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January 29, 2019

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: *California Regional Water Quality Control Board, Los Angeles Region, Order No. 94-2012-0175,* 13-TC-01 and 13-TC-02

Dear Ms. Halsey:

Enclosed for filing in this matter please find: (1) Rebuttal Comments of Los Angeles County Local Agency Test Claimants (Cities); (2) Rebuttal Comments of County of Los Angeles and Los Angeles County Flood Control District; (3) Attachments 1 and 2 to comments (Declaration of David W. Burhenn and Declaration of Karen Ashby); and (4) Section 7 Rebuttal Documents (cases and other legal authorities).

Thank you for your attention to this matter.

Very truly yours,

Howard Gest

HDG:da

REBUTTAL COMMENTS OF LOS ANGELES COUNTY LOCAL AGENCY TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, ORDER NO. R4-2012-0175, 13-TC-01 and 13-TC-02

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REBUTTAL COMMENTS OF LOS ANGELES COUNTY LOCAL AGENCY JOINT TEST CLAIMANTS, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, ORDER NO. R4-2012-0175, 13-TC-01 AND 13-TC-02

I. INTRODUCTION

Joint Test Claimants Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village and Whittier (collectively, "Claimants") jointly file this Rebuttal to the comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB") (collectively, "Water Boards") and the Department of Finance ("DOF") concerning Test Claims 13-TC-01 and 13-TC-02, *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175* (the "Joint Test Claims").

This Rebuttal addresses each of the comments made by the Water Boards and the DOF. In summary, the Water Boards contend that Claimants are not entitled to a subvention of state funds for the mandates contained in Order No. R4-2012-0175 (the "2012 Permit") because:

(a) the mandates were neither "new programs" nor represented "higher levels of service" (Water Boards' Comments ("WB Comments") at 22-30);

(b) the mandates were federal, not state in nature (WB Comments at 30-35);

(c) Claimants had fee authority to fund the mandates (WB Comments at 35-40); and

(d) by participating in a Watershed Management Program ("WMP") or Enhanced Watershed Management Program ("EWMP"), Claimants have voluntarily undertaken 2012 Permit requirements (WB Comments at 40-44).

The Water Boards apply these contentions to each of the mandates at issue (WB Comments at 44-140). The DOF argues only that the Claimants had fee authority to fund the mandates, and does not otherwise address the Joint Test Claims. DOF Comments at 1-2.

Although the Water Boards' and DOF's comments are lengthy, the test claims are governed by these established principles:

1. The test as to whether a mandate is new is whether the local government or agency was previously required to comply with the requirement at issue. This is determined by comparing the requirement with the pre-existing scheme. *See San Diego Unified Dist. v. Commission on State Mandates* ("*San Diego Unified School Dist*.") (2004) 33 Cal.4th 859, 878. As set forth below, the mandates at issue were not previously required.

2. The test as to whether a mandate is a higher level of service is whether there is "an increase in the actual level or quality of government services provided." *San Diego Unified School*

Dist., 33 Cal.4th at 877. Each of the mandates here increases the level or quality of government services provided.

3. The test as to whether a mandate is a program within the meaning of article XIII B, section 6, is whether its requirements are "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." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Each of the requirements at issue here provides services to the public. Moreover, they do not apply generally to all residents.

4. The test as to whether a mandate is a federal or state mandate is "if federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. . . [I]f federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federal mandated." *Department of Finance v. Commission on State Mandates* ("*Dept. of Finance*") (2016) 1 Cal.5th 749, 765. Federal law does not impose or compel the mandates at issue here.

5. The test as to whether a federal regulation creates a federal mandate is whether the regulation "expressly" or "explicitly" requires the provision at issue. *Department of Finance v. Commission on State Mandates* (*Dept. of Finance II*") (2017) 18 Cal.App.5th 661, 683. No federal regulation expressly or explicitly requires the provisions at issue here.

6. The State has the burden of showing a requirement is mandated by federal law or that it falls under any other exception to reimbursement. *Dept. of Finance I*, 1 Cal.5th at 769. A Water Board finding that a challenged requirement was federally mandated is not entitled to deference unless the Water Board finds, when imposing the disputed permit requirement, that it was the *only* means by which the maximum extent practicable standard could be implemented. *Id*. at 768. This finding must be case specific and supported by legal authority or the record. *Id*. The Water Boards have not shown that the requirements at issue here are the only means by which the maximum extent practicable standard can be implemented.

7. A state mandate can also be created where the State usurps a local agency's discretion and directs the means to comply with federal law, *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, or if the State freely chooses to shift the cost of a federal program onto the local agency. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594. As discussed below, the state has directed the means to comply with the CWA or shifted costs of compliance from itself to the local agencies for many of the mandates at issue.

8. 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. Gov't. Code §17565. This is the case for the mandates where activity took place before the adoption of the 2012 Permit.

9. The test as to whether local agency has fee authority is whether the local agency can impose a fee without voter or property owner approval. *In re Test Claim on: San Diego Regional Water Quality Control Order No. R9-2007-0001*, Case No. 07-TC-09 (2010), Statement of Decision ("San Diego County SOD") at 107.[1] Claimants do not have fee authority here.

In Section II below, Claimants address the Water Boards' general comments on the Joint Test Claims. WB Comments at 1-35, 40-44. In Section III, Claimants address the Water Boards' comments on the specific mandates at issue (WB Comments at 44-140). Section IV contains Claimants' response to the comments of the Water Boards and the DOF on Claimants' fee authority (WB Comments at 35-40; DOF Comments at 1-2).

REBUTTAL TO COMMENTS OF WATER BOARDS

II. RESPONSE TO GENERAL COMMENTS

A. *The Supreme Court's Decision in* Department of Finance v. Commission on State Mandates *Applies Directly to the Joint Test Claims*

The Water Boards first argue (WB Comments at 4-6) that the issues in these Joint Test Claims can be distinguished from those before the California Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749 , the seminal case on what constitutes a state versus federal mandate in the context of a stormwater permit issued under the federal Clean Water Act ("CWA"). In relevant part, the Water Boards argue that, notwithstanding the Supreme Court's holding that the Commission should not defer to Regional Board findings unless the Regional Board finds that the permit requirements were the *only* means by which the CWA's maximum extent practicable ("MEP") standard could be implemented, *Dept. of Finance*, 1 Cal.5th at 768, the Commission should nevertheless defer the Regional Board's findings here. WB Comments at 5.

As will be discussed in Section I.F.1 below, the LARWQCB did not in fact make findings that would allow this Commission to defer to the Board's judgment as to what constituted a federal mandate.[2] Those findings did not find that the 2012 Permit's requirements were the only means to implement the MEP standard and fall far short of the standard established in *Dept. of Finance.*

Dept. of Finance directly applies to these Joint Test Claims, and most particularly these three holdings:[3]

---

[1] The issue of whether a Claimant has fee authority if it has to first hold a protest hearing is currently in litigation.

[2] The other alleged distinctions raised by the Water Boards relate to issues not decided by the Supreme Court in *Dept. of Finance* (WB Comments at 5-6) and are addressed below. These are that the requirements in the 2012 Permit are not new programs or higher levels of service, that *Dept. of Finance* allegedly did not address other federal mandates, that none of the requirements in the former permit were found in EPA-issued MS4 permits and that the question of fee authority was not addressed.

[3] *See also* discussion in Section 5 Narrative Statement in Support of Joint Test Claim 13-TC-01 ("Cities Narrative Statement") at 7-8.

- *How is a mandate in a stormwater permit determined to be "federal" or "state"?*

> The Supreme Court set forth this test:
>
> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," that requirement is not federally mandated.

1 Cal. 5th at 765. In so holding, the Court noted the wide discretion afforded the State in determining what requirements would meet the maximum extent practicable standard. *Id.* at 768.

- *Must the Commission defer to the Water Boards' determination of what constitutes a federal mandate?*

The Supreme Court refused to grant such deference. The Court found that in issuing the former 2001 Los Angeles County stormwater permit ("2001 Permit"), "the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* at 768. The Court cited as authority its opinion in *City of Burbank v. State Water Resources Control Board* (2005) 5 Cal. 4th 613, 627-28 ("*City of Burbank*"), where it held that a federal National Pollution Discharge Elimination System ("NPDES") permit issued by a regional water board (such as the 2012 Permit) may contain State-imposed conditions that are more stringent than federal law requirements.

The Court squarely addressed the Water Boards' argument, made again here (WB Comments at 30-34), that the Commission should defer to the LARWQCB's determination that the challenged requirements in the 2012 Permit were federal mandates. Finding that this determination "is largely a question of law," the Court distinguished circumstances where the question involved the regional board's authority to *impose* specific permit conditions from those involving the question of who would *pay* for them. In the former circumstance, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768. But, the Court held,

> Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

Id. at 769.

- *Who Has the Burden of Establishing an Exception to Reimbursement of State-Mandated Costs?*

The Supreme Court placed on the State the burden of establishing that a mandate was in fact federal. In placing that burden, the Court held that because article XIII B, section 6, of the Constitution established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.* at 769.

The Supreme Court concluded that requiring the Commission to defer to a regional board would "leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." *Id.* Looking to the policies underlying article XIII B, section 6, the Court concluded that the Constitution "would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question." *Id.*

The Court held that the *only* circumstance under which deference to the Water Boards' expertise would be appropriate was if a regional board had "found, when imposing the disputed permit conditions, that those conditions were *the only means* by which the [MEP] standard could be implemented," which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15 (emphasis supplied). As discussed in Section I.F.1 below, there are no such explicit findings in the 2012 Permit.

The Supreme Court further found that in assessing whether federal law or regulation required a particular provision, it was important to examine the scope of the regulatory language. In discussing inspection requirements in the federal stormwater regulations for example, the Court rejected the Water Boards' argument that all permit-required inspections were federally mandated "because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* at 771. The Court held instead that the mere fact that the federal regulations "contemplated some form of inspections . . . does not mean that federal law required *the scope and detail* of inspections required by the Permit conditions." *Id.* (emphasis supplied).

This last holding is important in assessing the federal versus state character of the requirements at issue in these Joint Test Claims. Repeatedly, the Water Boards cite general federal regulatory language as mandating the LARWQCB to impose the specific and prescriptive requirements at issue in these Joint Test Claims. However, as the Supreme Court held, the existence of general federal permit regulations does not mean that those regulations "required the scope and detail" of the 2012 Permit provisions at issue.

B. *The Court of Appeal's Opinion in* Dept. of Finance II *Reinforces Claimants' Position on This Joint Test Claim*

The issue of federal authority for provisions in a similarly complex MS4 permit was addressed in detail by the court in *Dept. of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, *review denied,* (April 11, 2018) 2018 Cal. LEXIS 2647 ("*Dept. of Finance II"*).

This case provides an even clearer roadmap for the Commission to follow in assessing the federal mandate arguments raised by the Water Boards.

The test claim in *Dept. of Finance II* concerned a 2007 stormwater permit adopted by the San Diego Water Board. 18 Cal.App.5th at 671. In the permit, the board recited that it contained "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." *Id.* In attempting to distinguish the former Los Angeles County MS4 permit at issue in *Dept. of Finance*, the State argued that "the San Diego Regional Board here made a finding its requirements were 'necessary' in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make." *Id.* at 682.

The Court of Appeal found this distinction to be of no importance:

> The use of the word "necessary" also does not distinguish this case from *Department of Finance*. By law, a regional board cannot issue an NPDES permit to MS4's without finding it has imposed conditions "necessary to carry out the provisions of [the Clean Water Act]. That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the condition it imposed had done so. . . .
>
> Third, the Supreme Court in *Department of Finance* rejected the State's argument that the permit application somehow limited a board's discretion or denied it a true choice. "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit." . . .
>
> The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the [MEP]. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

Id. at 683 (citations omitted).

Under *Dept. of Finance II*, the fact that a water board may have determined that permit conditions were "necessary" to meet the MEP standard (and the Water Boards here argue a similar point, WB Comments at 5) is irrelevant to the question of whether those conditions were federal mandates. Instead, the test is whether the Regional Board had a choice as to whether to impose the condition at issue. *Id.* ("The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.")

Dept. of Finance II directly applies to how the mandates in these Joint Test Claims should be analyzed. First, the opinion is firmly rooted in the Supreme Court's opinion. The court cited *Dept. of Finance* in all of its holdings, and stated specifically that it was "[f]ollowing the analytical

regime established by *Department of Finance."* 18 Cal.App.5th at 667. In upholding the Commission, the court stated that it reached that conclusion "on the same grounds the high court in *Department of Finance* reached its conclusion." *Id.* Indeed, much of the opinion consists either of direct quotation of *Dept. of Finance* or a detailed description of the high court's analysis. *Id.* at 668-70; 676-80. These facts, and the fact that the Supreme Court denied review, establish that *Dept. of Finance II* represents controlling law.

Second, *Dept. of Finance II* affirmed the Supreme Court's holding that the language of general regulations describing what must be included in an NPDES permit application did not establish a federal mandate:

> To be a federal mandate for purposes of section 6 [of article XIII B of the California Constitution], however, the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit.

Id. at 683. In particular, the court found that the federal stormwater permit application regulations in 40 CFR § 122.26(d) did not render any of the permit conditions to be federal mandates. *Id.* at 684-89. This holding is directly relevant to these Joint Test Claims, as the Water Boards have justified the bulk of the 2012 Permit provisions at issue by reference to these regulations. *See* WB Comments at 58-59, 62, 71-72, 76-77, 82, 84-85, 89, 95-96, 99-100, 102, 104, 107, 110-111, 112-114, 115, 117, 120, 122, 125, 127, 129, 134, 137 and 139 (discussing provisions in 40 CFR § 122.26(d) as authority for 2012 Permit provisions).[4]

Third, unlike in *Dept. of Finance*, where the Court considered only limited provisions of the former Los Angeles County permit dealing with the placement of trash receptacles and facility inspections, *Dept. of Finance II* considered several complex programmatic permit conditions, including the permittees' jurisdictional management programs, watershed management programs, urban runoff management programs and assessment programs. *Id.* at 671-72. *Dept. of Finance II* thus has direct application to the specific provisions of the 2012 Permit at issue in these Joint Test Claims, which are in concept and detail similar to the permit provisions at issue in that case.

C. *The Water Boards Incorrectly Set Forth the Legal Basis for the 2012 Permit*

In discussing the "Regulatory Overview of the Clean Water Act MS4 Program" (WB Comments at 7-14), the Water Boards fail to set forth a complete account of the statutory and regulatory basis for the 2012 Permit.

First, a state with authorization to issue permits acts *in lieu* of federal requirements and not as *an arm* of U.S. EPA. The CWA "allows the EPA director to 'suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems *that operate under*

[4] The Water Boards have also relied on an EPA guidance document and regulations governing so-called Phase II MS4 permits, which regulate smaller MS4 operators, but not the Claimants in these Joint Test Claims. *See* discussions in Section II, below. Neither the guide nor the Phase II regulations provide authority for the provisions in the 2012 Permit at issue in these Joint Test Claims.

those state's own laws in lieu of the federal framework." Voices of the Wetlands v. State Water Resources Control Bd. (2011) 52 Cal.4th 499, 522 (emphasis supplied).[5] The State is not acting as a mere arm of the federal government when it issues a MS4 permit.

Second, while EPA maintains oversight over California's NPDES permitting programs, that oversight is limited to the permit's compliance with *federal* requirements. If a permitting authority, such as the LARWQCB, elects to use its federal and state law authority to issue more stringent conditions in an NPDES permit than are required under federal law and regulations, EPA has no oversight authority over such conditions, which are purely a matter of state law. *See Dept. of Finance,* 1 Cal. 5th at 757 ("California's permitting system now regulates discharges under both state and federal law.")

The Water Boards also fail to discuss how *Dept. of Finance* and *Dept. of Finance II* have clarified the meaning of the MEP standard as it may apply to test claims. The Water Boards contend that MEP is an "ever evolving, flexible and advancing concept." WB Comments at 11. This is not, however, the test that California courts (and this Commission) must employ. As discussed in further detail in Section I.F below, the question of whether a permit condition is a federal or state mandate is one which requires an examination of the regulatory or statutory authorization for that provision and whether that authorization was "express" or "explicit." If not, the provision is a state mandate. *See generally, Dept. of Finance II,* 18 Cal.App.5th at 683.

The Water Boards further contend that the final clause in 33 U.S.C. § 1342(p)(3)(B)(iii), providing that MS4 permits "shall require . . . such other provisions as the Administrator or the State determines appropriate for the control of such pollutants," means that permit requirements under the authority of this part of the statute are federal mandates. WB Comments at 12-13.

This is not correct. According to the Ninth Circuit, that clause is a "discretionary provision." 191 F.3d at 1166, cited with approval in *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 886. Thus, because this last phrase is a grant of discretion, not a mandate, permit requirements imposed under it are also discretionary and not a mandate. *Defenders of Wildlife v. Browner ("Defenders"),* 191 F.3d 1159, 1166 (9th Cir. 1999).[6]

D. *The Permit's Background*

The Water Boards' discussion of the development of the 2012 Permit and predecessor MS4 permits (WB Comments 14-20) is also not accurate. The Water Boards argue that various mandates in the 2012 Permit do not impose "new programs" or require "higher levels of service" because prior permits allegedly contained provisions "that were very similar or equivalent" to

[5] *See also* Cities Narrative Statement at 5.

[6] The Water Boards also make claims regarding the federal law basis for Total Maximum Daily Loads ("TMDL") requirements. WB Comments at 13. These assertions are addressed in Section II.A below. The Water Boards also argue generally (with no reference to specific 2012 Permit provisions) that federal law requires monitoring and reporting requirements in NPDES permits. The discussion of why those requirements constitute an unfunded state mandate can be found in Section II.

those in the 2012 Permit (WB Comments at 15). The Water Boards concede, however, that there was a lack of specificity in the 1990 and 1996 permits (WB Comments at 16).

Because these permits did not contain the specific programs at issue here, it cannot be said that those prior permits mandated these programs. The Commission has already held that if a pre-existing MS4 requirement is expanded in a succeeding permit, that expansion represents a new program or higher level of service. *In Re Test Claim On: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758,* Test Claim No. 07-TC-09 ("SD County SOD") at 49.[7] That holding applies here.

The Water Boards also ignore *Defenders, supra,* in their discussion of the requirement for permittees to meet numeric receiving water quality standards (WB Comments at 16-17). The Water Boards state that a precedential State Board order (Order WQ 99-05) "reflects" a U.S. EPA requirement. *Id.* The requirements of the CWA, however, are set forth in *Defenders,* which held that the CWA does not require municipal stormwater permits to comply with water quality standards or contain numeric effluent limits, and if the permitting agency chooses to include such provisions, their inclusion is a discretionary choice, not a statutory mandate. *Defenders,* 191 F.3d 1166. In fact, State Water Board Order WQ 99-05 was issued before EPA and the State Water Board received the guidance set forth in the Ninth Circuit's holding in *Defenders* that MS4 permittees were not required to meet water quality standards or numeric water quality standards. 191 F.3d at 1164-65.

Finally, while the Water Boards set forth in detail the rationale for the regulatory approaches followed in the 2012 Permit (WB Comments at 19-20), that rationale is not relevant to the issues in these Joint Test Claims. The issue in these Joint Test Claims is not whether the Water Boards should have included in the 2012 Permit the requirements at issue here. As the Supreme Court held in *Dept. of Finance,* the question before the Commission "is who will pay for them." 1 Cal. 5th at 769, *i.e.* are they state mandates for which Claimants are entitled to as subvention of funds pursuant to Article XIII B, section 6, of the Constitution.

E. *The Mandates Set Forth in the Joint Test Claims Are New Programs and/or Represent Requirements for Higher Levels of Service*

Article XIII B, section 6 of the California Constitution requires that the Legislature provide a subvention of funds to reimburse local agencies when the Legislature or a state agency "mandates a new program or higher level of service on any local government." The Water Boards assert that the 2012 Permit provisions in these Joint Test Claims do not impose new programs or require higher levels of service by the Claimants (WB Comments at 21-30.) This assertion is supported neither by the facts nor the law.

