual farm-gates or delivery points.

Department Response: Reject- This comment is not applicable to the current notice. Furthermore, this comment has been addressed previously in G10, G21, and G50 responses. The +/-12% standard would apply to existing devices. A new or replacement measurement device would be certified to be accurate to +/-5% by volume, if it is laboratory certified, or, +/-10% by volume in the field if using non-laboratory certification. These standards are not burdensome, as the Bureau of Reclamation requires +/-6% accuracy at the farm gate for all devices (see Comment G27). The commenter doesn't address (1) how the discrepancies between calculated farm-gate deliveries and deliveries based on billing records would be rectified? (2) How would accuracy be determined? (3) How the effect of water losses in the system would be separated from the effect to device accuracy? (4) And how sufficient accuracy for individual customers would be achieved? Department relied on the Water Conservation Plans submitted to the Reclamation in 2010 and 2011 that report many agricultural water suppliers comply with the Federal CVPIA standard of 6% accuracy or better (see summary of information prepared from the Water Conservation Plans in the Materials Relied Upon).

G68: Alternatively, if water measurement accuracies are established at the customer delivery point, revise the regulation to provide the same amount of time to implement water measurement as urban water suppliers were given.

Department Response: Reject. The compliance date of July 31, 2012 for implementation of the Efficient Water Measurement Practices is set in Water Code §10608.48(a). DWR believes that it is reasonable to allow 3 years to become compliant for the next Agricultural Water Management Plan that is due in December 31, 2015. Urban water suppliers' compliance with water metering was established by the Legislature. Section 10608.48 did not mandate a similar schedule.

G69: Update the Economic and Fiscal Impact Statement to be reflective of the revised regulation.

Department Response: Accept in Part. The cost of implementation may change depending on the options water suppliers would be eligible for. At this time it is unknown what percentage of water suppliers will use the section 597.3(b)(1)(B). The assumption in the Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement (FIS) dated April 22, 2011 is that 50% of the farm-gates in the Sacramento Valley (estimated to be about 2978 farm-gates) would be eligible for section 597.3(b)(1)(B), hereafter referred to as Group A, and the remaining 50% would measure at the farm-gate, Group B. Currently, the present value of the total cost is estimated to be $333 and 429 million for 20 and 40 year horizon. If we assume that due to the modifications to section 597.3(b)(1)(B) (before the 5th comment period) less than 50% of the farm-gates would become eligible for section 597.3(b)(1)(B), the cost of Group A will decrease and the cost of Group B would increase. Assuming that the water suppliers who would become eligible for section 597.3(b)(1)(B) be reduced from 50% to 25%, DWR estimates that the total cost of the regulation for 20 and 40 years would be 350 and 451 million. In other words, the number of measurement of lateral devices is reduced from 50% to 25% and the number of farm-gate devices will increase from 50% to 75%. Additionally if we assume that 75% of the devices at the farm-gates have to be replaced with new devices (compared with 50% assumed in the April 2011 estimate), the present value of costs would be $376 and $484 million, for 20 and 40 years, respectively. Therefore, the Department's Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement is updated. Assumes average initial cost of $7,570 plus average annual cost of $2,500 per affected farm; Farm size 313 acres.
See Addendum to Department Cost Analysis.

G70: Department will need to justify why the regulation is not subject to 11340.1 of the Government Code which states that "agencies shall reduce regulatory burden by substituting performance standards for prescriptive standards.

Department Response: Reject. DWR has included accuracy standard values as" performance standards" instead of prescribing specific water measurement devices or equipments or trade mark. Water suppliers may choose any options they are eligible for and use any measurement device(s) that meets the performance accuracy standards. Additionally, once a compliant device is selected, the operation and maintenance is held to best professional practices (performance standards).

H. AUTHORITY AND REFERENCE

Under the authority included under California Water Code Section 10608.48(i)(1), the Department of Water Resources is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements in paragraph (1) of subdivision (b) of Section 10608.48.

Water Code Section 10608.48(i)(1) states:

> *The department shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in paragraph (1) of subdivision (b).*

The section above refers to Section 10608.48(b), which states:

> *Agricultural water suppliers shall implement all of the following critical efficient management practices:*
>
> *(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).*
>
> *(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.*

I. DETERMINATIONS

I.1 Local Mandate Determination:

The proposed regulation does not impose a mandate on school districts. The regulation would impose specific farm gate water delivery measurements and reporting requirements on local agricultural water districts that supply water to more than 25,000 acres of irrigated land.