[7] Included in Section 7 Rebuttal Documents, Tab 4.

1. *The Requirements of the 2012 Permit in These Joint Test Claims Represent a "Program"*

The Water Boards first argue that the CWA requires all dischargers of stormwater, including municipalities, private industry and state and federal government, to obtain NPDES permits. WB Comments at 21. Thus, claim the Water Boards, "Local government is not singled out." *Id.*

This very argument has, however, already been addressed – and rejected – by the Commission. In the SD County SOD, the Commission stated: "The State Board and Regional Board filed joint comments . . . alleging that the permit . . . is not unique to government because NPDES permits apply to private dischargers also." SD County SOD at 30. The Commission rejected that argument, noting that the focus on the inquiry of whether a reimbursable program exists must be on the *executive order itself, e.g.,* the permit: "[W]hether 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." SD County SOD at 36 (emphasis supplied). *See also In re Los Angeles County Regional Water Quality Control Board Order No. 01-182, Permit CAS004001,* Test Claim No. 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21 ("LA County SOD") at 48.[8]

The Commission was applying the decision of the Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919, where the court dismissed a similar argument: [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." *Id.*

The Commission found that the San Diego County permit applied only to municipalities, that no private entities were regulated thereunder, and that the permit provided a service to the public through its requirement for the permittees "to reduce the discharge in urban runoff to the maximum extent practicable." SD County SOD at 36. Those same facts, and the Commission's analysis, apply as well to the 2012 Permit.

The Water Boards argue (WB Comments at 23-24) that the 2012 Permit does not carry out a governmental function of providing services to the public, one of the two definitions of a "program" under article XIII B, section 6. *County of Los Angeles v. State of California, supra,* 43 Cal.3d at 56; *see also San Diego Unified School Dist.* 33 Cal. 4th at 878. Reprising their "all dischargers must have NPDES permits" argument, the Water Boards contend that since Claimants were required to obtain NPDES permits for their MS4 discharges, they were obtaining an NPDES permit as just another point source discharger under the CWA, not as a governmental entity. WB Comments at 23.

As noted, this argument has already been addressed, and rejected, by the Commission. Most importantly, this argument does not analyze the specific permit provisions at issue in this test

[8] Attached in Section 7 Rebuttal Documents, Tab 4.

claim, which the Court in *County of Los Angeles v. Commission on State Mandates* called for. 150 Cal.App.4th at 919 ("T]he applicability of permits to public and private dischargers does not does not inform us about whether a particular permit *or an obligation thereunder* imposed on local governments constitutes a state mandate necessitating subvention . . .") (emphasis added). Whereas some Permit provisions might be analogous to provisions in permits issued to private parties, others, including the ones at issue here, are not: they provide a governmental service to citizens of Los Angeles County that private parties are not called upon to provide. This is discussed in more detail in the section addressing each specific permit provision.

The Water Boards, not surprisingly, criticize the Commission's findings in the LA County SOD,[9] arguing that the Commission's approach "fails to appropriately focus on whether the permit mandates functions peculiar to government" and "obscures" the CWA's focus on the regulation of pollutant discharges. *Id.* The Water Boards then argue that they have "issued hundreds, if not thousands, of NPDES permits to both public and private entities." (WB Comments at 24).

Again, that criticism misses the point made by the court in *County of Los Angeles, supra,* and the two previous MS4 test claim SODs issued by this Commission. The fact that NPDES permits may be issued to both public and private dischargers does not render the NPDES permit at issue in these Joint Test Claims, an MS4 permit applicable *only* to municipalities and addressing specific municipal requirements, not a "program." The "hundreds, if not thousands" of NPDES permits issued by the Water Boards did not require their permittees to:

- Implement and monitor TMDLs relating specifically to discharges from MS4 systems operated only by municipalities;

- Prohibit the discharge of certain non-stormwater discharges through the MS4s to receiving waters and conduct related monitoring, including coordinating with local water purveyors, developing a coordinated outreach and education program to minimize irrigation water discharge and conducting special evaluation of monitoring data;

- Undertake enhanced public information programs, including providing means for public reporting of clogged catch basin inlets or illicit dumping, organizing events to educate the public on stormwater and non-stormwater pollution problems, conducting public service announcements, providing public education materials, including at various retail outlets and schools, ensuring that ethnic communities within the municipality are identified and provided with appropriate culturally effective methods;

- Inventory and inspect industrial and commercial dischargers, including tracking of nurseries and nursery centers, inspecting various commercial facilities, including restaurants, automotive service facilities, gasoline stations, and nurseries twice during the permit term, with such inspections to meet criteria outlined in the permit, and inspecting industrial facilities and evaluating best management practices ("BMPs") at those facilities;

[9] The Water Boards do not discuss the analysis adopted in the later-decided SD County SOD.

- Track and inspect post-construction BMPs and enforce requirements for new development and re-development BMPs, including requiring municipalities to implement an electronic system to track development projects with post-construction BMPs, inspecting development sites before issuance of an occupancy certificate to confirm proper installation of BMPs installed for various purposes, and developing a post-construction BMP maintenance inspection checklist for permittee facilities and inspect such BMPs every two years;

- Inspect and inventory construction sites, including developing an electronic system to inventory municipal construction permitting activities, developing and implementing review procedures for construction plan documents, developing and implementing technical standards for the selection, installation and maintenance of construction BMPs, making technical standards readily available to the development community, inspecting construction sites of one acre or greater at specified intervals and evaluating the effectiveness of site BMPs, among other factors, and conducting staff training on specified topics for staff who may review plans and issue permits;

- Conduct various activities relating to permittee-owned municipal facilities and retrofitting, including inventorying permittee owned or operated facilities that may be potential sources of stormwater pollution, developing an inventory of retrofitting opportunities for existing development, screening existing development areas to identify candidate areas for retrofitting and to evaluate and rank candidate areas, requiring permittees to cooperate with private landowners to encourage site specific retrofitting projects using specified factors, implementing an integrated pest management program, installing trash excluders in areas not subject to a Trash TMDL or alternative measures and training all employees or contractors that use or have the potential to use pesticides or fertilizers regarding the proper use, handling and disposal of pesticides, less toxic methods of pest prevention and control and the reduction of pesticide use; and

- Address illicit connections and discharges to municipal storm drain channels, including ensuring that open channel signage includes public reporting of illicit discharges, developing and maintaining written procedures documenting how complaint calls are handled and tracked, maintaining documentation of complaint calls and recording the location of a spill or discharge and the action taken in response, implementing a spill response plan for sewage and other spills that may discharge into the MS4, requiring identification of responsible agencies and contact information in spill response plans and addressing coordination with spill response teams through departments, programs and agencies of the municipality and containing spills within four hours of becoming aware of the spill or within two hours of obtaining legal access to spills on private property.[10]

[10] *See* Cities Narrative Statement at 10-32.

The scope of these exclusively municipal and governmental requirements also completely refutes the second prong of the Water Boards' "program" argument, that the 2012 Permit does not impose "unique requirements on local governments." WB Comments at 24-27. No private party is required to perform the activities described above. These requirements are imposed uniquely on Claimants.

As set forth above, the Commission previously has held that MS4 permits, such as the 2012 Permit, do impose unique requirements on local agencies. *See* SD County SOD at 36. *See also* LA County SOD at 49. As the Commission held in the latter, "the issue is not whether NPDES permits generally constitute a 'program' within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim . . . constitutes a program because this permit is the only one over which the Commission has jurisdiction." *Id.* These holdings apply here.

The Water Boards nevertheless argue that the CWA is a "law of general applicability." WB Comments at 24. The Water Boards argue that the "state policy" implemented by the 2012 Permit is that the CWA and Chapter 5.5 of the state Porter-Cologne Act require NPDES permits "be consistent with the Clean Water Act," a policy which "applies generally to all residents and entities in the state and does not apply uniquely to local governments." *Id.*[11]

Again, this argument has already been rejected by the Court in *County of Los Angeles v. Commission on State Mandates* and this Commission in the San Diego and Los Angeles County SODs. *County of Los Angeles*, 150 Cal.App.4th at 919 ("[T]he applicability of permits to public and private dischargers does not does not inform us about whether a particular permit *or an obligation thereunder* imposed on local governments constitutes a state mandate necessitating subvention . . .") (emphasis added); SD County SOD at 36 ("[W]hether 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."). *See also* LA County SOD at 48.

Indeed, the Water Boards' argument ignores the fact that the requirements of the CWA and its implementing regulations directed to MS4 owners and operators *are completely separate* from the NPDES requirements applicable to other dischargers. In addition to the fact that there are specific requirements in the statute applicable to MS4s, relating to programs designed specifically to address the operation of MS4s, the federal CWA implementing regulations for MS4 permits are contained in a completely separate section (40 CFR § 122.26).

[11] The Water Boards allege that "[n]umerous provisions of the 2012 Permit are requirements of general applicability" which are "similar" to those in permits issued to private dischargers (WB Comments at 24), but nowhere specifically identify those alleged requirements or how they are the same as those for private dischargers. For example, while both private NPDES permittees and MS4 permittees are required to monitor discharges, the Water Boards nowhere show that those monitoring requirements are identical, or that there are not unique monitoring requirements imposed on local government. To the contrary, private NPDES permittees are not required to inspect third-party facilities, develop plans for development, address multiple types of public facilities or discharges into public storm drain channels, all of which, and more, are required in the 2012 Permit. *See also* Cities Narrative Statement at 10-32.

Further, it cannot be disputed as a matter of fact that the 2012 Permit is "imposed uniquely upon local government." The first page of the permit states that the County, the District and 84 incorporated cities within the coastal watersheds of Los Angeles County "are subject to waste discharge requirements as set forth in this Order." 2012 Permit at 1. The remainder of the requirements in the permit, including those at issue in these Joint Test Claims, are exclusively directed to those permittees, including the Claimants. The 2012 Permit is imposed uniquely on local agencies, and it serves a public purpose, *e.g.*, the regulation of pollutants in discharges. *See* 2012 Permit Section II.A (Nature of Discharges and Sources of Pollutants), 2012 Permit at 13.

The 2012 Permit, moreover, is directed at regulating the performance by local governments of a core duty of local governments, the protection of the life and property of residents from flood waters. Unlike industrial or commercial NPDES permittees, whose only legal responsibility is the lawful discharge of effluent from their facilities, municipalities must ensure the safe conveyance and discharge of stormwater in order to protect public health and property. An industrial facility can choose not to discharge by changing or ceasing its operations. A local agency operating an MS4 has no such choice when storms arrive. It must safely handle stormwater or face inverse condemnation and tort liability for flooding resulting from a failure to do so. *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.[12] Thus, an MS4 operator is legally compelled to obtain an MS4 permit so it can continue to carry out the uniquely governmental function of safely handling and discharging stormwater.

The Water Boards cite *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51 in support of their argument that the requirements of the 2012 Permit do not constitute a "program." WB Comments at 25-26. *City of Sacramento*, however, is inapposite. The Supreme Court there was considering whether a state statute which had the effect of requiring local governments to provide unemployment compensation to their own employees represented a "program." The Court concluded that simply requiring local governments to cover the unemployment costs of their employees, a requirement "'indistinguishable in this respect from private employers,'" was not a requirement imposed uniquely on local government. *Id.* at 67 (quoting *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 58). The Court noted, however, that "our standards [still] require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." *Id.* at 70 (emphasis in original).

The requirements at issue in these Joint Test Claims are precisely those which "the state freely chooses to impose on local agencies," particularly governmental costs "which they were not previously required to absorb." Unlike the unemployment compensation statute at issue in *City of Sacramento*, the 2012 Permit mandates local governments to undertake various public activities while undertaking the "peculiarly governmental" role of undertaking flood control to protect public health and safety. Again, as the Commission has held, it is the requirements of the 2012 Permit which constitutes the "program" under review, and the requirements of that permit are not generally applicable. *See* SD County SOD at 36; LA County SOD at 49.

[12] Attached in Section 7 Rebuttal Documents, Tab 1.

City of Richmond v. Commission on State Mandates (1998) 64 Cal.App.4th 1190, also cited by the Water Boards (WB Comments at 26), is equally inapposite. *City of Richmond* involved a statute which removed a limit on the right of survivors of deceased public employees from receiving both public retirement and workers compensation benefits. As a result, the city alleged that a state mandate had been created, since it was now responsible for the payment of increased survivor benefits. *Id.* at 1194. The court found that the resulting higher cost to the local government for compensating its employees was "not the same as a higher cost of providing services to the public." *Id.* at 1196. The court distinguished cases like *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, where "executive orders applied only to fire protection, a peculiarly governmental function." *Id.* That phrase precisely defines the 2012 Permit, which applies only to the operation and discharge of municipal storm drain systems, another "peculiarly governmental function."

City of Richmond also is distinguishable because it involved a statute which covered a subject of general application, employment benefits. By removing the limitation on the rights of survivors, "the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no 'unique requirements' on local governments." *Id.* at 1199. *City of Richmond* is simply a variation on *City of Sacramento,* and as irrelevant to these Joint Test Claims as the earlier case.

The Water Boards ask the Commission to speculate on what the Commission would hold if the Regional Board issued "identical NPDES permits to local governments and industrial dischargers." It is undisputed, however, that the permit obligations at issue in this Joint Test Claim are not identical to permit requirements issued to industrial dischargers. As the Commission held in the proceedings arising from the 2006 San Diego stormwater permit, "the only issue before the Commission is whether the *permit in this test claim* constitutes a program." SD County SOD at 36 (emphasis supplied). *See also* LA County SOD at 48.[13]

Finally, the Water Boards' argument that NPDES requirements are "[l]aws of general applicability" (WB Comments at 24) ignores the fact that both the California Supreme Court and the Court of Appeal have decided mandates cases involving stormwater NPDES permits and in so doing have interpreted the California Constitution. Were these permits "laws of general applicability," the courts could have avoided performing an extensive constitutional analysis when a fairly simple statutory analysis would have sufficed.

[13] The Water Boards note (WB Comments at 27) that in the *Dept. of Finance* case on remand from the Supreme Court, the trial court found that the mandated programs at issue in the 2001 Permit were not subject to a subvention of funds because, even though the requirements of an MS4 permit were in fact "unique" to local governments, such requirements were merely "incidental" to laws which allegedly applied to all residents. The trial court, however, ignored the structure of the CWA and its implementing regulations and the holdings of *County of Los Angeles v. Commission on State Mandates, supra,* and *Dept. of Finance II* in reaching this holding. Moreover, the trial court ignored the undisputed fact that the LARWQCB exercised its discretion to impose such requirements, hardly an "incidental" act and, under *Dept. of Finance II,* indicative of a state mandate. 18 Cal.App.5th at 683. Claimants have filed a Notice of Appeal with respect to that decision.

2. *The Mandated Programs Set Forth in the Joint Test Claim Represented "New Programs" as a Matter of Fact and Law*

In Section II, Claimants respond in detail on whether specific 2012 Permit requirements represent a new program or higher level of service. But the following points can be made here. As the Water Boards concede, a "program is 'new' if the local government had not previously been required to institute it." WB Comments at 27, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189. All of the mandated programs identified in the Joint Test Claim are "new" in that they were not previously required to be performed by Claimants under the 2001 Permit.

Arguing that the requirements of the 2012 Permit were not new programs, the Water Boards simply contend, without citation to either the 2012 Permit or previous MS4 permits issued to Claimants, that "many, (if not all) of the requirements at issue in the Test Claims are not new." WB Comments at 27. The Water Boards cite no such allegedly non-new programs, relying instead on the argument that the "inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the Clean Water Act and these new and advanced measures do not constitute a new program." WB Comments at 28.[14] This argument has previously been rejected by the Commission. The Commission's test is whether the *specific requirements* of the 2012 Permit at issue in these Joint Test Claim were also included in previous stormwater permits. As the Water Boards themselves concede ("these new and advanced measures", WB Comments at 28), they were not. Whether "the inclusion of new and advanced measures . . . is anticipated under the Clean Water Act" (WB Comments at 28) may go to whether the measures are federal or state, but it does not go to whether they are new.

The Commission has held that any new requirements not contained in a previous permit, even when those programs were only expanding on a program contained in the previous permit, constituted a new program or higher level of service. *See* SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan ("SUSMP") and local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service). The same analysis applies to the requirements at issue in these Joint Test Claims.

3. *The Mandated Programs Identified in the Joint Test Claims Imposed Higher Levels of Service on the Claimants*

Claimants have demonstrated that the requirements of the 2012 Permit at issue were new programs, eligible for a subvention of funds. Having established this, Claimants need go no further. Yet, to the extent that such requirements instead represented a "higher level of service," this fact also has been established. In the Narrative Statements, Claimants set forth precisely how the requirements of the 2012 Permit were additional to those in the 2001 Permit. These additional requirements imposed separate and additional increased costs on Claimants. In fact, as noted

[14] The failure of the Water Boards to support their argument with facts in the record violates the requirements of the Commission's own regulations, which require that if "representations of fact are made, they shall be supported by documentary or testimonial evidence . . . ." 2 Cal. Code Reg. § 1183.2(c)(1).

above, the Commission has found that even enhancement of requirements found in previous MS4 permits constitutes a "higher level of service" in the subsequent permit. SD County SOD at 53-54.

As they argued in contending that the 2012 Permit and its requirements were not a "program," the Water Boards improperly collapse the Permit's multiple and complex requirements into a simple requirement for "better water quality," a goal which has remained the same over the history of MS4 permitting. WB Comment at 28. Again, it is not the overall goals of the CWA and Porter-Cologne which is the focus. Those "overall goals" are not the "program" before the Commission. As set forth in Section I.E.1, the 2012 Permit requires specific, different and enhanced services to the public by the permittees, including the preparation of planning documents, extra training in stormwater issues of the public employees that process permits, inspections of commercial and industrial facilities and construction sites that involve more intense review, tracking and inventorying. These requirements all involve providing enhanced services to the public and increased costs to the permittees, as set forth in the Section 6 Declarations.[15]

The fact that these requirements are exclusive to the permittees under the 2012 Permit will be discussed with regard to each item in Section II. And, while the Water Boards may attempt to characterize these requirements where they expand on a requirement from the 2001 Permit as "merely refinements of existing requirements" (WB Comments at 28), the Commission has held that such expansions on existing requirements in fact are higher levels of service. SD County SOD at 53-54.

In fact these requirements were not simply "refinements" of existing Claimant responsibilities or a requirement as the Water Boards argue, WB Comments at 28, or a requirement that "municipalities reallocate some of their resources in a particular way." WB Comments at 29. The Water Boards never explain how, with appropriate documentary or testimonial evidence, the mandates at issue in the Joint Test Claim could be paid for if Claimants "reallocate" local agency resources. Indeed, the Water Boards do not even argue that amount of money required to comply with the 2012 Permit is the same or less than the money required to comply with the 2001 Permit. *Id.* Instead, the requirements in the 2012 Permit imposed actual and distinct increased costs on Claimants, as set forth in the Narrative Statements and accompanying Claimant declarations.

For this reason, the Water Boards' citation of *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 (WB Comments at 29 nn. 161 and 162) is inapposite. In that case, the court held that a state requirement that county law enforcement officers be trained in domestic violence did not impose a higher level of service because the mandate involved adding a single course to "an already existing framework of training." *Id.* at 1194. The mandate, concluded the court, "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training." *Id.*

[15]*See* Section 6 Declarations in Support of Test Claim 13-TC-01 ("City Declarations"), ¶¶ 8(g), 9(h), 10(f), 11(e), 12(e), 13(j), 14(j) and 15(h);

This is not what the LARWQCB did in mandating the 2012 Permit programs at issue here. As discussed more fully below, the LARWQCB in the 2012 Permit did not redirect a reallocation of funds. It added new programs and higher levels of service, with new and higher costs.