I.2 Estimate Cost and Savings:

I.2.1 Non-federal water suppliers

There is significant uncertainty regarding the potential cost to agricultural water suppliers associated with compliance with the regulation due the large range of data and assumptions. The mid-range estimates of total present value of costs are $350 million over 20 years. About $70 million of that would be initial assessments and capital improvements, and the remainder is the present value of annual O&M, administration, and capital replacement. Costs could be as little as half that amount or as much as twice that amount. Average costs per acre potentially affected were estimated to be $24 in initial costs and $6.5 in annual ongoing O&M costs. Costs to individual farms are likely to vary significantly.

I.2.2 Federal (CVPIA and RRA) water suppliers

Federal water suppliers that comply with the Reclamation Criteria would comply with the State Regulation, provided the water suppliers submit initial certification signed by a professional engineer, that they meet the federal standards and devices are maintained and calibrated to operate to accuracy of +/- 6 percent, under most conditions. If the federal contractors have not been complying with the Reclamation criteria DWR has estimated the maximum cost to federal water suppliers, for doing field testing, to be approximately $32 million assuming that there is 1.8 million acre of irrigated land with 22 water suppliers greater than 25,000 acres of irrigated land that would be in the same condition as other non-federal water suppliers in terms of measuring water. However, federal water suppliers have been under the Standard Criteria for many years and therefore should have implemented devices with accuracy of +/- 6%. Consequently, we anticipate the only cost to the federal water suppliers would be the cost of initial certification of compliance (needed with the 2012 Agricultural Water Management Plans) for existing devices by a Professional Engineer. Though no analysis was done to estimate the cost of initial certification it is expected to be minimal.

I.3 Economic Impact on Small Business:

Fiscal impacts and costs to water suppliers are indirectly dealt with in this section, as costs to the agricultural water suppliers associated with complying with the regulation will be passed on to their customers (i.e., farmers) through higher water rates and assessments. Though agricultural water suppliers might need voter approval to increase rates since they are subject to Proposition 218, which divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval. Nevertheless, the legislation has clearly singled out two efficient water management practices and considered them as 'critical' including the water measurement requirement. Unlike other efficient water management practices that are required only when locally cost effective under section 10608.48(c), SB X7-7 legislation does not provide any exemptions from the water measurement requirement of 10608.48(b)(1).

Only Agricultural water suppliers that provide water to more than 25,000 acres of irrigated land are subject to this regulation. As mentioned, costs to those agricultural water suppliers will be passed on to their customers. However, as required by legislation, agricultural water suppliers have to measure water deliveries to their customers in order to adopt a billing structure that is based at least partially on volume of water delivered. The volumetric pricing of water deliveries is expected to achieve an equitable billing for the agricultural water users, as well as encourage water use efficiency and conservation.

I.4 Assessment of Cost Impacts Incurred By Private Sector:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

I.5 Assessment of Effect on Jobs/Business:

The proposed regulation for agricultural water measurement will not:

- Eliminate jobs within California;

- Eliminate existing businesses within California:
- Affect the expansion of businesses currently doing business within California

I.6 Reports Required From Business:

The proposed regulation for agricultural water measurement will require new criteria and methods in reports submitted in Agricultural Water Management Plans.

I.7 Significant Effect on Housing Cost:

None.

I.8 Small Business Determination:

The proposed regulations may affect small businesses.

I.9 Alternative Determination:

DWR considered three alternative frameworks for developing a range of options for measuring agricultural water deliveries: (1) develop a regulation that includes a list of acceptable measurement devices maintained in defined manners to achieve desired accuracy; (2) develop a regulation setting a performance standard that defines minimum benchmarks for device accuracy that could be met or bettered by a range of devices; or (3) develop a regulation that provides a process for suppliers to assess and report their own locally-determined standards for measurement accuracy.