The Water Boards contend that the "iterative process" for refining MS4 permits means that higher levels of permit specificity do not constitute a higher level of service. WB Comments at 29. The Commission, however, has already rejected this argument. In the San Diego County test claim, the DOF similarly argued that the additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, and therefore they were not new requirements. SD County SOD at 49.

In response, the Commission stated that it did "not read the federal [CWA] so broadly" and that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service." *Id.* The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50. The test for whether a requirement is new or a higher level of service is whether the local government or agency was previously required to comply with it. *See San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 ("the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 . . ."). Whether a requirement is a result of the iterative process does not go to this question; at best it goes to the question of whether the CWA compelled it.

The Water Boards also argue that the "costs incurred must involve programs previously funded exclusively by the state." WB Comments at 29. This argument is erroneous. To the contrary, the state can create new programs not previously funded by the state, and impose them on local agencies, resulting in a reimbursable mandate. *See e.g., Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172 (Executive Order requiring school districts to develop a reasonably feasible plan to address segregation constitutes a reimbursable state mandate); *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at 537 (Executive Order requiring local agencies to purchase protective clothing and equipment for fighters constituted a program within the meaning of article XIII B, section 6). As the court held in *County of Los Angeles v. Commission on State Mandates, supra,* 110 Cal.App.4th at 1194, "the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, *or forcing a new program on a locality* for which it is ill-equipped to allocate funding." (Emphasis added.)

The cases cited by the Water Boards (WB Comments at 29), which involved the shifting of costs from one local agency to another, do not hold otherwise. For example, *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 involved a statute which authorized counties to charge cities and other local entities for the costs of booking persons into county jails. The court determined that the financial and administrative responsibility for the operation of county jails and detention of prisoners had been the sole responsibility of counties prior to adoption of the statute. The shifting of responsibility was thus from the *county* to the cities, not from the *State* to the cities, and because of that, the statute did not impose a state mandate. *Id.* at 1812. Here, the requirements in the Joint Test Claims involved imposition of a mandate by a state agency, *e.g.*, the LARWQCB,

on local government, *e.g.*, Claimants. As such, they fall well within the purpose of article XIII B, section 6.

County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264 likewise is inapposite. The court found there that the statute at issue merely reallocated property tax revenues for public education, which for years had been a shared state and local responsibility, and that there was no evidence of any increased costs imposed on local government by operation of the statute. *Id. at* 1283. By contrast, these Joint Test Claims involve the adoption of specific new provisions in an executive order which require the Claimants to incur new costs. *See* Cities' Narrative Statement, Sections IV.A.4-H.4; City Declarations at ¶¶ 8(f), 9(g), 10(e), 11(d), 12(d), 13(j), 14(i).

The Water Boards ignore the holdings of this Commission in prior test claims, mischaracterize the evidence set forth in these Joint Test Claims and misapply cases that are inapposite to the factual and legal issues presented here. The requirements of the 2012 Permit at issue represent the imposition of a higher level of service on the Claimants.

F. *The Water Boards Have Not Met the Burden of Establishing That Federal Law Mandated the Requirements in the 2012 Permit*

The Supreme Court has held that water boards have the burden of establishing that a requirement in a stormwater permit is federally mandated. *Dept. of Finance*, 1 Cal. 5th at 769. The Water Boards have not met that burden here.

Dept. of Finance sets forth a clear and specific test to determine the potential existence of a federal, as opposed to state, mandate in an MS4 permit.

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

1 Cal. 5th at 765. In *Dept. of Finance*, the Supreme Court rejected the State's argument that deference should be afforded the regional board's determination that requirements in an MS4 permit were federally mandated. Calling that determination "largely a question of law," the court concluded:

> Had the Regional Board found, when imposing the disputed Permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the Board's expertise in reaching that finding would be appropriate.

Id. at 768. Such a finding, cautioned the Court, "would be case specific, based among other things on local factual circumstances." *Id.* at 768 n.15. Thus, blanket statements by a regional board that

a permit, or a particular provision of that permit, is a federal mandate do not pass muster under *Dept. of Finance.*

Dept. of Finance II provides further guidance to the Commission, and the court there is no more deferential to the Water Boards. In explaining what it means for federal law to "compel" the state to impose a requirement, the Court of Appeal held that "the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit." 18 Cal.App.5th at 683 (*citing Dept. of Finance,* 1 Cal. 5th at 770-71). Thus, held the court, citing to "regulations broadly describing what must be included in an NPDES permit application by an MS4" was not the same as "express mandates directing the San Diego Regional Board to impose the requirements it imposed." *Id.*

The court then examined each of the provisions raised by the permittees in the San Diego County MS4 permit test claim, and found that none was expressly or explicitly required by the federal permit application regulations. As a result, the court concluded that the San Diego County MS4 permit requirements were state, not federal, mandates. 18 Cal.App.5th at 684-89. (The fact that the general MS4 permit application regulations do not expressly or explicitly require the measures at issue in these Joint Test Claims is discussed in Section II below.)

The Water Boards argue (WB Comments at 31) that, although the LARWQCB "exercised its discretion," the requirements it imposed were nevertheless federal rather than state mandates because the LARWQCB believed the requirements were "necessary." Again, that is not the test. The test is not whether the LARWQCB believed the requirements were necessary, but whether the requirements were compelled by federal law, i.e., the *only* means to implement federal law, or whether the LARWQCB imposed the requirement by virtue of a true choice. *Dept. of Finance,* 1 Cal. 5th at 765. As the court said in *Dept. of Finance II*, "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the [MEP] standard establishes only that the San Diego Regional Board exercised its discretion. . . . .its use of the word 'necessary' did not equate to finding the permit requirement was the *only* means of meeting the standard." 18 Cal.App.5th at 682 (emphasis in original). The record of the 2012 Permit is devoid of any findings by the LARWQCB that the permit requirements at issue were the only means by which the MEP standard might be attained.

1. *The Permit Findings Cited by the Water Boards Do Not Require the Commission To Defer to the Water Boards on the Question of Whether the Mandates are Federal or State*

The Water Boards argue that, unlike the 2001 Permit at issue in *Dept. of Finance,* "in issuing the 2012 Permit, the LARWQCB made specific findings throughout the Permit that its provisions are based on federal law and are necessary to meet CWA standards under the factual circumstances presented." WB Comments at 31 (emphasis in original).

Two responses are in order. First, none of the findings meet the *Dept. of Finance* standard that the specific requirement at issue was, as a matter of fact, the *only* means by which the federal permitting standard could be achieved. Second, the findings cited by the Water Boards (WB Comments at 31-33) do not in fact support their contention.

The following are the findings cited by the Water Boards and Claimants' response:

- "This Order is issued pursuant to CWA section 402 and implementing regulations adopted by the USEPA *and chapter 5.5, division 7 of the California Water Code (commencing with section 13370).* This Order serves as an NPDES permit for point source discharges from the Permittees' MS4s to surface waters."[16]

Response: First, the finding itself refers to a section of the California Porter-Cologne Act providing for state implementation of NPDES permits, and which includes Water Code § 13377. That statute provides in relevant part that water boards issue state permits (called "waste discharge requirements") which shall include not only requirements needed to comply with federal requirements but also "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." "Water quality control plans," sometimes called "basin plans," are plans devised by the Water Boards to implement water quality control within various basins. *See generally City of Burbank, supra,* 35 Cal. 4th at 619, discussed in SD County SOD at 4. This finding by itself is sufficient to rebut the assertion that the permit is based solely on federal law.

Second, the Water Boards omitted the second part of the quoted finding. It reads: "This Order also serves as waste discharge requirements (WDRs) pursuant to article 4, chapter 4, division 7 of the California Water Code (commencing with Section 13260)."[17] Division 7 of Porter-Cologne sets forth *State* authority under the Porter-Cologne Act (not the CWA) to issue WDRs for discharges into waters of the state. **Thus, the very finding cited by the Water Boards in support of their argument that the 2012 Permit merely implements federal law contradicts that argument. That finding also specifies that the 2012 Permit is a State-issued WDR, implementing the provisions of the state Porter-Cologne Act.**

- "This Order implements the federal Phase I NPDES Storm Water Program requirements. These requirements include three fundamental elements: (i) a requirement to effectively prohibit non-storm water discharges through the MS4; (ii) requirements to implement controls to reduce the discharge of pollutants to the maximum extent practicable, and (iii) other provisions the Regional Water Board has determined appropriate for the control of such pollutants."[18]

Response: This finding does not constitute the type of finding required in *Dept. of Finance* and *Dept. of Finance II* to afford deference to the Water Boards. In fact, the reference to "other provisions the Regional Water Board has determined appropriate for the control of such pollutants" only reinforces the fact that the Board was exercising discretion to impose permit conditions as a "true choice," not that it was compelled to do so.

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[16] 2012 Permit Finding H, at 20 (AR SB-AR-013313) (italics added).

[17] *Ibid.*

[18] 2012 Permit Finding I, at 20 (AR SB-AR-013313).

- "[T]he Regional Water Board finds that the requirements in this permit are not more stringent than the minimum federal requirements."[19]

Response: This conclusory statement, without any reference to a specific permit requirement or facts in the record, and which does not indicate that the permit requirements were the only means by which the MEP standard could be complied with, does not constitute the case specific finding, based on local factual circumstances, required by the Supreme Court and Court of Appeal to afford deference to the Water Boards.

- "This Order includes programmatic requirements in six areas pursuant to 40 CFR section 122.26(d)(2)(iv) as well as numeric design standards for storm water runoff from new development and redevelopment consistent with the federal MEP standard (see State Water Board Order WQ 200-11, the 'LA SUSMP Order'). This Order also includes protocols for periodically evaluating and modifying or adding control measures, consistent with the concept that MEP is an evolving and flexible standard."[20]

Response: This finding again does not refer to any specific permit requirements or facts in the record. It is not a case specific finding for which deference is appropriate. The argument that permit requirements were a federal mandate because the MEP standard is "an evolving and flexible standard" has previously been rejected by the Commission. *See* SD County SOD at 49.

- "The Regional Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. . . . .The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR § 122.26 or in USEPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in Clean Water Act section 402(p)(3)(B)(ii) and (iii) and the related federal regulations and guidance. Consistent with federal law, all of the conditions in this Order could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits."[21]

Response: As with previous findings, this is a conclusory statement by the LARWQCB, without reference to specific Permit requirements, and therefore not entitled to deference. Moreover, the test is not whether the requirements could have been included in a permit adopted by USEPA, but whether "the federal law or regulation . . . expressly or explicitly require the condition imposed in the permit." *Dept. of Finance II,* 18 Cal.App.5th at 683. Unless the CWA or federal regulations[22] "expressly or explicitly" require the permit provisions at issue, they are not federally mandated. *Id.*

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[19] 2012 Permit Finding S, at 26 (AR SB-AR-013319).

[20] 2012 Permit Fact Sheet, Part IV.B, at F-34 (AR SB-AR-013606).

[21] 2012 Permit Fact Sheet, Part VIII, at F-141 (AR SB-AR-013713).

[22] "USEPA guidance" does not constitute a law or regulation. As discussed in Section II.C.1.c, such guidance is prefaced by a statement that it is not to be relied upon as authority binding on any party, including a permittee.

- "The Regional Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan . . ."[23]

Response: Like the first finding cited by the Water Boards, this finding demonstrates that the 2012 Permit includes requirements to implement State, not solely federal, law. The reference to the "Basin Plan" includes all of the *State-mandated* water quality objectives and beneficial uses assigned to various waters within the basin in question. This is a State requirement, and one mandated by Water Code § 13263 for every WDR: "The requirements [of the WDR] shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected . . . ." Water Code § 13263(a).

- "The requirements of the Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the maximum extent practicable and to protect water quality. The Regional Water Board finds that the requirements of the Order are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate."[24]

Response: This finding does not meet the requirements of *Dept. of Finance*. It does not refer to specific requirements of the 2012 Permit, cite to evidence in the record, cite to case specific local circumstances or find that the permit requirements were the *only* way in which to meet the MEP standard. Indeed, this finding is an example of what the Supreme Court in *Dept. of Finance* found to be an improper assumption by the Water Boards of jurisdiction over what constituted an unfunded mandate: "The State's proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." 1 Cal. 5th at 769. The finding also ignores the fact that the Legislature placed with the Commission exclusive jurisdiction to determine if a mandate is entitled to reimbursement under article XIII B, section 6. Govt. Code § 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333. This finding, like the others cited by the Water Boards, does not require deference.

Finally, the Water Boards cite an excerpt of another finding in the 2012 Permit Fact Sheet ("Fact Sheet Excerpt"), a finding which asserts, *inter alia*, that "it is entirely federal authority that forms the legal basis to establish the permit provisions."[25] WB Comments at 33. That finding, however, is boilerplate, not case specific. It can be found in almost identical language in other MS4 permits and/or permit fact sheets adopted by regional boards across the state prior to adoption of the 2012 Permit. *See* Declaration of David W. Burhenn, Attachment 1 hereto ("Burhenn Decl.") and Exhibits A-B. This language can be found in a permit issued by the Central Valley Water Board to the City of Modesto[26] and by the San Francisco Bay Water Board to permittees

[23] 2012 Permit Fact Sheet, Part VIII, at F-141 (AR SB-AR-013713).

[24] 2012 Permit Fact Sheet, Part IX, at F-159 (AR SB-AR-013731).

[25] 2012 Permit Fact Sheet, Part IX, at F-158 (AR SB-AR-013730).

[26] *Compare* Waste Discharge Requirements for City of Modesto, Order No. R5-2008-0092, Finding 30 at 6-7 *with* Fact Sheet Excerpt at F-158. An excerpt of this permit is attached as Exhibit A to the Burhenn

discharging to San Francisco Bay.[27] The fact that this language is boilerplate demonstrates that it is not case specific as required by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 768 and n.15.

The Water Boards also argue that the LARWQCB "determined that the requirements in the Permit were practicable," Claimants allegedly did not present evidence that they were impracticable, and therefore "the Commission must defer to the board's findings." WB Comments at 33. This contention again ignores the controlling case law. Under that law, it is the Water Boards, not Claimants, which have the burden of demonstrating that a federal mandate exists, either through an express finding that the permit requirement is the "only means" by which the MEP standard can be achieved or by demonstrating that federal law or regulation expressly or explicitly requires the inclusion of the requirement in the permit. *Dept. of Finance,* 1 Cal. 5th at 768-769; *Dept. of Finance II,* 18 Cal.App.4th at 683. Moreover, *Dept. of Finance II* holds that the fact that a regional board found the "permit requirements were 'necessary' to meet the [MEP] standard establishes only that the [regional board] exercised its discretion." 18 Cal.App.5th at 682.

Were the Water Boards correct, all a regional board would have to do is to proclaim, as they have done here without reference to the evidence or the record, that permit requirements were practicable. That is not the law. The burden lies with the Water Boards to demonstrate, with case-specific findings based on local circumstances and evidence in the record, that the permit requirements are mandated by federal law. 1 Cal. 5th at 769.

2. *The Holdings of* Dept. of Finance *and* Dept. of Finance II Apply to All Requirements of the 2012 Permit

The Water Boards contend (WB Comments at 33-34) that *Dept. of Finance* and *Dept. of Finance II* were limited to a consideration of the MEP standard as it applied to requirements in the former Los Angeles County and San Diego County MS4 permits. Thus, they argue, the holdings in those cases do not extend to the separate CWA requirements requiring the effective prohibition of the discharge of non-stormwater to the MS4, provisions relating to TMDLs and provisions relating to monitoring and reporting. WB Comments at 34.

This argument, however, ignores the plain language of *Dept. of Finance* and the analysis performed by the Supreme Court to identify whether a mandate was federal or state. In formulating that test, the Court analyzed three unfunded mandates cases, none of which involved stormwater permits: *City of Sacramento, supra*, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. *See Dept. of Finance,* 1 Cal. 5th at 765 ("From *City of Sacramento, County of Los Angeles, and Hayes,* we distill the following principle").

Decl. As with all such exhibits, the Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States), Govt. Code § 11515 and Cal. Code Regs., tit. 2, section 1187.5, subd. (c).

[27] *Compare* Fact Sheet, Order No. R2-2009-0074 (San Francisco Water Board) at App I-12 to 13 *with* Fact Sheet Excerpt at F-158. An excerpt of this fact sheet is attached as Exhibit B to the Burhenn Decl.

The Supreme Court's statement of that principle, that if "federal law gives the state discretion whether to impose a particular implement requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated," is without any linkage to stormwater permit requirements, much less the MEP standard. And, to illustrate the principle, the Court cited yet another non-CWA case, *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal. App. 3d 794.

Further, the requirement that federal law or regulation "must 'expressly' or 'explicitly' require the condition imposed in the permit" set forth in *Dept. of Finance II*, 18 Cal.App.5th at 683, was without reference to the MEP standard. This separate and independent test applies as well to the non-stormwater, TMDL and monitoring and reporting provisions at issue in these Joint Test Claims.

The holdings in *Dept. of Finance* and *Dept. of Finance II* apply to all requirements at issue in these Joint Test Claims.

3. *Similar Provisions in an EPA-Issued Permit Do Not Necessarily Support an Argument that the Mandates in these Joint Test Claims Are Federally Mandated*

The Water Boards contend that U.S. EPA has "issued permits requiring either equivalent or substantially similar provisions to the contested provisions of this Permit," thus demonstrating that "the Los Angeles Water Board effectively administered federal requirements concerning permit requirements." WB Comments at 35.

The presence of a requirement in an EPA permit does not establish that the requirement is federally mandated. Under the CWA, EPA has the same discretion as a state to include requirements that go beyond CWA requirements. *See* 33 U.S.C. § 1342(p)(3)(B)(iii) ("and such other provisions as the *Administrator* or the State determines appropriate for the control of such pollutants.") (Emphasis added). As the Ninth Circuit held in *Defenders*, this section gives EPA discretion to include in municipal stormwater permits provisions that the CWA does not require. 191 F.3d at 1166-67 (CWA does not require inclusion of compliance with water quality standards in municipal stormwater permits, but EPA has discretion to so include this requirement).

Thus, while the Supreme Court found that the absence of a particular permit provision in EPA-issued permits undermines "the argument that the requirement was federally mandated" *Dept. of Finance*, 1 Cal. 5th at 772, the presence of a particular requirement does not necessarily establish a federal mandate. Instead, because EPA also has discretion, the test as to whether a requirement that is also in a federal permit is a federal mandate is whether the CWA or its regulations compel or expressly or explicitly require the permit condition imposed. *Dept. of Finance II*, 18 Cal.App.5th at 682. [28]

[28] The Water Boards also argue that had the LARWQCB not issued a permit meeting federal standards, U.S. EPA could have objected to the 2012 Permit. WB Comments at 35. U.S. EPA's only role, however, is to ascertain whether the permit meets federal, not state, requirements. 33 U.S.C. § 1342(d)(2) (review to

With respect to the EPA-issued MS4 permits cited by the Water Boards, the Declaration of Karen Ashby and Exhibits 1-5 thereto (Attachment 2 to the Rebuttal Comments) filed herewith demonstrate that the specific mandates at issue in these Joint Test Claims are *not* in fact present in the permits cited by the Water Boards. *See* discussion of individual 2012 Permit mandates in Section II.A-H below. The Supreme Court rightly cited the lack of such evidence as undermining "the argument that the requirement was federally mandated." 1 Cal. 5th at 772. And, as set forth above, although the Water Boards might contend that some provisions similar to (but not the same as) those in the 2012 Permit might be found in certain of the EPA-issued MS4 permits, that by itself does not establish that those provisions are federal mandates.