This regulation is based on alternative (2), which specifies a performance standard that defines minimum device accuracy benchmarks. This alternative provided the most appropriate framework and flexibility to establish a range of measurement options. A performance standard meets the intent of the legislation in the most flexible and cost-effective manner. No specific technology is required and no specific device is required. The only requirement is to use a device that meets an acceptable minimum accuracy standard.

Pursuant to Administrative Procedures Act Government Code 11346.5 (a) (13), the Department has determined for the reasons discussed above in this Final Statement of Reasons and in the summary and response to comments to the initial 45-day comment period and two subsequent 15-day notices that no alternatives considered would be more effective in carrying out the purposes for which the Agricultural Water Measurement proposed or would be as effective and less burdensome to affected private persons than the adopted Agricultural Water Measurement.

J. Updated Informative Digest:

No revision to the original informative digest needed**.**

Declaration of Michael Glaze
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, Michael Glaze, declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am employed by South Feather Water & Power Agency (hereinafter "South Feather") as its General Manager. I previously submitted a declaration dated June 28, 2011, that accompanied the Narrative Statement in 10-TC-12. For my work duties and further background information, please see my earlier declaration.

3. I have reviewed the letters submitted by Department of Finance and Department of Water Resources in opposition to the consolidated test claims. I have also reviewed Claimants' rebuttal and, as to those factual matters applicable to South Feather, attest to the truth of the statements made therein.

4. Customer growth within South Feather's service area has been consistently stagnant over the past two decades. New connections have increased by an average of only 0.77% annually since 1991, and the Butte County Association of Governments forecasts the 2010-2035 annual population growth for the unincorporated areas with Butte County at 1.1%.

5. South Feather's water rights are limited by place of use designations. Generally, South Feather's place of use includes the unincorporated areas of Bangor, Palermo and Kelly Ridge, and the north-eastern portion of the City of Oroville. South Feather is not permitted to serve water outside its designated place of use without first applying for and obtaining the approval of the State Water Resources Control Board.

6. South Feather's reservoirs are subject to flood control criteria that limit South Feather from storing water in reservoirs during certain portions of the year at elevations above each reservoir's spill crest. Specifically, Little Grass Valley Reservoir cannot store water above elevation 5,034.00 feet between October 1 and March 15 annually; Sly Creek Reservoir cannot store water above elevation 3,515.00 feet between October 1 and May 1 annually; Lost Creek Reservoir cannot store water above elevation 3,279.05 feet between November 1 and May 1 annually; and Ponderosa Reservoir cannot store water above elevation 953.50 feet between November 1 and April 30 annually. During these periods, combined storage in South Feather's reservoirs is reduced by 18% (29,356 AF).

7. In 2008 South Feather participated in a water transfer involving the release of water stored in South Feather's reservoirs. Based on that experience, the Board of Directors of South Feather resolved to not participate in future water transfers. One objectionable experience from South Feather's 2008 transfer is DWR's interpretation of refill criteria; given Lake Oroville's location downstream of South Feather's reservoirs, DWR adopted the position that South Feather's reservoirs could not refill the storage space vacated by the water transfer until Lake Oroville actually or theoretically spilled.

8. South Feather owns and operates hydroelectric power plants and sells the electricity generated under a long-term agreement with Pacific Gas & Electric. I have reviewed the provisions of Water Code section 540 and the definitions contained in Public Utility Code section 331. Based on the my understanding of the foregoing and after consulting with South Feather's legal counsel, Dustin Cooper, it is my conclusion that South Feather is not an electrical "aggregator" that "combines the loads of multiple end-use customers in facilitating the sale and purchase of electric energy, transmission, and other services on behalf of these customers." Furthermore, given South Feather's agreement with PG&E, and not directly with any retail electricity customers, it is my opinion that South Feather is not engaged in any direct transaction addressed by section 540.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 6th day of August, 2013, at Oroville, California.

Michael C. Glaze, General Manager
South Feather Water & Power Agency

Declaration of Sean Earley
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, Sean Earley, declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am employed by Richvale Irrigation District (hereinafter "Richvale") as its General Manager. I previously submitted a declaration dated February 14, 2013, in support of the Narrative Statement in 12-TC-01. For my work duties and further factual background, please see my earlier declaration.

3. I have also reviewed the declaration submitted by then-General Manager Brad Mattson dated June 28, 2011, in support of the Narrative Statement in 10-TC-12. As to the factual matters asserted by Mr. Mattson in that declaration, I affirm the truthfulness of his statements and adopt them as my own understanding and beliefs.

4. Richvale along with three other districts entered into a settlement agreement with the State of California to quantify and account for the joint districts' water rights in light of the construction of Oroville Dam and related facilities. Essentially, the settlement agreement sets forth a maximum amount of water that may be diverted each irrigation season. No credit or carryover is recognized if the joint districts divert less than the maximum amount permitted. Furthermore, the agreement sets forth the place of use area where water diverted under the settlement agreement may be used. Approval from the Department of Water Resources is necessary to apply water outside the designated place of use, such as to accommodate a temporary water transfer

or to provide water to additional customers. I understand that a copy of the settlement agreement is attached to the Declaration of Dustin C. Cooper, submitted with the rebuttal.

5. Richvale participated in rice land idling transfers in 2009, 2010, and 2012 to help alleviate the effects of statewide drought. The transfers were limited to the irrigation season, April through September. Richvale was required to obtain DWR's consent to the transfer because it involved temporarily applying water outside the joint districts' place of use. Richvale is not currently pursuing any water future transfers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 7th day of August, 2013, at Richvale, California.

Sean Earley, General Manager
Richvale Irrigation District

Declaration George Barber
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, George Barber, declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am employed by Paradise Irrigation District (hereinafter "Paradise" or "District") as its General Manager. I previously submitted a declaration dated June 28, 2011, that accompanied the Narrative Statement in 10-TC-12. For my work duties and further factual background, please see my earlier declaration.

3. I have reviewed the letters submitted by Department of Finance and Department of Water Resources in opposition to the consolidated test claims. I have also reviewed Claimants' rebuttal and, as to those factual matters applicable to Paradise, attest to the truth of the statements made therein.

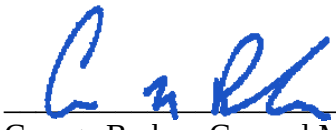
4. The District has experienced little to no growth in the amount of customers served water by it over the last 20+ years. Population data from the California Department of Finance, Demographic Research Unit shows an increase in population in the Town of Paradise from 25,408 in 1990 to 26,218 in 2010, an increase of 3.2% in 20 years. In my opinion, one of the biggest factors limiting customer growth of the District is that the Town of Paradise is one of the largest if not the largest municipality in California without a centralized sewer system (instead relying on septic systems). This fact restricts the District's ability to expand by serving more customers and limits increases in population density within the District's boundaries.

5. The District's water rights are limited by place of use limitations. Generally, the District's place of use designation is coterminous with the political boundaries of

the Town of Paradise. The District cannot serve water outside its designated place of use without first applying for and obtaining the approval of the State Water Resources Control Board.

6. The District owns and operates two reservoirs: Paradise with a capacity of 11,497 acre-feet, and Magalia with a capacity of 2,574 acre-feet. In 1997 the California Division of Safety of Dams limited the District's storage capacity in Magalia Reservoir to not more than 796 acre-feet. Thus, the actual storage capacity of the District's two reservoirs is 12,293 acre-feet. Given limited storage capacity and unpredictable hydrologic conditions, the District is always potentially one year away from imposing water curtailments due to drought. For this and other reasons, the District has never participated in a water transfer and will likely never participate in a transfer in the future.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 6 day of August, 2013, at Paradise, California.



George Barber, General Manager
Paradise Irrigation District

Declaration of Eugene Massa, Jr.
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, Eugene Massa, Jr., declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am employed by Biggs-West Gridley Water District (hereinafter "Biggs") as its General Manager. I previously submitted a declaration dated February 22, 2013, in support of the Narrative Statement in 12-TC-01. For my work duties and further factual background, please see my earlier declaration.

3. I have also reviewed the declaration submitted by former General Manager Karen Peters dated June 29, 2011, in support of the Narrative Statement in 10-TC-12. As to the factual matters asserted by Ms. Peters in that declaration, I affirm the truthfulness of her statements and adopt them as my own understanding and beliefs.