G. *Claimants Lack Fee Authority to Fund the Mandates at Issue in the Joint Test Claim*

Claimants respond to the funding arguments made by the Water Boards on pages 35-40 of the WB Comments in Section III, Response to the Comments of the DOF and the Water Boards' Regarding Fund Issues ("Funding Rebuttal"), below.[29]

H. *Participation in a WMP or EWMP Does Not Preclude a Subvention of Funds for the Development and Implementation of a WMP or EWMP or for Compliance with Permit Parts III.A.4, VID.4 through VI.D.6 and VI.D.8 through VI.D.10*

The Water Boards contend that the costs to develop and implement a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) are not recoverable (WB Comments at 40-42). The Water Boards further contend that participation in a WMP or EWMP precludes a subvention of funds for compliance with Permit Parts III.A.4 (non-stormwater discharges), VI.D.4 through VI.D.6, and VI.D.8 through VI.D.10 (minimum control measures except planning and land development) (WB Comments 42-44). The Water Boards do not contend that participation in a WMP or EWMP precludes a subvention of funds for compliance with TMDLs.

The Water Boards' arguments lack merit. Essentially, the Water Boards seek to promote form over substance. All of the planning and implementation costs arising from participation in a WMP or EWMP, and all of the costs for complying with the permit provisions, would be incurred

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determine if permit is "outside the guidelines and requirements of this chapter.") EPA does not address whether the state mandates in the permit are appropriate. Accordingly, EPA's oversight of the permit to determine compliance with federal requirements does not address whether the permit also contains discretionary, state mandates. As the court held in *Dept. of Finance II*, the fact that a regional board is required to ensure that any NPDES permit issued by it meets the requirements of the CWA does not mean that all of its requirements are federal mandates. 18 Cal.App.5th at 682-83.

[29] The Water Boards argue, in a single sentence and without citation to any evidence, that the increased costs to implement the mandates at issue in these Joint Test Claims "are *de minimis"* and therefore not entitled to subvention. WB Comments at 35. As a matter of fact, the actual increased costs to implement those mandated requirements are not *de minimis*, as reflected in the Section 6 Declarations filed in support of the Joint Test Claims.

regardless of whether claimants participated in a WMP, EWMP, or not. These costs, therefore, are not voluntarily incurred.

As set forth in Claimant's Narrative Statement (Narrative Statement at 9-10), under the permit Claimants can either comply directly with a specific provision or comply through a WMP or EWMP. As the Water Board states, "participation in a WMP or EWMP encourages implementation of the permit on a watershed scale (WB Comments at 40). As such, WMP and EWMP participation is encouraged, not discouraged.

Significantly, participation in a WMP or EWMP does not relieve Claimants' compliance with the permit. With respect to Permit Part III.A.4 (non-stormwater discharges), Claimants participating in a WMP or EWMP must "include strategies, control measures and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A and VI.D.10 [minimum control measures concerning illicit connection and illicit discharges]." Permit, Part VI.C.5.b.iv.(2). With respect to Permit Parts VI.D.4 through VI.D.6 and VI.D.8 through VI.D.10 (minimum control measures ("MCMs") Claimants which participate in a WMP or EWMP must assure that compliance with those sections is achieved in any WMP or EWMP also. If a permittee elects to eliminate a control measure identified in one of these sections because it is not applicable to the permittee, the permittee must provide justification for its elimination. Permit Parts VI.C.b.iv.(1)(a) and (c).

The discretion of Claimants participating in a WMP or EWMP is thus constrained by the Permit, here the non-stormwater and MCMs requirements. Claimants must comply with these permit requirements, whether through a WMP, EWMP, or not.

For this reason, the cost for meetings, staff time, work by consultants and submittals to the Water Boards in conjunction with a WMP or EWMP is just as much a function of the mandates of the permit as if these costs were incurred to comply directly with the non-stormwater discharge prohibitions and the minimum control measures. If a Claimant was not participating in a WMP or EWMP, it still would have to conduct meetings, incur staff time, hire consultants to achieve compliance, and make submissions to the Water Boards to demonstrate its compliance. Merely because this work is included in a document titled "Watershed Management Program" or "Enhanced Watershed Management Program," rather than "Report on Compliance" or "Annual Report" simply elevates form over substance. Because the staff time, meetings, consultant costs and submittals are for compliance with the mandates of the permit, which have to be complied with whether in the form of a WMP, EWMP or directly, these costs are being incurred to comply with the mandates of the permit. They are not voluntary.

The Water Boards appear to argue that Claimants that participate in a WMP or EWMP are only required to develop and implement programs required by federal regulations. WB Comments at 42. In fact, the permit does not limit Claimants' compliance obligations solely to federal regulations. As the Water Boards themselves concede, Claimants must also either comply directly with the non-stormwater discharges (Part III.A.4) and the minimum control measures (Parts VI.D.4 through VI.D.6 and VI.D.8 through VI.D.10) or through customized actions (WB Comments at 43). Thus, again, the actions being performed under the WMPs or EWMPs are not voluntary. They are all undertaken to comply with specific mandates of the permit.

III. SPECIFIC RESPONSES

A. *TMDL Requirements*

Permit Section VI.E.1 requires Claimants to comply with the TMDL requirements set forth in Permit Attachments L through R. The Water Boards contend that these requirements are "necessary," that they are not new programs or higher levels of service, and that they are not unique to local government (WB Comments at 44). These contentions lack merit.

1. *The TMDL Requirements are Neither Necessary nor Federally Mandated*

The Water Boards contend that inclusion of the TMDL requirements are necessary and federally mandated by reason of a federal regulation, 40 CFR § 122.44(d)(1)(vii)(B), which provides that, when developing water-quality based effluent limits, the effluent limits should be consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by EPA. As set forth in Claimants' Narrative Statements however,[30] the Water Boards were not required to include these water quality based effluents, which are based on water quality standards, in the permit.

First, TMDL provisions are solely for the purpose of meeting water quality standards. Federal law does not require municipal stormwater permits to contain provisions to meet water quality standards. *Defenders, supra,* 191 F.3d at 1164-65. Instead, municipal permits must only contain controls "to reduce the discharge of pollutants to the maximum extent practicable . . . ." 33 U.S.C. § 1342(p)(3)(B)(iii). Therefore, the CWA does not require in MS4 permits TMDL provisions, which go only to compliance with water quality standards,

Second, EPA or a state has the *discretion* to require compliance with water quality standards pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii), which provides that municipal stormwater permits shall contain "such other provisions as the Administrator or the State *determines appropriate* for the control of such pollutants." (Emphasis added.) This, however, is discretionary. As discussed above, it is not required. Because requiring compliance is discretionary, it is not a federal mandate. *Defenders,* 191 F.3d at 1166-67.

Similarly, 40 CFR § 122.44(d)(1)(vii)(B) does not require that municipal stormwater permits contain TMDL provisions. This regulation provides that NPDES permits are to include conditions consistent with the assumptions and requirements of TMDL waste load allocations "when applicable." 40 CFR § 122.44. Because MS4 permits are not required to contain provisions to comply with water quality standards, TMDL wasteload allocations intended to achieve such standards are not "applicable."

The Fact Sheet adopted by the LARWQCB in support of the 2012 Permit recognized that the Board's inclusion of the TMDL provisions was not mandated but was adopted pursuant to the discretionary portion of 33 U.S.C. § 1342(p)(3)(B)(iii). (Permit Attachment F, p. F-84.) The Fact

[30] *See* Cities Narrative Statement, Sections IV.A.4-H.4; Cities Declarations at ¶¶ 8(f), 9(g), 10(e), 11(d), 12(d), 13(j), 14(i) and 15(g).

Sheet also cited two California statutes as support for the incorporation of the TMDLs, Water Code §§ 13263 and 13377, which provide that permits shall include more stringent effluent standards or limitations to implement water quality control plans. *Id.* These facts demonstrate that the LARWQCB's inclusion of the TMDL provisions was a discretionary decision, based in part on state law, not a federal mandate necessitated by federal law.

The Water Boards also quote from page F-36 of the Fact Sheet to the effect that "the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates." WB Comments at 45. As previously discussed, this Fact Sheet discussion is part of boilerplate language being inserted in MS4 permits across the state. *See* Modesto and San Francisco Bay permit and fact sheet excerpts attached as Exhibits A-B to the Burhenn Declaration. It is not the type of specific finding that the Supreme Court provided in *Dept. of Finance* should be given deference. This boiler-plate finding is not entitled to any such deference.

The Water Boards also cite a 2014 guidance memorandum from U.S. EPA allowing, under certain circumstances, for the inclusion of numeric effluent limitations as necessary to meet water quality standards. WB Comments at 49-50. As previously noted, EPA guidance is not binding on the Water Boards, a fact noted in the 2014 guidance memorandum itself: "This memorandum is guidance. It is not a regulation and does not impose legally binding requirements on EPA or States." Guidance at 1. Indeed, the Department of Justice has expressly forbidden federal prosecutors from using guidance to form the basis for enforcement actions, as discussed in Section II.C.1.c below.

In fact, as set forth in the Ashby Declaration at ¶ 18, no EPA-issued MS4 permit includes the specific requirements set forth in the 2012 Permit. Although those EPA-issued permits contain provisions directed at achieving water quality standards, they do not take the same approach or impose the same requirements as the 2012 Permit. The Boise, Boston and Worcester permits contain no TMDL requirements or other numeric effluent limits. They do not incorporate any TMDLs. The Albuquerque permit provides that permittees must develop a stormwater management program designed to reduce the discharge of pollutants to the maximum extent practicable, including BMPs consistent with the assumptions and requirements of adopted TMDLs but, unlike the 2012 Permit, contains no numeric effluent limits. No TMDL specific monitoring is required. The D.C. permit requires development of a consolidated TMDL implementation plan and monitoring to assess whether waste load allocations are being attained, but contains no strict timetables and also no numeric effluent limits.

2. *The TMDL Requirements Are New Programs and/or a Higher Level of Service*

Although the Water Boards concede that "certain specific TMDL-related provisions may be new to the 2012 Permit" (WB Comments at 52), the Boards nevertheless argue that they are not new programs or higher levels of service because the 2001 Permit had provisions that reflected the Los Angeles River Trash TMDL (WB Comments at 51-52).

A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists

where the mandate results in an increase in the actual level or quality of governmental services provided. *San Diego Unified School Dist., supra*, 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.

Here, with the exception of the LA River Trash and Marina del Rey dry weather bacteria TMDLs, none of the TMDL requirement was present in the 2001 Permit. The other TMDL requirements are therefore a new mandate or a higher level of service. And with respect to the Los Angeles River Trash TMDL, under the 2001 Permit, permittees were required to be in compliance with the applicable interim or final effluent limitations for that TMDL as identified in 2001 Permit. 2001 Permit, Part 7.1.B.2. Those interim or final effluent limitations required a reduction of trash to 30 percent of the baseline load calculated as a rolling 3-year annual average. *See* LARWQCB Resolution No. 2007-012, Attachment A, Table 7.2.3. The 2012 Permit has amended those implementation requirements; permittees must now reduce trash to *zero* percent of the baseline allocation. Permit Attachment O, Part A.3. These implementation requirements are thus also new.

The Water Boards also argue that the TMDL requirements should not be treated as new because the 2001 Permit required Claimants to take actions to meet water quality standards, and the TMDL requirements simply provide a timeframe in which to reach those standards. WB Comments at 52. The 2001 Permit, however, did not impose specific, numeric waste load allocations or place a date on which those allocations must be met. Again, these were new requirements, requiring new and more expensive programs. Certainly by imposing TMDL requirements where none had previously existed, the Water Boards required Claimants, at a minimum, to undertake a higher level of service.

3. *The TMDL Requirements Are Unique to the Joint Test Claimants*

Finally, the Water Boards argue that the TMDL requirements are not unique to the Joint Test Claimants because TMDL requirements in general could apply to non-governmental parties. WB Comments at 54. Again, the Water Boards ignore the specific requirements at issue in the 2012 Permit. The TMDL requirements are imposed on MS4 dischargers, i.e., the Joint Test Claimants only. These specific waste load requirements are not imposed on any non-governmental entity, and the Water Boards do not identify any non-local governmental entity that is subject to them. These particular TMDL waste load requirements are imposed on municipal dischargers, not other, non-governmental entities. As a matter of fact, these particular TMDL requirements are imposed uniquely on governmental entities.

4. *The TMDL Monitoring Requirements Are Also New Programs or Higher Levels of Service*

Finally, the TMDL monitoring requirements are also new programs or a higher level of service. The Water Boards make the same arguments with respect to monitoring that they make with respect to the TMDL requirements themselves, specifically, that the requirements, although not previously required, are similar to other monitoring requirements under the 2001 Permit (WB Comments at 55-60).

Under the 2001 Permit, however, only the Los Angeles Flood Control District was required to monitor, and that monitoring constituted only "mass-emission" monitoring at 5 stations in major rivers. In the 2012 Permit, the monitoring obligation is imposed on all 84 permittees, and is in addition to the mass-emission monitoring that the District is required to continue to perform. And unlike the mass-emission monitoring, the TMDL monitoring is at "outfalls," i.e., where the MS4 discharges to a water of the United States (Permit, Attachment E.VII and VIII). Again, these are new requirements that Claimants had not had to implement before. Thus, these monitoring requirements are newly imposed on Claimants.

These monitoring requirements are also unique. The Water Boards do not dispute that only the Claimants have to perform this monitoring. It is not imposed on any other entity; the monitoring is imposed only on Claimants.

B. *Requirements Regarding Non-Stormwater Discharges*

Part III.A.1 of the 2012 Permit requires the permittees, including Joint Test Claimants, to prohibit certain non-stormwater discharges "through the MS4 to receiving waters." For non-exempted non-stormwater flows, the permittees, including Claimants, are required to develop and implement various procedures relating to such flows. Such requirements either exceed the requirements of the CWA and federal stormwater regulations or specify the means of compliance with the Act and the regulations, and consequently are state mandates.

1. *Requirement Concerning Prohibition of Non-Stormwater Discharges*

Part III.A.1 of the 2012 Permit requires the permittees, including Joint Test Claimants, to prohibit certain non-stormwater discharges "through the MS4 to receiving waters." The Water Boards assert that this requirement was not new, that it is necessary to implement federal law and is not unique to local government. WB Comments at 61-65.

First, with respect to whether Part III.A.1 is a new program, the requirement in the 2001 Permit was to "*effectively* prohibit non-storm water discharges . . . ." 2001 Permit, Part 1.A (emphasis supplied). The absolute prohibition in Part III.A.1 is new.

Second, the CWA itself does not require permittees to address non-stormwater discharges "through the MS4 to receiving waters." As the Water Boards concede, the statute instead requires only that MS4 permits "include a requirement to effectively prohibit non-stormwater discharges 'into the storm sewers.'" WB Comments at 62 (quoting 33 U.S.C. § 1342(p)(3)(B)(ii)). The Water Boards allege that language in a preamble to the federal stormwater regulations implicitly requires such controls, but the regulatory language itself, like the statute, refers to control of illicit discharges "to" the MS4. 40 CFR § 122.26(d)(2)(i)(B). And, the fact that the State Board supported LARWQCB's language (WB Comments at 63) does not go to whether the requirements in Part III.A.1 were a state mandate.

Third, the fact that other stormwater permits might also contain provisions regarding the discharge of non-stormwater into the MS4 does not assist the Water Boards (WB Comments at 64-66) in that none of the three quoted permits contains the explicit requirement of municipalities

to prohibit the discharge of non-stormwater "through the MS4 to receiving waters." This specific requirement applies to local agencies as MS4 operators, and thus is a uniquely governmental function.

2. *Requirements Concerning Conditional Exemptions from Non-Stormwater Discharge Prohibition*

Part III.A.2 of the 2012 Permit, relating to conditional exemptions from the non-stormwater discharge prohibition, requires the non-Flood Control District Joint Test Claimants to assure that appropriate BMPs are employed for discharges from essential non-emergency firefighting activities and, with regard to unpermitted discharges by drinking water suppliers, to work with those suppliers on the conditions of their discharges.

Part III.A.4.a of the 2012 Permit requires dischargers, including the Joint Test Claimants, to "develop and implement procedures" to require non-stormwater dischargers to fulfill requirements set forth in Part III.A.4.a.i through vi.

Part III.A.4.b of the 2012 Permit requires the non-District permittees to "develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs." The non-District permittees are required to coordinate with local water purveyors, where applicable, to promote landscape water use efficiency requirements, use of drought tolerant native vegetation and the use of less toxic options for pest control and landscape management. The non-District permittees are also required to develop and implement a "coordinated outreach and education program" to minimize the discharge of irrigation water and pollutants associated with such discharge as part of the Public Information and Participation in Part VI.D.4.c of the Permit.

The Water Boards argue (WB Comments at 66-67) that the Joint Test Claimants are given "significant flexibility" to customize their response to these requirements through the WMP or EWMP process. Because Claimants elected to implement a WMP or EWMP, the Water Boards argue, this was a "choice" and not a state mandate. WB Comments at 67.

Again, the Water Boards ignore the fact that the requirements in Part III.A.2 and A.4 do not vanish when the Joint Test Claimants choose to implement a WMP or EWMP. As discussed in Section I.H above, the control measures set forth in those provisions must be reflected in the Watershed Management Program developed in the WMP or EWMP: "Where Permittees identify non-storm water discharges from the MS4 as a source of pollutants that cause or contribute to exceedance of receiving water limitations, the Watershed Control Measures shall include strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants *consistent with Parts III.A* . . . ." 2012 Permit Part VI.C.5.b.iv.(2) (emphasis added).

Thus, the provisions of Parts III.A.2 and III.A.4 are directly relevant and applicable to what is *required* of the permittees, including the Joint Test Claimants.[31]

a. *The Conditional Exemption Requirements are a Program and/or Represent a Higher Level of Service*

The Water Boards (WB Comments at 67-70) argue that the provisions of Parts III.A.2 and A.4 are not in fact new programs or represent a higher level of service. As set forth below, this argument is supported neither by the facts nor by the law.

First, concerning Part III.A.2.i (relating to discharges from essential non-emergency firefighting activities), the Water Boards argue that since this category was not conditionally exempt in the 2001 Permit, the requirements associated with it in the 2012 Permit require a "lesser standard." WB Comments at 68. This argument ignores the fact that the requirements in Part III.A.2.i are in fact new, never before having been required of the permittees. A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal.App.4th at 1189.

Second, concerning Part III.A.2.ii (relating to discharges from potable drinking water supply and distribution system releases) the Water Boards contend that this provision "carried over" a much more limited condition in the 2001 Permit. WB Comments at 68. In fact, the 2001 Permit only required that such discharges be "consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices." 2001 Permit Part A.1.2.(c)(2). The 2012 Permit requires implementation of BMPs based on a 2005 American Water Works Association manual or equivalent industry standard, and requires that permittees work with drinking water suppliers to ensure notice, monitoring and recordkeeping in the event of any discharge of 100,000 gallons or more. In addition, permittees are required to demand that suppliers keep detailed records of discharges, a demand which requires the permittees to work closely with the suppliers. All of these requirements represent new and/or higher levels of service.

Third, requirements in Part III.A.2.b relating to lake dewatering, landscape irrigation, swimming pool/spa discharges, fountain dewatering and residential car-washing and sidewalk rinsing, all of which discharges were exempt from regulation in the 2001 Permit, now mandate permittees to ensure that all such discharges meet the requirements set forth in Table 8 of the 2012 Permit. Compliance with these Table 8 required conditions represent a new program and/or higher level of service.

The Water Boards also make a further argument, contending that since under the 2001 Permit, the LARWQCB's Executive Officer could remove categories of exempt non-stormwater discharges or subject them to conditions, the above requirements in the 2012 Permit "clarified" the conditions for the exempt non-stormwater discharges. WB Comments at 69. This argument,

[31] The Water Boards further argue that pursuant to Part III.A.2, the Executive Officer of the LARWQCB can approve alternative conditions to those set forth in Part III.A for the conditionally exempt non-stormwater discharges. WB Comments at 67. This argument does not, however, make the requirements of Part III.A at issue in these Joint Test Claims any less of a mandate. Instead of known written conditions, the Executive Officer can impose "alternative conditions." Those conditions still represent mandates.

however, does not assist the Water Boards since they identify no conditions imposed under the 2001 Permit by the Executive Officer on any of the non-stormwater discharges that were continued in the 2012 Permit. All of the referenced specific conditions, the "new programs" or requirements for a higher level of service, are new to the 2012 Permit.