4. Biggs along with three other districts entered into a settlement agreement with the State of California to quantify and account for the joint districts' water rights in light of the construction of Oroville Dam and related facilities. Essentially, the settlement agreement sets forth a maximum amount of water that may be diverted each irrigation season. No credit or carryover is recognized if the joint districts divert less than the maximum amount permitted. Furthermore, the agreement sets forth the place of use area where water diverted under the settlement agreement may be used. Approval from the Department of Water Resources is necessary to apply

water outside the designated place of use, such as to accommodate a temporary water transfer or to provide water to additional customers. I understand that a copy of the settlement agreement is attached to the Declaration of Dustin C. Cooper, submitted with the rebuttal.

5. Biggs participated in rice land idling transfers in 2010, and 2012 to help alleviate the effects of statewide drought. The transfers were limited to the irrigation season, April through September. Biggs was required to obtain DWR's consent to the transfer because it involved temporarily applying water outside the joint districts' place of use. Biggs is not currently pursuing any water future transfers.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 7th day of August, 2013, at Gridley, California.

Eugene Massa, Jr., General Manager
Biggs-West Gridley Water District

Declaration of Michael Glaze
In Support of Claimants' Rebuttal
10-TC-12 and 12-TC-01

I, Michael Glaze, declare as follows:

1. I make this declaration based on my personal knowledge, except for matters set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein under oath.

2. I am employed by South Feather Water & Power Agency (hereinafter "South Feather") as its General Manager. I previously submitted a declaration dated June 28, 2011, that accompanied the Narrative Statement in 10-TC-12. For my work duties and further background information, please see my earlier declaration.

3. I have reviewed the letters submitted by Department of Finance and Department of Water Resources in opposition to the consolidated test claims. I have also reviewed Claimants' rebuttal and, as to those factual matters applicable to South Feather, attest to the truth of the statements made therein.

4. Customer growth within South Feather's service area has been consistently stagnant over the past two decades. New connections have increased by an average of only 0.77% annually since 1991, and the Butte County Association of Governments forecasts the 2010-2035 annual population growth for the unincorporated areas with Butte County at 1.1%.

5. South Feather's water rights are limited by place of use designations. Generally, South Feather's place of use includes the unincorporated areas of Bangor, Palermo and Kelly Ridge, and the north-eastern portion of the City of Oroville. South Feather is not permitted to serve water outside its designated place of use without first applying for and obtaining the approval of the State Water Resources Control Board.

6. South Feather's reservoirs are subject to flood control criteria that limit South Feather from storing water in reservoirs during certain portions of the year at elevations above each reservoir's spill crest. Specifically, Little Grass Valley Reservoir cannot store water above elevation 5,034.00 feet between October 1 and March 15 annually; Sly Creek Reservoir cannot store water above elevation 3,515.00 feet between October 1 and May 1 annually; Lost Creek Reservoir cannot store water above elevation 3,279.05 feet between November 1 and May 1 annually; and Ponderosa Reservoir cannot store water above elevation 953.50 feet between November 1 and April 30 annually. During these periods, combined storage in South Feather's reservoirs is reduced by 18% (29,356 AF).

7. In 2008 South Feather participated in a water transfer involving the release of water stored in South Feather's reservoirs. Based on that experience, the Board of Directors of South Feather resolved to not participate in future water transfers. One objectionable experience from South Feather's 2008 transfer is DWR's interpretation of refill criteria; given Lake Oroville's location downstream of South Feather's reservoirs, DWR adopted the position that South Feather's reservoirs could not refill the storage space vacated by the water transfer until Lake Oroville actually or theoretically spilled.

8. South Feather owns and operates hydroelectric power plants and sells the electricity generated under a long-term agreement with Pacific Gas & Electric. I have reviewed the provisions of Water Code section 540 and the definitions contained in Public Utility Code section 331. Based on the my understanding of the foregoing and after consulting with South Feather's legal counsel, Dustin Cooper, it is my conclusion that South Feather is not an electrical "aggregator" that "combines the loads of multiple end-use customers in facilitating the sale and purchase of electric energy, transmission, and other services on behalf of these customers." Furthermore, given South Feather's agreement with PG&E, and not directly with any retail electricity customers, it is my opinion that South Feather is not engaged in any direct transaction addressed by section 540.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this the 6th day of August, 2013, at Oroville, California.

Michael C. Glaze, General Manager
South Feather Water & Power Agency