With respect to street/sidewalk washing, the Water Boards argue that requirements contained in Resolution 98-08 were incorporated into the 2012 Permit. WB Comments at 69. It is undisputed, however, that street/sidewalk washing was conditionally exempt under the 2001 Permit, without reference to the requirements of Resolution 98-08. By explicitly incorporating the requirements of Resolution 98-08 into the 2012 Permit, the LARWQCB added new requirements that were not previously present, mandating a new program or higher level of service.

The Water Boards also contend that conditions imposed on non-stormwater exempt discharges were "based on what the Permittees were already doing under the 2001 Permit." WB Comments at 69. The Water Boards argue that some permittees had undertaken to require BMPs to address these non-stormwater discharges. WB Comments at 69-70. This argument, too, does not establish that the conditions in the 2012 Permit were not a new program or a requirement for a higher level of service. Under the Government Code, if a local agency voluntarily undertakes an obligation, and that obligation later becomes a requirement of an executive order, a state mandate still exists: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." Govt. Code § 17565.

b. *The Exempt Non-Stormwater Discharge Requirements are Not Necessary to Implement Federal Law*

The Water Boards discuss at length (WB Comments at 71-74) EPA's position on the effective prohibition of non-stormwater discharges into the MS4 and the requirement that MS4 permittees have a program to address such discharges. That is not the relevant inquiry in determining the existence of a state, versus federal, mandate. The question is, does federal law or regulation compel or "explicitly" or "expressly" require the exempt non-stormwater discharge conditions found in Part III.A.2 and A.4 of the 2012 Permit? *Dept. of Finance II,* 18 Cal.App.5th at 683. They do not.

The Water Boards allege that "[a]s required by federal law, the 2012 Permit specifies requirements" concerning discharges of non-stormwater to the MS4. WB Comments at 72. Again, applying the tests established in *Dept. of Finance* and *Dept. of Finance II,* federal law does not specify the requirements of Parts III.A.2 or A.4 at issue in these Joint Test Claims. None of these requirements is called for in the CWA or in the implementing regulations in Title 40 of the Code of Federal Regulations. As discussed in Section I.F above, that is the test for determining whether a permit requirement is mandated by federal law. The Water Boards do not address this point.

The Water Boards contend (WB Comments at 72-73) that the LARWQCB identified a need for the conditions. Whether the regional board identified a need for a permit condition is not the question before the Commission. Again, as the Supreme Court held in *Dept. of Finance*, the question is not whether the Board had the authority to impose the conditions. It is, who will pay

for them? *Dept. of Finance,* 1 Cal. 5th at 769.[32] The Water Boards also argue that had it not imposed conditions on the exempt stormwater discharges, permittees "may incur more costs to implement a prohibition of all non-stormwater discharges" and cite a study apparently commissioned by the City of Los Angeles (not a Claimant) in support. This argument is speculative, and does not go to whether the requirements were federally mandated.

Finally, none of the stormwater permits issued by EPA contains these conditions. Ashby Decl. ¶ 10. The fact that EPA-issued permits do not contain similar prohibitions undermines the argument that the requirement is federally mandated. *Dept. of Finance,* 1 Cal. 5th at 772.

There is no support for the argument that federal law mandated the requirements of Parts III.A.2 and A.4 of the 2012 Permit. The State has the burden of proving that a mandate is federal. *Id*. at 769. The Water Boards have not met their burden here. The LARWQCB's imposition of this requirement is a state, not a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 765.

c. *No Other Mandate Exceptions Apply*

The Water Boards (WB Comments at 74-75) appear to argue that because certain permittees, including some Claimants, participated in the development of a CAL Fire BMP handbook and an American Water Works Association BMP handbook separately from development of the 2012 Permit, that this somehow disqualifies them from receiving a subvention of state funds. Thus, argue the Water Boards, if a permittee ever cooperated in the development of a BMP, and that BMP later is separately incorporated into an MS4 permit, the permittee has somehow waived its ability to seek funding in a test claim. The Water Boards cite no authority for this proposition, and it is no different, conceptually, from the decision by a permittee to voluntarily undertake a BMP which then is later incorporated as a binding requirement in a permit. As noted above, the Government Code provides that in such a case, any costs incurred after the BMP was incorporated in the permit become subject to reimbursement. Govt. Code § 17565.

The Water Boards also argue that permittees were provided the option in the 2012 Permit to implement the requirements of an "equivalent" manual with respect to the requirements of Parts III.A.2.a.i and ii. WB Comments at 74. This option does not excuse the requirements of Part III.A.2 that the permittees employ BMPs developed for firefighting or water distribution activities, and thus cannot serve as an exception to the mandate requirements.[33]

[32] The Water Boards cite the U.S. EPA Permit Improvement Guide as authority for the Part III.A requirements. As discussed in detail in Section II.C.1.c below, the Guide is not a source of federal authority for this, or any other, 2012 Permit requirement.

[33] The Water Boards further allege that the City of Los Angeles, which is not a Claimant herein, suggested certain proposed conditions for landscape irrigation, and that the LARWQCB adopted certain of those conditions in the 2012 Permit. WB Comments at 75. Even were the City of Los Angeles a Claimant, the provision of comments during development of a permit does not render the State's partial acceptance of those comments an exception to a mandate.

3. *Non-Stormwater Evaluation Requirements*

Part III.A.4.c of the 2012 Permit requires Claimants to evaluate monitoring data collected pursuant to the 2012 Permit's Monitoring and Reporting Program (Attachment E) and "any other associated data or information" to determine if any authorized or conditionally exempt non-stormwater discharges identified in Permit Parts III.A.1, A.2 and A.3 are a source of pollutants that may be causing or contributing to an exceedance of a receiving water limitation in Part V or water quality-based effluent limitation in Part VI.E.

Part III.A.4.d. requires that if these data show that the non-stormwater discharges are such a source of pollutants, Claimant are required to take further action to determine whether the discharge is causing or contributing to exceedances of receiving water limitations, report those findings to the LARWQCB, and take steps to effectively prohibit, condition, require diversion or require treatment of the discharge.

a. *The Evaluation Requirements Relating to Non-Stormwater are a New Program and/or a Requirement for a Higher Level of Service and Are Not Necessary to Implement Federal Law*

The Water Boards argue that requirements that permittees, including Claimants, evaluate non-stormwater discharges was a carryover from the 2001 Permit and that they are necessary to implement federal law. WB Comments at 75-77. Neither proposition is correct.

First, the requirements in Part III.A.4.c and d are specific and detailed as to *how* the permittees, including Claimants, are to evaluate non-stormwater discharges. Nothing in the 2001 Permit required permittees to undertake those specific steps and these specific requirements are not contained in that permit. As the Water Boards themselves admit, there was no explicit requirement for an evaluation of non-stormwater discharges in the 2001 Permit. The permit requirements cited by the Water Boards (WB Comments at 75-76) refer either to general legal authority to carry out investigations and monitoring or general requirements relating to all discharges from the MS4 (not specific requirements related to exempt non-stormwater discharges).

At best, the Water Boards themselves describe these requirements, as they may apply to exempt non-stormwater discharges," as "implicit" and that the provisions at issue in the Joint Test Claims "merely make explicit what was already required in the prior permit." WB Comments at 76. Even if it were the case that the 2001 Permit required, in general, the evaluation that 2012 Permit now explicitly requires, the very act of detailing precisely what steps permittees were required to take represents the imposition of a higher level of service on Claimants. *See* SD County SOD at 53-54 (additional requirements in program required under previous permit represent a higher level of service).

Second, while the Water Boards cite general federal regulatory provisions requiring MS4 permittees to address general "illicit discharges" into MS4s (which regulations do *not* explicitly or expressly require the specific mandates in Parts A.4.d), the exempt non-stormwater discharges addressed by Part A.4 of the 2012 Permit are in fact not considered "illicit discharges" unless they are identified by the municipality as sources of pollutants to waters of the United States." 40 CFR § 122.26(d)(2)(iv)(B)(1).

Moreover, 40 CFR § 122.26(d)(2)(iv)(B)(1) requires that if there is a finding of a significant pollutant source to waters of the United States, the permittee is required only to *address* the discharge. This can be done through public information and education or other means, and not necessarily through a strict prohibition of such discharges, imposition of BMPs, or permitting. The decision as to how to address the discharge is left to the municipality in the federal regulations. By contrast, Part 4.d of the 2012 Permit requires specific actions by the permittees to prohibit, impose conditions in addition to those in Table 8, require diversion of the discharge to the sanitary sewer or require treatment of the discharge. By mandating those responses, the LARWQCB usurped the permittees' ability to design their own program and imposed requirements that exceed the federal regulation. *See Long Beach Unified, supra,* 225 Cal.App.3d at 173.

The requirements of 2012 Permit Parts 4.A.c and 4.A.d are both (1) new programs and/or requirements for higher levels of service and (2) not necessary to implement federal law.

C. *Public Information and Participation Program ("PIPP") Requirements*

Part VI.D.5 of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to undertake specific Public Information and Participation Program ("PIPP") activities, either individually or as part of a County-wide or Watershed Group sponsored PIPP.

Preliminarily, the Water Boards contend that Claimants mischaracterize the 2001 Permit by ascribing the PIPP responsibilities under the 2001 Permit to the Los Angeles Flood Control District, which was then Principal Permittee (WB Comments at 78-79). The Water Boards also contend that, even though under the 2001 Permit only the District was responsible for the programs at issue here, the 2012 Permit's imposition of these PIPP requirements onto other permittees was not a new program or higher level of service as to them.

First, none of the PIPP requirements at issue here were previously assigned to the other permittees. Under the 2001 Permit, the District was responsible for the public information program, with the exception that each permittee was to mark the storm drains they owned with a legible "no dumping" message, provide the District with contact information, and conduct educational and certain outreach programs relating to specific pollutants in specific watersheds (2001 Permit, Parts 4.B.1(a), (b), (c)(4), and (d), at 30-31). None of these 2001 Permit programs are the 2012 PIPP requirements at issue here.

The Water Boards nevertheless contend that under the 2001 Permit, each permittee was obligated to implement the Stormwater Quality Management Program (SQMP) and the PIPP program was a part of the SQMP (WB Comments at 78). This general obligation, however, did not make the other permittees responsible for the Principal Permittee's obligations. The 2001 Permit made this clear in Part 3.E, the same section on which the Water Boards rely. Part 3.E specifically states that "Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries (see Findings D.1, D.2 and D.3, *and not for the implementation of the provisions applicable to the Principal Permittee* . . . ." (Emphasis added.) Thus, contrary to the Water Boards' assertion, Claimants were not responsible under the 2001 Permit for the Flood Control District's obligations, including its PIPP obligations. This, and the plain language of Part 4.B of the 2001 Permit (e.g., the "Principal Permittee shall be responsible

for developing and implementing the Public Education Program, as described in the SQMP," 2001 Permit at Part 4.B), plainly shows that it was *not* the responsibility of each permittee to undertake all PIPP requirements in the 2001 Permit.

The LARWQCB was well aware that under the 2001 Permit the other permittees were not performing the PIPP obligations that were assigned to the Flood Control District. For example, excerpts of the Annual Report for the City of Los Angeles for 2010-11 (attached as Exhibit C to the Burhenn Decl.) show that the City (by far the largest permittee under the 2001 Permit) did not undertake a number of responsibilities under the permit, since those were reserved to the District.

Finally, as discussed in detail below, many of the specific PIPP requirements in the 2012 Permit were in fact not found in the 2001 Permit. Thus, they represent new, specific requirements for all permittees, not simply new requirements for non-District permittees.

The Water Boards argue further (WB Comments at 79) that the LARWQCB made "specific findings" concerning the alleged necessity of the PIPP requirements imposed by the Board to implement federal law and that those findings "are entitled to deference." To the contrary, none of the statements made in the Fact Sheet amounts to a specific finding by the LARWQCB, with a citation to evidence in the record, that the particular PIPP requirements imposed by the 2012 Permit were the only way that the federal MEP standard could be achieved.

The findings also quote a U.S. EPA fact sheet for Phase II permits, which is not applicable to Phase I permits like the 2012 Permit. As the Joint Test Claimants set forth in their Narrative Statements,[34] the 2012 Permit was adopted as a "Phase I" permit, which apply to stormwater sewers serving larger population areas. Those Phase I permits are governed by regulations found at 40 CFR § 122.26(d). The regulations governing Phase II permits, covering "Small MS4s," are found at 40 CFR § 122.34. *See also* 40 CFR § 122.26(b)(18)(ii) (small MS4s are MS4s "[n]ot defined as 'large' or 'medium' [MS4s] . . . .") The Phase II regulations are inapplicable to Phase I permittees and cannot serve as a source of federal authority to argue that there is a federal "mandate."

The Water Boards also argue that because permittees can customize PIPP programs as part of their WMP or EWMP, the requirements of Part VI.D.5 do not constitute a state mandate. WB Comments at 79. Because the WMP or EWMP must assess the requirements of Part VI.D.5 and incorporate/customize all control measures set forth therein, unless their elimination is justified by the permittee as not applicable (Part VI.C.5.b.(iv)(c)), these PIPP requirements are still mandated, whether complied with through the WMP or EWMP or other means.

1. *General PIPP Implementation*

Part VI.D.5.a of the 2012 Permit requires the non-District permittees, including Claimants, to "measurably increase" the knowledge of target audiences about the MS4, adverse impacts of stormwater pollution on receiving waters and potential solutions to mitigate impacts, to "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" and to "involve and engage a

[34] Cities Narrative Statement at 5; County-District Narrative Statement at 6.

diversity of socio-economic groups and ethnic communities" in Los Angeles County to participate in stormwater pollution impact mitigation.

Part VI.D.5.b requires the permittees to implement the PIPP activities by participating either in a County-wide or Watershed Group-sponsored PIPP or individually.

a. *The General PIPP Requirements are a New Program and/or Represent Higher Levels of Service*

The Water Boards argue (WB Comments at 80) that the requirements of Part VI.D.5.a and b do not constitute a new program or higher level of service since the requirements were largely carried over from the 2001 Permit. As discussed above, this argument ignores the fact that in the 2001 Permit, the public information requirements at issue here were assigned to the District as Principal Permittee. *See, e.g.*, 2001 Permit Part 4.B: "The *Principal Permittee* shall implement a Public Information and Participation Program (PIPP) . . . The *Principal Permittee* shall be responsible for developing and implementing the Public Education Program . . . ." (Emphasis added). By contrast, Part VI.D.5.a of the 2012 Permit mandates that "[*e]ach Permittee* shall implement a . . . PIPP. Further, *[e]ach Permittee* shall be responsible for developing and implementing the PIPP and implementing specific PIPP requirements." (Emphasis added.) Similarly, 2012 Permit Part VI.D.5.b requires implementation by all permittees through either a County-wide, Watershed Group or individual jurisdiction PIPP program. But whatever program option is chosen, implementation by each permittee is required.

The undisputed fact that the 2012 Permit imposed these requirements for the first time on all permittees, as opposed to only the District, makes them a new program and/or higher level of service with respect to all permittees other than the District.

b. *The General PIPP Requirements are a "Program"*

The Water Boards also contend (WB Comments at 80-81) that because there are PIPP elements in an MS4 Permit issued to Caltrans, the requirement to develop and implement a PIPP "is not unique to local government." This, however, is not the sole test for determining the existence of a "program" eligible for subvention under article XIII B, section 6 of the California Constitution. In *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874, the California Supreme Court repeated its holding in *County of Los Angeles, supra,* that the electorate had in mind two kinds of "programs" when article XIII B was adopted:

> We conclude that the drafters and the electorate hand in mind the commonly understood meanings of the term – [(1)] programs that carry out the governmental function of providing services to the public, or [(2)] 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.

San Diego Unified School Dist., supra, 33 Cal. 4th at 784, (quoting *County of Los Angeles, supra,* 43 Cal. 3d at 56).

The Supreme Court there established that if a governmental entity was, as is the case here, providing services to the public (here, by providing the public with information about stormwater pollution), it was performing a governmental function. As such, the PIPP qualifies as a "program" subject to a subvention of funds under article XIII B, section 6 of the California Constitution.

c. *The General PIPP Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the detailed requirements of 2012 Permit Part VI.D.5.a and b are "necessary to implement federal regulations." WB Comments at 81. This is not correct

First, federal law does not explicitly or expressly require these specific provisions. The federal NPDES MS4 permit application regulations require that an MS4 operator include in its management program "[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" 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 CFR § 122.26(d)(2)(iv)(B)(5-6). Nothing in these regulations explicitly or expressly requires the permit to contain the provisions set forth in in 2012 Permit Part VI.D.5.a and b. *Dept. of Finance II*, 18 Cal.App.5th at 683.

The Water Boards cite (WB Comments at 82) two additional regulations, 40 CFR § 122.26(d)(2)(v), which requires that permittees estimate "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," and 40 CFR § 122.42(c)(3), which requires that the annual report filed by the MS4 operator must include "[r]evisions, 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." Again, neither of these regulations explicitly requires the requirements in the 2012 Permit but, like the vast bulk of the NPDES regulations, set forth general parameters for the programs to be designed by the permittees.

The Water Boards also cite as authority documents or guidance which explicitly do not serve as federal requirements for the provisions in the 2012 Permit. WB Comments at 81-82. The first of these is the U.S. EPA Phase II Fact Sheet. This Fact Sheet applies only to Phase II permits, which are a completely different category of NPDES MS4 permits from the Phase I permit at issue here. *See* 33 U.S.C. § 1342(p)(4); *compare* 40 C.F.R. § 122.26(d) (application requirements for large and medium MS4s) with 40 C.F.R. 122.130 et seq. (small MS4s).

The Water Boards next cite the U.S. EPA MS4 Permit Improvement Guide ("Permit Improvement Guide.") What the Water Boards do not mention, however, is that the Guide cannot provide any binding authority from which the Water Boards could infer a federal mandate. As the Guide itself states, on page 3: "This Guide does not impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public."

Indeed, the United States Department of Justice has issued a policy expressly prohibiting federal prosecutors from using use their enforcement authority to "effectively convert agency guidance documents into binding rules" and also from using "noncompliance with guidance

documents as a basis for proving violations of applicable law" in affirmative civil enforcement cases.[35] If guidance documents cannot be used to establish a basis for compliance with federal law, they cannot be cited as federal authority for the Water Boards.[36] *See also City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, in which the court noted that two U.S. EPA guidance documents cited by plaintiffs in that case explicitly stated that they did not constitute legally binding requirements. The court accordingly did not apply the reasoning set forth in that guidance. 135 Cal.App.4th at 1429-30.

The Water Boards also cite three US EPA-issued MS4 permits. One of those permits, the permit issued for Small (Phase II) MS4s in Massachusetts is not relevant to these Joint Test Claims because, as noted above, the 2012 Permit is a Phase I MS4 permit, not a Phase II Permit, which is subject to different regulatory requirements. The Phase II Massachusetts permit is not relevant to the 2012 Permit and will not be discussed further.

With respect to the other EPA-issued MS4 permits cited in the Water Boards' comments, while those EPA permits contain certain public information requirements, none contains as extensive or prescriptive requirements as those in the 2012 Permit. Ashby Decl. ¶ 11; *See also* Exhibit 1 to Ashby Decl. discussing 2012 Permit Provision VI.D.5.a. For example, the Albuquerque, Boston and Worcester permits require outreach to non-English speakers but do not compel measureable increases of changes or outcomes; the Boise permit does not require measureable change or outreach to non-English speaking residents; and the D.C. permit does not require outreach to non-English speakers or indicia of measureable change.

2. *Public Participation Requirements*

Part VI.D.5.c of the 2012 Permit requires non-District permittees, including Claimants, to provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and "general storm water and non-storm water pollution prevention information" through a telephone hotline, or in public information and the government pages of the telephone book. Part VI.D.5.c also requires Claimants to identify staff or departments serving as contact persons and providing current, updated hotline information. This part also requires permittees to organize events "targeted to residents and population subgroups" to "educate

[35] Memorandum regarding Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, January 25, 2018, attached as Exhibit D to Burhenn Declaration. Claimants request that, pursuant to Evidence Code § 452(c), the Commission take administrative notice of the Memorandum as an official act of an executive department of the United States. While this memorandum was issued recently, it reflects jurisprudence going back a number of years. *See, e.g., Appalachian Power Co. v. EPA* (D.C. Circuit 2000) 208 F.3d 1015, where the Circuit Court of Appeals for the District of Columbia set aside an EPA guidance document relating to Clean Air Act emission monitoring on the ground that the guidance broadened a previous rulemaking and thus should have itself been subject to rulemaking procedures. 208 F.3d at 1028 (attached in Section 7 Rebuttal Documents, Tab 1).

[36] The Water Boards also cite (WB Comments at 82) a U.S. EPA document entitled "Development an Outreach Strategy, Minimum Measure: Public Education and Outreach on Stormwater Impacts: Developing Municipal Outreach Programs." This document is applicable only to Phase II stormwater permittees, and has no application to the 2012 Permit.

and involve the community in storm water and non-storm water pollution prevention and clean-up (e.g., education seminars, clean-ups, and community catch basin stenciling)."

a. *The Public Participation Requirements are a New Program and/or Require a Higher Level of Service*

While there are some similarities between the requirements in Part VI.D.5.c of the 2012 Permit and PIPP requirements in the 2001 Permit, there are also unique and/or expanded requirements which constitute a new program and/or higher level of service. Under the 2012 Permit, permittees are required to include a means for public reporting of non-stormwater pollution prevention information, to identify staff or departments who will serve as contact persons and provide that information on the permittee's website and organize events targeted to residents and population subgroups to educate and involve the community in storm water and non-storm water pollution prevention and clean-up, such as education seminars, clean-ups, and community catch basin stenciling. The outreach in the 2001 Permit was limited to the District as Principal Permittee. 2001 Permit, Part 4.B.1(c)(1)(vi).

The Water Boards contend (WB Comments at 84) that certain permittees were undertaking PIPP events within their jurisdictions under the 2001 Permit. This proves only that those permittees were in compliance with the more general requirements of the older permit, which provided that each permittee "shall conduct education activities within its jurisdiction . . . ." 2001 Permit Part 4.B.1(c)(4). Moreover, even were some of the specific PIPP requirements in the 2012 Permit being voluntarily undertaken by Claimants, this fact would not prevent eligibility for a subvention of funds. As discussed above, once such requirements were legally mandated, Claimants would be entitled to a subvention of state funds. Govt. Code § 17565.

b. *The Public Participation Requirements are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 84-85) cite several federal NPDES permit application regulations in support of their argument that the requirements in 2012 Permit Part VI.D.5.c are necessary to comply with federal law. None of those regulations, however, supports the Water Boards' argument.

The first regulations cited by the Water Boards (40 CFR § 122.26(d)(2)(iv)(B)(5) and (6)) require that a permittee must include in its stormwater management program "[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" 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." These regulations again do not explicitly or expressly require the specific public participation requirements of the 2012 Permit, nor the scope and detail of those requirements. *Dept. of Finance II,* 18 Cal.App.5th at 683; *Dept. of Finance,* 1 Cal. 5th at 771.

The next two regulations cited by the Water Boards also offer no support for their argument. 40 CFR § 122.26(d)(2)(iv) merely requires that the proposed management program

including a "comprehensive planning process which involves public participation . . . ." 40 CFR § 122.26(d)(2)(iv)(A)(6) requires, *inter alia*, "educational activities" in association with reducing to the MEP pollutants from "the application of pesticides, herbicides and fertilizer . . . ." Finally, 40 CFR § 122.26(d)(2)(iv)(B)(6) requires 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." None of these regulations mandates the specific requirements of Part VI.D.5.c of the 2012 Permit. Nor does the annual reporting requirement in 40 CFR § 122.42(c)(3), which requires permittees to include in their annual reports a summary of the number and nature of public education programs. Since "public education" activities are limited to the management of used oil and toxic materials, this does not mean that the far broader public education requirements of the 2012 Permit are required by federal regulation.

The Water Boards' citation to the EPA Permit Improvement Guide is also unavailing. The citation to the Permit Improvement Guide is, for the reasons discussed in Section II.C above, inapposite, since the Guide expressly does not mandate any activity by any permittee.

The Water Boards cite provisions in the EPA-issued D.C. and Boise permits as support for their argument that the provisions in Part VI.D.5.c are required by federal law. WB Comments at 85-86. While the Boise permit requires establishment of a website to provide a mechanism for reporting of IC/ID and key agency contacts, it does not require organizing public effects and activities. The D.C. permit requires facilitation of public participation events, but not a means of public reporting of IC/ID or agency contacts. *See* Ashley Decl. at ¶ 10; Exh. 1 to Ashley Decl., Section IV.D.

3. *Residential Outreach Program Requirements*

Part VI.D.5.d of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to conduct stormwater pollution prevention public service announcements and advertising campaigns, provide public education materials on the proper handling of vehicle waste fluids, household waste materials, construction waste materials, pesticides and fertilizers (including integrated pest management ("IPM") practices), green waste and animal wastes; distribute "activity specific" stormwater pollution prevention public education materials at, but not limited to, automotive parts stores, home improvement centers, lumber yards and hardware and paint stores, landscaping and gardening centers and pet shops and feed stores; maintain stormwater websites or provide links to stormwater websites via each Claimant's website, which must include educational material and opportunities for public participation in stormwater pollution and cleanup activities; and, provide schools within each Claimant's jurisdiction with materials to educate K-12 students on stormwater pollution.

In each of the VI.D.5.d requirements, Claimants are required to "use effective strategies to educate and involve ethnic communities in storm water pollution prevention through culturally effective methods." Part VI.D.5.d.(6). This requires Claimants to identify such ethnic communities and appropriate culturally effective methods.

a. ***The Residential Outreach Program Requirements Are a New Program and/or Represent a Higher Level of Service***

The Water Boards argue that the myriad requirements of 2012 Permit Part VI.D.5.d do not constitute a new program or a higher level of service "because all of the requirements and/or substantially similar requirements were in the 2001 Permit." WB Comments at 86.

First, regarding the Part VI.D.5.d.(1) requirement that each permittee conduct "storm water pollution prevention public service announcements and advertising campaigns," the Water Boards argue that this is a carry-over of requirements in the 2001 Permit. WB Comments at 86. In that permit, however, only the Principal Permittee was responsible for "advertising" and "public service announcements" (2001 Permit Part 4.B.c.(1), (3)), not each individual permittee. The Water Boards' reference to a Report of Waste Discharge ("ROWD") describing activities carried out by the District along with various cities does not change the fact that the 2001 Permit did not mandate such activities on the other Claimants. Any voluntary acts by Claimants prior to the 2012 Permit do not constitute a bar to subvention. Govt. Code § 17565.

Second, regarding the Part VI.D.5.d.(2) requirement that public education materials include information on the proper handling of various waste streams, the Water Boards argue (WB Comments at 87) that permittees under the 2001 Permit had requirements relating to the distribution of outreach materials on certain pollutants, depending on the watershed. 2001 Permit Part 4.B.1.d. The 2012 Permit requirements, however, expand on the 2001 Permit mandates by making each permittee responsible for producing the public information materials on the identified topics, none of which was required in the 2001 Permit, which made the Principal Permittee responsible, only in cooperation with the permittees, to "coordinate to develop outreach programs" focusing on the watershed-based pollutants. 2001 Permit Part 4.B.1(d). The Water Boards contend that various cities were undertaking public information activities regarding various waste types, as reflected in reports made by those cities to the LARWQCB. Again, that a permittee may have voluntarily undertake a public information program while under the aegis of a previous permit does not render that voluntary act as a mandate under that permit. Govt. Code § 17565.

Third, regarding the Part VI.D.5.d.(3) requirement that each permittee distribute "activity specific" stormwater pollution prevention materials at various retail outlets, the Water Boards argue (WB Comments at 87) that these specific requirements are a "refinement" of a 2001 Permit requirement for the Principal Permittee (the District) to distribute "How To" instructional material "in a targeted and activity-related manner." 2001 Permit Part 4.B.1.c.(iv). This requirement, however, was not a mere "refinement." The 2012 Permit requires specific outlets for the distribution of the materials, and makes that distribution requirement applicable to all permittees. These are additional requirements that were not present in the 2001 Permit. The Commission has held that a similar expansion of requirements in an existing program still represents a new program and/or requirement for a higher level of service. SD County SOD at 53-54.[37]

[37] The Water Boards also cite the distribution in the Ballona Creek watershed of a pamphlet regarding stormwater pollution prevention. Distribution of this pamphlet was not required by the terms of the 2001 Permit, unlike the requirements of Part VI.D.5.d of the 2012 Permit at issue here.

Fourth, concerning the Part VI.D.5.d.(4) requirement that permittees maintain stormwater websites or provide links to stormwater websites via the permittee's website, including education material and opportunities for the public to participate in stormwater pollution prevention and clean-up activities, the Water Boards (WB Comments at 87-88) again argue that this is a mere "refinement" of a requirement in the 2001 Permit. The earlier requirement, in 2001 Permit Part 4.B.1.b, however, required the District, as Principal Permittee, to gather public reporting contacts from the permittees and make that available on a website. Nothing in the 2001 Permit required each permittee to provide education material and opportunities for public participation on the permittee's website.

Fifth, concerning Part VI.D.5.d.(5), which required each permittee to provide to independent, parochial and public schools materials to educate K-12 students on stormwater pollution, the Water Boards argue (WB Comments at 88) that this "carries over" a requirement in the 2001 Permit that the District "in cooperation with the Permittees" provide schools with materials to educate students. 2001 Permit Part 4.B.1.c.7. To the contrary, this requirement is not just a reiteration of the 2001 Permit requirement. The 2012 Permit now is much broader, now covering independent and parochial in addition to public schools, and now imposing this requirement on each permittee to provide these materials. This is a requirement for a higher level of service. The fact that two cities were voluntarily distributing videos under the 2001 Permit (WB Comments at 88) again does not make that a mandated activity under the earlier permit. Govt. Code § 17565.

Finally, concerning Part VI.D.5.d.(6), which requires that in implementing all activities in Part VI.D.5.d, permittees use "culturally effective methods," the Water Boards contend (WB Comments at 88) that this merely "carries over" a requirement in the 2001 Permit that the Principal Permittee "shall develop a strategy to educate ethnic communities and businesses through culturally effective methods." 2001 Permit Part 4.B.1.c.5. Again, the plain language of the two permits shows that the 2012 Permit requires an enhanced level of effort and that the responsibility for this task was expanded from the District to all non-District permittees. As such, it represents a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. ***The Residential Outreach Program Requirements Constitute a "Program"***

The Water Boards again argue that because the Caltrans MS4 permit includes a somewhat similar but less comprehensive public information program (one not directed to specific neighborhoods or specific populations), the public information programs in the 2012 Permit are not unique to local government. WB Comments at 89. As previously discussed, under California Supreme Court precedent, an executive order requirement can constitute a "program" subject to a subvention of funds under article XIII B, section 6, when it requires a local agency to provide services to the public. Here, the permittees are required to provide information on addressing

stormwater pollution to the public, a service to the public clearly falling under the first of the two tests set forth in *San Diego Unified School Dist., supra,* 33 Cal. 4th at 847.[38]

c. *The Residential Outreach Program Requirements Are Not Necessary to Implement Federal Law*

The Water Boards argue (WB Comments at 89) that residential outreach "is necessary to meet federal standards applicable to MS4 discharges." After citing the federal regulations previously discussed (40 CFR § 122.26(d)(2)(iv) and 40 CFR § 122.26(d)(2)(iv)(A)(5-6)), none of which expressly or explicitly requires the provisions at issue in Part VI.D.5.d of the 2012 Permit, the Water Boards go on to essentially ignore those governing regulations. Instead, the Water Boards cite the afore-mentioned Permit Improvement Guide, Phase II regulations governing small MS4 permittees and various EPA guidance issued under the Phase II program as the source of federal authority. None of these, however, mandates the requirements in Part VI.D.5.d.

First, the Water Boards cite the Permit Improvement Guide as authority for provisions in Part VI.D.5.d.i. WB Comments at 89-90. As previously discussed, the Guide cannot provide the basis for federal authority for any 2012 Permit mandate. While the Water Boards defend these non-binding provisions as "consistent with the federal intent" regarding the tailoring of stormwater management programs based on pollutant sources within a permittee's "MS4 service area," there is no requirement in the CWA or the federal stormwater regulations expressly or explicitly requiring the specific requirements in the 2012 Permit. *Dept. of Finance II,* 18 Cal.App.5th at 683.

Second, the Water Boards cite a U.S. EPA "Storm Water Menu of BMPs" as support, but that Menu applies to Phase II permittees, not Claimants. WB Comments at 90-91. Similarly, citation to the Massachusetts MS4 permit is inapposite, since that is a Phase II, small MS4 permit, developed and subject to different regulatory requirements than the 2012 Permit.

With regard to the targeting of school children as part of the outreach program (Part VI.D.5.d.i(5)), the Water Boards cite to "Federal regulations" which are not, however, regulations applicable to the 2012 Permit.[39] WB Comments at 91. Those regulations apply to Phase II (small operators) not Phase I permits. 40 C.F.R § 122.34. A similar citation (WB Comments at 91) of a U.S. EPA "Storm Water Menu" also is inapposite, since the "menu" also applies to Phase II, not Phase I, permittees. ‘

The Water Boards cite requirements in the EPA-issued permit to Albuquerque as support for the federal nature of the Part VI.D.5.d requirements. WB Comments at 91. However, as set forth in Exhibit 1 to the Ashby Decl., while the Albuquerque permit requires an outreach effort

[38] Moreover, any comparison should be between a local government and private parties, not between a state agency, Caltrans, and a local government. The fact that the state is imposing an obligation on local governments that is also am obligation of the state only proves that the state is attempting to shift its obligations to local governments, which would also constitute a basis for finding the requirement to be a state mandate. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.

[39] The cited regulation, 40 CFR § 122.34(b)(1)(ii) applies, as noted above, only to Phase II permittees.

that encompasses a range of mechanisms and approaches, it does not *prescribe* the specific requirements for such an effort.

With regard to the requirement that public education materials be distributed in culturally effective methods (Part VI.D.5.d.i.(6)), the Water Boards cite "federal regulations" (WB Comments at 92) but, again, those regulations are for Phase II, not Phase I, permittees.[40] The Water Boards also cite a U.S. EPA Fact Sheet on Public Education and Outreach Minimum Control Measures and a Fact Sheet on tailoring outreach programs to minority communities (WB Comments at 92). Again, both of the fact sheets are part of the Phase II permitting program, and do not constitute federal authority for the provisions in the Phase I 2012 Permit. Neither is the EPA "Storm Water Menu" quoted by the Water Boards at 92-93.

In summary, neither the CWA nor the federal regulations expressly or explicitly require the obligations set forth in Part VI.D.5.d of the 2012 Permit. Accordingly, these are not federal mandates. *Dept. of Finance,* 18 Cal.App.5th at 683.

D. *Industrial/Commercial Facilities Program Requirements*

Part VI.D of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to track and inspect various industrial and commercial facilities, including the creation and updating of an electronic database of such sources.

1. *Critical Industrial/Commercial Source Tracking*

Part VI.D.6 of the 2012 Permit requires the non-District permittees, including Claimants, to develop and implement an industrial/commercial source program following, at minimum, the requirements set forth in that part.

Part VI.D.6.b requires the tracking of nurseries and nursery centers in addition to other sources and the inclusion of information regarding the source, including the North American Industry Classification System ("NAICS") code, the status of exposure of materials to stormwater, the name of the receiving water, identification of whether the facility is tributary to a waterbody listed as impaired under CWA § 303(d) where the facility generates pollutants for which the waterbody is impaired, and whether the facility has filed a "No Exposure Certification" ("NEC") with the State Board. This provision requires Claimants to conduct field work to identify facilities and to collect information sufficient to fill the tracking database. Additionally, Claimants must update the inventory at least annually, through collection of information through field activities or through other readily available inter- and intra-agency informational databases.

a. *The Critical Industrial/Commercial Source Tracking Requirements are a New Program and/or Require a Higher Level of Service*

While acknowledging that the "specific information required under Part VI.D.6.b is slightly modified" from that of comparable requirements in the 2001 Permit, the Water Boards

[40] *See* WB Comments at 92 n.546, citing 40 CFR § 122.34(b)(1)(ii).

contend that the requirement to track critical source "is directly carried over" from Part 4.C.1 of the 2001 Permit. WB Comments at 94. This assertion, however, is not correct.

In particular, these requirements of Part VI.D.6.b were not contained in the 2001 Permit:

- Requirement of an electronic database for the tracking. Part VI.D.6.b.i. The Water Boards argue that this "simply builds" on a recommendation (not requirement) in the 2001 Permit. WB Comments at 94-95. Recommendations, however, are not requirements, and there were no requirements in the 2001 Permit for an electronic tracking database.

- Requirement for listing of NAISC code for facilities in addition to the SIC code. Part VI.D.6.b.ii.(4). The Water Boards argue that there are "crosswalk" tables to identify NAICS codes from SIC codes (WB Comments at 94), but this does not obviate the need to use those tables and populate the tracking database with the correct code.

- Requirement for indicating a facility's status for exposure of materials to stormwater. Part VI.D.6.b.ii.(7). The Water Boards claim that this information was required in the 2001 Permit, but cite to no provision therein. WB Comments at 94. In fact, this information was not required under the 2001 Permit. The Water Boards claim that documentation is available on exposure to stormwater on the State Water Board's database of GIASP permittees. *Id.* It is the permittees, including Claimants, who will have to locate and post that information. And, the 2001 Permit did not require permittees to make a qualitative evaluation of whether a facility *needed* to be covered under the GIASP (which would have involved an evaluation of its physical layout), only whether it *had* a GIASP.

- Requirement for indicating the receiving water for the facility. Part VI.D.6.b.ii.(8). The Water Boards argue that this information would already have been complied due to a requirement in 2001 Permit Part 4.C.3.b that permittees were to consider requiring facility operators to implement additional controls if they were in an environmentally sensitive area or discharged to a tributary to an impaired waterbody. WB Comments at 94 and n.559. But the 2001 Permit did not require permittees to list receiving waters or to make any assessment of whether the facility discharged pollutants for which the waterbody was listed as impaired.

- Requirement for indicating whether the facility has filed an NEC with the State Water Board. Part VI.D.6.b.ii.(11). The Water Boards argue (WB Comments at 94) that documentation on whether a certificate is available in the State Water Board's online database of GIASP enrollees. Again, this argument does not address the fact that the *permittees* are now required to undertake the review of that database and then populate the tracking database.

- Requirement to track nurseries and nursery centers, as well as "all other commercial or industrial facilities that the Permittee determines may contribute a substantial pollutant

load to the MS4. Part VI.D. b.i.1.(d), VI.D.b.i.4. Neither of these requirements, new to the 2012 Permit, are addressed by the Water Boards in their comments.

For all of the reasons, the tracking requirements outlined above in Part VI.D.6 of the 2012 Permit constitute a new program and/or higher level of service.

b. ***The Critical Industrial/Commercial Source Tracking Requirements Are Not Required to Implement Federal Law***

In arguing that the tracking requirements in Part VI.D.6.b are necessary to implement federal law, the Water Boards cite only one federal regulation, 40 CFR § 122.26(d)(2)(ii), which provides that the MS4 permit application must contain "an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the [MS4], storm water associated with industrial activity." By its plain terms, this regulation neither explicitly nor expressly requires the detailed requirements at issue in the Joint Test Claims nor its scope or detail. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

The Water Boards cite, and quote at length, from the Permit Improvement Guide (WB Comments at 95-96) but, for the reasons already discussed, the Guide cannot provide a source of federal authority for the mandates in the 2012 Permit. The Guide does not set forth enforceable requirements; its guidance is not a requirement or mandate.

The Water Boards also cite the Permit Improvement Guide (WB Comments at 96) to argue that the inclusion of nurseries and nursery centers was justified by federal requirements. Again, the Guide is not a source of federal authority, and nothing in the federal regulations requires the inclusion of nurseries or nursery centers as critical commercial sources. Equally, nothing in the regulations inhibits the LARWQCB's *discretion* to add those facilities to the tracking requirement. But it is that very exercise of discretion which demonstrates that the inclusion was not a mandate.

The Water Boards attempt to string together regulatory language requiring provision of a list of water bodies that receive MS4 discharges with another excerpt from the Permit Improvement Guide (WB Comments at 96-97) to argue that this is a "federal requirement" justifying the requirement to maintain an inventory. Again, nothing in the language or Guide constitutes a federal mandate for the specific requirements at issue in the Joint Test Claims.

Next, the Water Boards cite the EPA-issued Boise permit as support for their claim that inventory and inspection requirements for industrial and commercial facilities is a federal requirement. WB Comments at 97. However, as set forth in Paragraph 11 of the Ashby Declaration, while the Boise permit requires development of an industrial/commercial inspection program, that requirement is not as extensive as that in the 2012 Permit. While it references agricultural sources, the Boise permit does not specifically require the inclusion of nurseries or nursery centers. *Id.* Moreover, the Boise permit does specify what facilities must be inspected, how often or when additional BMPs might be required. Exhibit 1 to Ashby Decl.

c. *No Other Mandate Exceptions Apply*

The Water Boards assert, without citation to the record beyond a 1994 ROWD excerpt involving a list of industries by SIC category, that the costs of complying with Part VI.D.6.b of the 2012 Permit are "*de minimis*." WB Comments at 97. Nothing supports that assertion and it is rebutted by the declarations of Claimants attesting to the increased costs of implementing Part VI.D.6.[41]

The Water Boards also claim that "it is feasible and reasonable" for the Permittees to collect fees, and cite the LA County SOD regarding inspection requirements in the 2001 Permit. The requirements of Part VI.D.6.b, however, do not go to inspections but rather the establishment, population and updating of an electronic database, activities which are not "inspections of critical commercial and industrial sources." WB Comments at 97. Such activities are not related to the property-by-property inspection of facilities, where fees (so long as they are not double-collected, see discussion in Section II.D.2.c below), may be apportioned in certain circumstances,

2. *Critical Commercial and Industrial Source Inspection Requirements*

Part VI.D.6.d of the 2012 Permit requires that non-District permittees, including Claimants, inspect commercial facilities (restaurants, automotive service facilities (including automotive dealerships)), retail gasoline outlets and nurseries and nursery centers twice during the term of the Permit, with the first inspection to occur within 2 years after the Permit's effective date. In the inspection the permittees are required, among other things, to evaluate whether the source is implementing "effective source control BMPs for each corresponding activity" and to require implementation of additional BMPs where "storm water from the MS4 discharges to a significant ecological area . . . , a water body subject to TMDL provisions . . . or a CWA § 303(d) listed impaired water body." In addition to basic inspection obligations, this provision requires Claimants to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

Part VI.D.6.e requires Claimants to inspect industrial facilities, including the categories of facilities identified in 40 CFR § 122.26(b)(14)(i-xi) (the "Phase I facilities"), and facilities specified in 40 CFR § 122.26(d)(2)(iv)(C) (the "Specified Facilities"). Included among the inspection requirements are to confirm that each facility has a current Waste Discharge Identification ("WDID") number for coverage under the GIASP or has applied for and received a current NEC, and to require implementation of additional BMPs where "storm water from the MS4 discharges to a water body subject to TMDL Provisions . . . or a CWA § 303(d) listed impaired water body." For facilities discharging to MS4s that discharge to a Significant Ecological Area ("SEA"), the Permit requires that Claimants "shall require operators to implement additional pollutant-specific controls to reduce pollutants in storm water runoff that are causing or contributing to exceedances of water quality standards." In addition to basic inspection obligations, this provision requires Claimants to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

[41] *See* Cities Declarations at ¶ 11(d); County Declaration at ¶ 11(d).

a. ***The Critical Source Inspection Requirements Are New Programs and/or Require a Higher Level of Service***

The critical source inspection requirements in Part VI.D.6.d and e of the 2012 Permit, while similar in some respects to those in the 2001 Permit, differ in significant ways that constitute a new program or requirement for a higher level of service.

First, two entirely new categories of commercial/industrial facilities are required to be inspected, nurseries and nursery centers and all other commercial or industrial facilities that the permittee determines may contribute a substantial pollutant load to the MS4.

Second, regarding the inspection of critical commercial sources, the 2012 Permit additionally requires the inspector to confirm that non-stormwater BMPs are being effectively implemented in compliance with municipal ordinances (the 2001 Permit required only review of stormwater BMPs), that the inspector verify that effective source control BMPs (as identified in Table 10 of the Permit) are being implemented for "each corresponding activity," and if the facility discharges to an MS4 which discharges to an SEA, a waterbody subject to TMDL provisions or a waterbody on the CWA section 303(d) list of impaired waterbodies, to require implementation of additional BMPs. By contrast, 2001 Permit Part 4.C.2.a required only review of stormwater BMPs and did not require review of source control BMPs. Moreover, Part 4.C.3.b of the 2001 Permit only required, with respect to MS4 discharges into Environmentally Sensitive Areas and 303(d) listed waters, that the permittee "consider requiring operators to implemental additional controls" to reduce pollutants.

Third, regarding the inspection of critical industrial sources, the 2012 Permit additionally requires that during the first mandatory inspection, permittees must identify facilities that have filed an NEC with the State Water Board and then, 3 to 4 years after the effective date of the permit, perform a second mandatory compliance inspection of at least 25 percent of the facilities that filed the NEC to verify the continuity of the no exposure status. 2012 Permit Part V.D.6.e.i.(1) and (3). Additionally, during the inspection the permittee must confirm that if applicable, the industrial facility has applied for and received a current NEC. 2012 Permit Part V.D.6.e.i.(2). The inspector must also verify that effective source control BMPs (as identified in Table 10 of the Permit) are being implemented and that if the facility discharges to an MS4 which discharges to a waterbody subject to TMDL provisions or which is on the CWA section 303(d) list of impaired water bodies, to require implementation of additional BMPs. The inspector must also require, for facilities discharging into MS4s which discharge into SEAs, that the facility implements additional pollutant-specific controls to reduce pollutants in storm water runoff that are causing or contributing to exceedances of water quality standards. 2012 Permit Part V.D.6.e.ii.(3).

None of the above requirements was contained in the 2001 Permit. The Water Boards in their comments (WB Comments at 98-99) do not address these specific additional requirements, but simply contend that the inspection requirements from the 2001 Permit "were largely carried over to the 2012 Permit." WB Comments at 98. However, the Commission has already found that the inspection requirements in the 2001 Permit were state mandates and so, even if they had not changed, they remain state mandates. Los Angeles County SOD at 40-42. In fact, while there was some carry over of the inspection requirements, the additional specific new requirements in the

2012 Permit are new, and therefore constitute a new program and/or requirements for a higher level of service, as the Commission found in the San Diego County Statement of Decision. SD County SOD at 53-54.

b. *The Critical Source Inspection Requirements Are Not Necessary to Implement Federal Law*

Though the Water Boards argue (WB Comments at 99-100) that the inspection requirements in the 2012 Permit are mandated by federal law, in fact the California Supreme Court already has found, that similar but less complex inspection requirements in the 2001 Permit were not mandated by federal law. *Dept. of Finance,* 1 Cal. 5th at 770-71. The Water Boards cite a 2008 letter from a U.S. EPA official in support (WB Comments at 99-100), but that very letter was considered, and dismissed as non-authoritative, by the Supreme Court. *Id.* at 771 n.16.

The Water Boards again cite the Boise permit as evidence that the requirements of Part VI.D.6.e are required by federal law. As noted in the Ashby Declaration (¶ 11) and Exhibit 1 thereto, this citation is not supported by the actual provisions in the Boise permit. While inspections are required in this permit, the number and scope of those facilities are more limited than in the 2012 Permit and no inspection is required to determine the possession of an NEC or a waste discharge identification number.

c. *No Other Mandate Exceptions Apply*

The issue of whether stormwater fees can pay for the inspections required by Part VI.D.6.d and e remains an open issue. The permittees in the 2001 Permit test claim have challenged the Commission's finding that fees would be available to pay for inspections, on the basis that since fees already are collected for enforcement of the GIASP, pursuant to Water Code § 13260(d)(2)(B)(ii). These issues remain the subject of pending litigation.

Additionally, there are requirements in the inspection provisions, including the requirement to follow-up with sources regarding BMP implementation and the review of NEC facilities, that may not be recoverable in inspection fees, since they are not directly related to inspections.

E. *Planning and Land Development Program Requirements*

Part VI.D.7.d.iv of the 2012 Permit requires Claimants, except for the District, to implement a tracking system and inspection and enforcement program for new development and redevelopment post-construction BMPs.

1. *Electronic Project Tracking System Requirements*

Permit Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X, require the permittees to implement a GIS or other electronic system for tracking projects that have post-construction BMPs, including such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.

a. ***The Requirements Are a New Program and/or a Higher Level of Service***

The Water Boards (WB Comments at 102) contend that the 2012 Permit requirements at issue are merely a "refinement" of requirements in the 2001 Permit and Annual Reporting requirements. As even the Water Boards admit, however, the 2001 Permit did not require "all the fields of information" contained in the 2012 Permit. *Id.* In addition, the 2001 Permit did not require any formalized tracking of the fields set forth in the 2012 Permit, nor did it require electronic tracking of the information.

Again, as the Commission has found in test claims involving MS4 permits, the fact that a subsequent permit requirement expands (in this case, significantly) on similar but less specific requirements in the earlier permit makes those expanded requirements a new program and/or a requirement for a higher level of service. SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model SUSMP and local SUSMPs, requirement in succeeding permit to submit a Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

b. ***The Requirements Are Not Necessary to Implement Federal Law***

While the Water Boards contend (WB Comments at 102-03) that the inventory and tracking requirements are federally required, the authorities they cite do not support their contention. First, the general NPDES permit application regulations cited by the Water Boards, 40 CFR § 122.26(d)(2)(iv)(A)(2), do not require the specific inventory and tracking requirements set forth in the 2012 Permit. That regulation requires that MS4 permits include a "description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from [MS4s] which receive discharges from areas of new development and significant new redevelopment." Under the test in *Dept. of Finance II*, the regulations sets forth no express or explicit requirement for the inventory and tracking requirements in the 2012 Permit. *Dept. of Finance II*, 18 Cal.App.5th at 683. Nor does the regulation require the "scope and detail" of the requirements in the 2012 Permit. *Dept. of Finance*, 1 Cal. 5th at 771.

The Water Boards reference a statement by the LARWQCB in the Permit Fact Sheet that the "tracking system is deemed critical" to the success of the planning and development program, WB Comments at 102, is not determinative. That statement reflects the exercise of the Board's discretion to impose the tracking requirement, but does not demonstrate that it is expressly or explicitly required by the federal regulations. Indeed, if it was explicitly or expressly required, then the Water Boards would cite to the place in the regulations where it state that it is required. The Water Boards do not do so.

The Water Boards' reference to the Permit Improvement Guide is, again, inapposite, since the Guide cannot serve as federal authority for any permit requirement. *See* discussion in Section II.C.1.c., above.

The Water Boards again cite the Boise permit to argue that because it includes tracking of post-construction projects, this proves that the 2012 Permit requirements are federal in nature. However, as the Ashby Declaration states (Ashby Decl. at ¶ 12), the requirements in the Boise permit are less prescriptive than in the 2012 Permit. While post-development tracking is required, the Boise Permit does not specify the content of data to be included in the tracking requirements or the development of a maintenance checklist.

c. *The Requirements are a "Program"*

The Water Boards (WB Comments at 103) again repeat their argument that the inventory and tracking requirement is "not unique to local government," citing the fact that the Caltrans MS4 permit also contains a tracking requirement for BMPs installed on highway projects. But Caltrans is required to track its own BMPs, not BMPs of third parties. State Water Board Order 2012-011-DWQ, as amended, at pp. 41-42. This requirement is therefore unique.

In any event, as set forth above, the fact that Caltrans keeps track of its own BMPs does not make the 2012 Permit requirements not a "program" for purposes of the subvention of state funds. The requirements to inventory and track BMPs is a governmental program associated with the permitting and development of municipal areas. As such, they are "programs that carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra*, 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards assert, without evidence or citation to the record, that the costs of the inventory and tracking requirements are "de minimis and therefore not entitled to subvention." WB Comments at 103. The Boards assert also that the tracking requirements require Claimants "to maintain information that they should already be obtaining . . . ." WB Comments at 104. Neither of these assertions establishes an exception to a subvention of funds. Claimants have established that they have incurred substantial costs to implement the requirements of these and other provisions in Part IV.D.7 of the 2012 Permit. *See* Cities' Declarations at ¶ 12(d); County Declaration at ¶ 12(d).

2. *Inspection of Development Sites*

Part VI.D.7.d(iv)(1)(b) of the 2012 Permit requires Claimants, except the District, to inspect all development sites upon completion of construction and before issuance of an occupancy certificate to "ensure proper installation" of LID measures, structural BMPs, treatment control BMPs and hydromodification control BMPs.

a. *The Inspection Requirements are a New Program and/or Higher Level of Service*

The Water Boards (WB Comments at 104) repeat the argument that the inspection requirements at issue in the 2012 Permit were "necessary to ensure implementation" of controls and were first required by the 2001 Permit. This is not the test as to whether the 2012 Permit establishes a new program or a requirement for a higher level of service. *First, there was no*

requirement in the 2001 Permit for these inspections now required by the 2012 Permit. Thus, those inspection requirements are new. And, even if it were to be concluded that the inspection requirements were an enhancement of the 2001 Permit's requirements relating to post-construction BMPs, that enhancement would constitute a new program or higher level of service. SD County SOD at 53-54.

b. *The Inspection Requirements are Not Required to Implement Federal Law*

The Water Boards (WB Comments at 104-05) make several arguments that the post-construction inspection requirements in the 2012 Permit are required by federal law or regulation. None of those arguments supports that conclusion.

The Water Boards first argue that the inspection requirement "directly addresses" federal NPDES permit regulations. But, as discussed above, those regulations do not explicitly or expressly require the specific inspection requirements set forth in the 2012 Permit. As such, they cannot represent a federal mandate. *Dept. of Finance II*, 18 Cal.App.5th at 683. The Water Boards then cite federal regulations governing Phase II MS4 permits, regulations which *are not applicable* to the Phase I MS4 permit program, which governs the 2012 Permit.[42] WB Comments at 104-05. These regulations, which govern small MS4s, provide no federal regulatory authority to the Water Boards.

The Water Boards again cite the Permit Improvement Guide. WB Comments at 105. For the reasons discussed in Section II.C.1.c., above, the Guide is not a source of authority for the provisions in the 2012 Permit.

The Water Boards (WB Comments at 105) assert that provisions in the District of Columbia and Boise permits requiring post-construction inspections support the argument that the 2012 Permit provisions are federally mandated. In fact, as set forth in the Ashby Declaration (Ashby Decl. at ¶ 12), the provisions in those two permits are less prescriptive. In the DC Permit, the permit requires a formal process for site plan reviews and post-construction verification, including inspections, but does not require the specific inspection items in the 2012 Permit relating to LID and hydromodification BMPs. The Boise Permit requires inspection of permanent storm water management controls, but not specific LID and hydromodification features required of projects under the 2012 Permit.

c. *The Inspection Requirements Constitute a "Program"*

The Water Boards, citing an MS4 permit issued to Caltrans (which has no authority over private development projects or for or the issuance of certificates of occupancy), argue that because Caltrans has to inspect its own BMPs, the requirements in the 2012 Permit to inspect third-party properties are not "unique to local government." WB Comments at 105. As previously discussed with respect to the tracking database, however, the requirements imposed on Caltrans relate to its

[42] *See* discussion in Section II.C., above.

own BMPs, State Water Board Order 2012-011-DWQ, as amended, at p. 41, not BMPs of third parties. These inspections of third-party properties are therefore unique.

Moreover, performing inspections to assure third-party compliance provides a service to the public, here, the inspection of post-construction BMPs prior to the issuance of a Certificate of Occupancy, a uniquely local government-issued document. The public receives the benefits that come from these properly operating BMPs. Programs that provide services to the public are "programs" within the meaning of article XIII B, section 6. *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

d. *No Mandate Exceptions Apply*

The Water Boards contend (WB Comments at 106) that because inspections may be required by other authorities, such as under building codes, the costs of fulfilling this mandate are "*de minimis*" and thus not subject to subvention. This assertion is speculative and ignores the fact that inspectors must be trained and checklists prepared to ensure that the specific BMP requirements of Part VI.D.7.d.iv.(1)(b) are met by the project. The same is true with respect to the Water Boards' other argument, that the completion inspection required under Part VI.D.8.j. means that the BMP inspection can be met "at no additional cost." The Part VI.D.8.j inspection requirements do not include post-construction BMPs, but instead are focused on construction BMPs. Thus, there are distinct costs associated with the fulfillment of the mandates in Part VI.D.7.d.iv.(1)(b).

3. *Post-Construction BMP Inspection Program Requirements*

Part VI.D.7.d(iv)(1)(c) of the 2012 Permit requires permittees, including non-District Claimants, to develop a post-construction BMP maintenance inspection checklist and inspect at an interval of at least once every two years permittee-operated post-construction BMPs to assess operation conditions.

a. *The Post-Construction BMP Inspection Requirements are a New Program and/or Higher Level of Service*

As they do with other post-construction BMP requirements in the 2012 Permit, the Water Boards (WB Comments at 106) argue that these requirements simply represent a "refinement" of completely unrelated, and less specific, requirements in the 2001 Permit. In fact, Part 4.D of the 2001 Permit contained no mandate that permittees develop a maintenance inspection checklist and then inspect permittee-operated post-construction BMPs at regular intervals. That requirement in the 2012 Permit is a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Post-Construction BMP Inspection Requirements Are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 106-07) contend that the post-construction BMP checklist and inspection requirements in the 2012 Permit are necessary to implement federal law.

The federal NPDES permit application regulations cited by the Boards,[43] however, do not explicitly or expressly require the requirements in the 2012 Permit. The post-construction BMP checklist and inspection requirements are therefore not federal mandates. *Dept. of Finance II,* 18 Cal.App.5th at 683. Moreover, the general requirements in the federal regulations for a stormwater management program do not require the "scope or detail" of the post-construction BMP inspection requirements set forth in the 2012 Permit. *Dept. of Finance,* 1 Cal. 5th at 771.

The Boise Permit, cited by the Water Boards in support of their federal mandate argument, requires inspections only of "high priority locations." The 2012 Permit, by contrast, is more expansive. The 2012 Permit requires inspections (and associated checklists) of all post-construction BMPs.

c. *The Post-Construction BMP Inspection Requirements are a "Program"*

The Water Boards repeat the argument that, because Caltrans is required under its NPDES MS4 permit to inspect installed stormwater treatment BMPs, this demonstrates that "Claimants are not being treated differently than non-local government entities." WB Comments at 107. Again, however, Caltrans is required to inspect its own BMPs, State Water Board Order 2012-011-DWQ, as amended, at p. 41, not BMPs of third parties. The 2012 Permit's requirements are therefore unique.

Moreover, as also discussed above, post-construction BMP inspections provide a service to the public. As previously discussed, one criteria for identifying a "program" within the meaning of article XIII B, section 6, is if the program is the carrying out of "the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. The inspection of privately-owned BMPs assures that the public receives the benefit of these BMPs and does not suffer the injury from them being absent or inoperative. The inspection therefore provides a public service. The inspection of publicly owned post-construction BMPs whose sole function is to improve water quality within a municipality is also clearly a service to the public. These inspections thus constitutes a "program" eligible for a subvention of funds.

d. *No Other Mandate Exceptions Apply*

The Water Boards contend, without citation to the record (WB Comments at 107), that the post-construction BMP checklist and inspection requirement is "a minimal cost" and "a *de minimus* cost." These assertions are based on speculation and in any event are contradicted by the costs set forth by Claimants in the Section 5 Narrative Statements and Section 6 Declarations submitted in support of the Joint Test Claims.[44]

The Water Boards also argue that (WB Comments at 108) that Part VI.D.7.d.iv.(1)(c) overlaps with provisions in Parts VI.D.4.c.vii.(7)(a) and VI.D.9.h.x.(1). The latter requirements

[43] 40 CFR § 122.26(d)(2)(iv)(A)(1-2).

[44] *See* Cities Narrative Statement at Section IV.E.4; County-District Narrative Statement at Section IV.G.4; Cities Declarations at ¶ 12(d); County Declaration at ¶ 12(d).

only address the need for post-construction inspection and maintenance of the permittees' own treatment-control BMPs. The former requires development of a specific checklist and a schedule of inspections at least every two years, and with "particular attention" being required "to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation." The requirements of Part VI.D.7.d.iv.(1)(c) are more extensive and specific than those in Parts VI.D.4 and VI.D.9.

F. *Development Construction Program Requirements*

Part VI.D.8 of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to follow requirements applicable to construction sites, including inspection of construction sites of one acre or more in size, creation of a construction site inventory and electronic tracking system, the development of technical standards for Erosion and Sediment Control Plans ("ESCP") and review of those plans, the development of procedures to review and approve construction site plan documents, and the training of permittee employees.

As discussed in Section I.H above, Claimants have the option to prepare a WMP or EWMP that would incorporate development construction program control measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.8 and incorporate/customize all control measures set forth therein, unless their elimination is justified by the permittee as not applicable (Part VI.C.5.b.(iv)(c)), the provisions set forth below are mandates.

In the Los Angeles County SOD, the Commission found that the inspection requirements of the 2001 Permit constituted state mandates. The Water Boards argue that this finding should not be honored because, according to the Water Boards, the construction requirements of both the 2001 and 2012 Permits stem from a 1996 Los Angeles County Stormwater Permit, and presumably are therefore not new. WB Comments at 109. This is an argument which was not made by the Water Boards in their comments in the 2001 Permit test claims.[45] Nor was this argument made by the Water Boards in their comments on the Draft Staff Analysis concerning these test claims.[46] Having not made the argument in the previous test claim proceedings that the 2001 Permit was an alleged continuation of the requirements in the 1996 Permit, and the Commission having found that such requirements were in fact new programs (LA County SOD at 48-49), the Water Boards waived or are estopped from making that argument now.

[45] *See* Letter Dated April 18, 2008 to Ms. Paula Higashi, Executive Director, Commission on State Mandates from Elizabeth Miller Jennings, Staff Counsel IV, Office of Chief Counsel, State Water Resources Control Board (Exhibit D to Item 3 on Agenda for the July 31, 2009 Commission Hearing). These documents are in the Commission's record for these proceedings.

[46] *See* Letter dated June 5, 2009 from Dorothy Rice, Executive Director, State Water Resources Control Board and Memorandum to Ms. Higashi from Ms. Jennings, Dated June 5, 2009, entitled "Commission on State Mandates – Response to Draft Staff Analysis re: *Municipal Storm Water and Urban Runoff Discharges* 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21. (Exhibit M to Item 3 on Agenda for the July 31, 2009 Commission Hearing.) These documents are in the Commission's record for these proceedings.

In any event, the 2012 Permit's construction development requirements are new and distinct from those in the 1996 Permit. The construction activity inspection program requirements in the 1996 Permit were far less prescriptive and detailed than those in Part VI.D.8 of the 2012 Permit that are at issue in this Joint Test Claim. For example, the site inspection provisions of the 1996 Permit required only that the District (as Principal Permittee) develop a model construction activity inspection program, including checklists, which model must include procedures for construction site inspections, procedures to require corrective action be undertaken by contractors at noncomplying sites, procedures for enforcement action against noncomplying activity and appropriate training for program staff.[47] The 1996 permit language, unlike the language in Part VI.D.8 of the 2012 Permit, contains no specification as to how inspections are to be carried out.

Similarly, the "minimum recommended requirements" and BMPs set forth in the 1996 Permit are barebones (mainly set forth in the Water Boards comments at page 109), with none of the specificity in the language of Part VI.D.8 of the 2012 Permit. Thus, even were it to be concluded that the 2012 development construction provisions were a descendant of the 1996 Permit provisions, those requirements are now much more extensive and detailed, and therefore would still be a new program and/or higher level of service. *See* SD County SOD at 53-54.[48]

1. *Construction Site Electronic Inventory/Tracking System Requirements*

Part VI.D.8.g(i) of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits (or any other municipal authorization to move soil and/or construct or destruct that involves land disturbance).

Part VI.D.8.g.ii of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to complete an inventory of development projects, which must be continuously updated as new sites are permitted and completed. This inventory/tracking system must contain, among other items, contact information for the project, basic site information, the proximity of all water bodies, significant threats to water quality status, current construction phase where feasible, required inspection frequency, start and anticipated completion dates, whether the project has submitted a Notice of Intent to be covered under the General Construction Activities Stormwater Permit ("GCASP") and whether it has obtain GCASP coverage, the date the ESCP was approved and post-construction structural BMPs subject to operation and maintenance requirements.

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[47] LARWQCB Order No. 96-054, Part 2.III.B.3.a (2001 AR at R0028699).

[48] The Water Boards also contend that Claimants did not address the Commission's finding that the Claimants had fee authority to conduct inspections of commercial, industrial and construction sites. WB Comments at 108. This is not correct; the Commission's finding is discussed in both Section 5 Narrative Statements. *See* Cities Narrative Statement at 35; County-District Narrative Statement at 38. The Claimants' disagreement with the reasoning of the Commission, an argument which has not been resolved by the courts, also is discussed in the Narrative Statements. *Id.* at 33, 36. [48] Those same arguments apply to the comparable requirements in the 2012 Permit.

a. *The Construction Site Inventory and Tracking Requirements Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend (WB Comments at 110) that the construction site inventory and tracking requirements in the 2012 Permit stem from requirements in the 2001 Permit, requirements which were only to use an "effective system to track grading permits issued by each Permittee."[49] The 2001 Permit encouraged, but did not require the use of a database or GIS system.[50]

It is plain that the far more detailed requirements of the 2012 Permit constitute a new source or higher level of service. Electronic tracking is required not only of grading permits, but also encroachment permits, demolition permits, building permits, and construction permits issued by the permittees. Moreover, the inventory must contain specific (and updated) information, none of which was required by the 2001 Permit. The requirements of 2012 Permit Part VI.D.8.g are a new program and/or require a higher level of service. *See* SD County SOD at 53-54.

b. *The Inventory and Tracking Requirements are Not Necessary to Implement Federal Law*

The Water Boards contend that federal NPDES permit application regulations require the construction site inventory and tracking requirements in the 2012 Permit. WB Comments at 110-111. In fact, neither of these regulations[51] requires the "scope and detail" of the 2012 Permit requirements. *Dept. of Finance, supra,* 1 Cal. 5th at 771. The first cited regulation requires only a description of procedures for identifying priorities for inspecting sites and enforcing control measures and the second requires only that permittees have a plan "to develop, implement and enforce controls to reduce the discharge of pollutants from [MS4s] which receive discharges from areas of new development and significant redevelopment," though discharges from MS4s containing construction site runoff are addressed in a different regulation.[52]

Under the test in *Dept. of Finance II*, neither of these regulations explicitly or expressly require the detailed provisions in the 2012 Permit. 18 Cal.App.5th at 683. As also discussed above, the Permit Improvement Guide, also cited by the Water Boards (WB Comment at 110) is not a source of federal authority.

Moreover, in the Fact Sheet for the 2012 Permit, the LARWQCB cited as legal authority the provisions in 40 CFR § 122.34(b)(4).[53] This regulation, however, and others set forth in 40 CFR § 122.30-122.37 are intended to cover only so-called "small MS4s," not the Phase I MS4s such as those governed by the 2012 Permit, and whose regulatory requirements are set forth in 40 CFR Part 122.26, as previously discussed.

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[49] 2001 Permit, Part 4.E.3.c.

[50] *Ibid.*

[51] 40 CFR § 122.26(d)(2)(iv)(D)(3) and 40 CFR § 122.26(d)(2)(iv)(A)(2).

[52] 40 CFR § 122.26(d)(2)(iv)(A)(2).

[53] 2012 Permit Fact Sheet at F-72-73.

c. *No Other Mandate Exceptions Apply*

The Water Boards, citing a comment by one permittee and statements in annual reports filed by others, claim that the additional cost to meet the requirements of 2012 Permit Part VI.D.8.g are "*de minimis."* WB Comments at 111. No evidence as to these alleged minimal costs is adduced by the Water Boards, however, and Claimants have already declared that the costs of implement the construction site provisions of the 2012 Permit are considerably more than "de minimis." *See* Cities Narrative Statement; County-District Narrative Statement at 35; Cities Declarations at ¶ 13(j); County Declaration at ¶ 13(i).

And, if the Water Boards are arguing that because one or more permittees may have undertaken activities which were voluntary under the 2001 Permit but are obligatory under the 2012 Permit, the Government Code, again, provides that such voluntary activities are subject to a subvention of state funds if they were subsequently mandated by the state: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the o0perative date of the mandate." Govt. Code § 17565.

2. *Construction Plan Review and Approval Procedures Requirements*

Part VI.D.8.h of the 2012 Permit requires the non-District permittees, including Claimants, to develop and implement review procedures for construction plan documents, including preparation and submittal of an ESCP meeting multiple minimum requirements, verification of GCASP or other permit coverage and other items. In addition, Claimants must develop and implement a checklist to conduct and document review of each ESCP.

a. *The Plan Review and Approval Requirements Are a New Program and/or Represent a Higher Level of Service*

The Water Boards contend (WB Comments at 112) that Part 4.E.2.a of the 2001 Permit is "analogous to, and the basis for, the requirement of Part VI.D.8.h of the 2012 Permit," and therefore Part VI.D.8.h is not a new program or higher level of service. The requirements of the 2001 Permit, however, do not support that argument. The 2001 Permit only required that, in addition to certain minimum BMPs, permittees were to require developers to prepare a local Storm Water Pollution Prevention Plan ("SWPPP") for approval prior to issuance of a grading permit for construction projects of one acre or greater. The plan review requirements of the 2012 Permit are far more complex, requiring the development of plan review procedures, the minimum requirements of the ESCP, verification of developer permit coverage and development and implementation of a checklist to conduct and document review of each ESCP.

In view of the far greater complexity, and additional requirements in the 2012 Permit, the requirements of Part VI.D.8.h are a new program or higher level of service. These requirements represent a significant expansion of the plan review requirements in the 2001 Permit. *See* SD County SOD at 53-54.

b. *The Plan Review and Approval Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the requirements of Part VI.D.8.h of the 2012 Permit are required by federal law, citing general federal NPDES permit application regulations requiring that permittees have "procedures of site planning" and "procedures for identifying priorities for inspecting sites and enforcing control measures." WB Comments at 112 (citing 40 CFR § 122.26(d)(2)(iv)(D)(1) and (3)).[54]

This general regulatory language does not contain the "scope and detail" of the 2012 Permit requirements, *Dept. of Finance,* 1 Cal. 5th at 771, nor do the regulations "explicitly" or "expressly" require the detailed provisions in the 2012 Permit. *Dept. of Finance II,* 18 Cal.App.5th at 683. These regulations do not mandate these specific activities. Similarly, as discussed earlier, the Permit Improvement Guide provisions cited by the Water Boards (WB Comments at 112-13) do not provide federal authority for the provisions in the 2012 Permit, or any MS4 permit.

The Water Boards contend that the Boise and Albuquerque permits contain the ESCP requirements at issue in the 2012 Permit. WB Comments at 113. This is not the case. Neither the Albuquerque nor Boise permit contains as prescriptive an ESCP review and approval procedure as in the 2012 Permit. Ashby Decl. at ¶ 13. Also, neither the Albuquerque nor Boise permit explicitly requires the development of a construction project inventory with specific fields. Exhibit 1 to Ashby Decl.

3. *BMP Technical Standards Requirements*

Part VI.D.8.i(i) of the 2012 Permit requires the non-District permittees, including Claimants, to implement technical standards for the selection, implementation and maintenance of construction site BMPs within their jurisdictions.

Part VI.D.8.i(ii) requires that such construction BMPs must be tailored by permittees, including Claimants, to the risks posed by the project, as well as be in minimum conformance with standards in Permit Table 15; the use of BMPs meeting the requirements of Permit Tables 14 and 16 for constructions sites of one or more acres or for paving projects; provision of detailed installation designs and cut sheets for use in ESCPs; and, provision of maintenance expectations for each BMP or category of BMPs.

Part VI.D.8.i(iv) requires that permittees make technical standards "readily available" to the development community and that such standards must be "clearly referenced" within each permittee's stormwater or development services website, ordinance, permit approval process and/or ESCP review forms.

Part VI.D.8.i(v) requires local BMP technical standards to cover all items set forth in Tables 13, 14, 15 and 16 of the Permit.

[54] As discussed in Section II.F.1.b above, the LARWQCB did not cite this regulation as legal authority in the 2012 Permit Fact Sheet.

a. *The BMP Technical Standards Requirements are New Programs and/or Require a Higher Level of Service*

The Water Boards argue that these provisions of the 2012 Permit are not a new program or higher level of service because provisions in Part 4.E.1 of the 2001 Permit "are the basis" for the BMP Technical Standards requirements in the 2012 Permit. WB Comments at 113. Those earlier permit requirements, however, consist merely of general admonitions to retain sediments and construction related materials, wastes, spills or resides on site, contain non-stormwater runoff on site and control erosion from slopes or channels "by implementing an effective combination of BMPs." There is no requirement in the 2001 Permit to tailor the BMPs to the particular risks posed by a project, no requirement to consider the quality of the receiving water into which discharges may flow, no requirement for the specific BMP types identified in the tables in the 2012 Permit and no requirement for "maintenance expectations" for BMPs.

The requirements of Part VI.D.8.i of the 2012 Permit represent a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The BMP Technical Standards Requirements are Not Necessary to Implement Federal Law*

The Water Boards cite two general NPDES permit application regulations in arguing that 2012 Permit Part VI.D.8.i is "necessary" to meet federal requirements. WB Comments at 113-14. These regulations, like other NPDES permit application regulations, are general, requiring only a "description of requirements for nonstructural and structural best management practices" and a "description of appropriate educational and training measures for construction site operators." 40 CFR § 122.26(d)(2)(iv)(D)(2); (4). Neither of these regulations requires the "scope and detail" of the provisions in Part VI.D.8.i nor expressly or explicitly require those provisions. As such, there is no federal requirement for the measures contained in 2012 Permit Part VI.D.8.i. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683. And, as noted above, the LARWQCB itself did not cite those federal regulations in the 2012 Permit Fact Sheet as legal authority for Part VI.D.8.

The Water Boards contend (WB Comments at 114) that the Boise Permit requires that permittees have manuals describing construction stormwater management controls and specifications, and including acceptable control practices, selection and sizing criteria, illustrations, design examples and recommended operation and maintenance practices. As set forth in Exhibit 1 to the Ashby Declaration, however, the Boise permit requires that the technical guidance address the installation and maintenance of BMPs that may be implemented, but does not require risk assessments, detailed design sheets, or specify the types of BMPs to include within the manuals.

c. *The BMP Technical Standards Requirements are a Program*

The Water Boards (WB Comments at 114) argue that because there are requirements in the Caltrans MS4 permit to describe how BMPs are to be developed, constructed and maintained, the requirements in Part VI.D.8.i of the 2012 Permit are "not unique to local government." As

discussed elsewhere, the requirement to develop BMP technical standards for BMPs for construction projects within its jurisdiction is a governmental program associated with the development of municipal areas. As such, they are "programs that carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards speculate that because Part VI.D.8.i.(iii) allows use of BMPs from a handbook, the costs associated with the implementation of Part VI.D.8.i "is *de minimis*." WB Comments at 114. Again, there is no proof to support that assertion and the Claimants have set forth far more than "de minimis" costs for the implementation of Part VI.D.8. *See* Cities Narrative Statement at 27; County-District Narrative Statement at 35; Cities Declarations at ¶ 13(j); County Declaration at ¶ 13(i).

4. *Construction Site Inspection Requirements*

Part VI.D.8.j of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to inspect all construction sites of one acre or greater in size on the frequencies set forth in the Permit, which requires inspections prior to land disturbance activities, during active construction and at the conclusion of the project and as a condition to approve and/or issuing a Certificate of Occupancy. The frequency of inspections is also set in Table 17 of the Permit.

As part of their inspection obligations, Claimants must develop, implement and revise as necessary standard operating procedures that identify the inspection procedures to be followed by each permittee. Additionally, during inspections, Claimants must verify "active coverage" under the GCASP for specified projects; review the ESCP; inspect the site to determine whether all BMPs have been selected, installed, implemented and maintained; assess the appropriateness of planned and installed BMPs, and their effectiveness; visually observe and record non-stormwater discharge, potential illicit discharges and connections and potential discharge of pollutants in stormwater runoff; develop a written or electronic inspection report generated from a field inspection checklist; and, track the number of inspections for the site to ensure that it meets the minimum requirements of Permit Table 17.

a. *The Inspection Provisions Represent a New Program and/or a Higher Level of Service*

The Water Boards argue that 2012 Permit Part VI.D.E.j "essentially sets forth the same requirement" as Part 4.E.2.b of the 2001 Permit and Attachment U-4 to that permit (the Monitoring and Reporting Program). WB Comments at 115. In the prior test claim, the Commission found that Part 4.E.2.b of the 2001 Permit is a state mandate. Los Angeles County SOD at 46-47. If 2012 Permit Part VI.D.E.j sets forth the same requirements, then this part remains a state mandate. In fact, the requirements in the 2012 Permit are now even more specific and complex.

Part 4.E.2 of the 2001 Permit required that for construction sites of one acre or greater, developers had to prepare and submit a Local SWPPP for approval prior to being granted a grading permit, inspect such sites at least once during the wet season, and prior to issuing the site a grading

permit, require proof that the site had filed for coverage under the GCASP. Attachment U-4 required permittees to report on the number of number of inspections and outcomes.

While the 2001 Permit required only one inspection during the wet season, the 2012 Permit requires inspections at least monthly for most construction sites and during wet weather events and at least once bi-weekly for construction sites that discharge to a tributary listed as an impaired waterbody for sediment or turbidity or which are determined to be a "significant threat" to water quality. Additionally, permittees are required to inspect prior to land disturbance, during construction and prior to issuing a Certificate of Occupancy. None of these requirements is contained in the 2001 Permit.

Similarly, the 2001 Permit did not require permittees to develop, implement and revise as necessary standard operating procedures for inspection procedures; review the applicable ESCP (which was not required under the 2001 Permit); determine whether all BMPs were selected, installed, implemented and maintained according to the ESCP; did not require an assessment of the appropriateness of planned and installed BMPs and their effectiveness; require that Claimants make visual observations and keep records of non-stormwater water discharges, potential illicit discharges and connections and potential discharge of stormwater runoff; or require Claimants to develop a written or electronic inspection report generated from an inspection checklist used in the field.

These new requirements constitute a new program and/or higher level of service, as the Commission previously has found. Los Angeles County SOD at 46-47; *see* SD County SOD at 53-54.

b. *The Inspection Provisions are Not Necessary to Implement Federal Law*

In arguing that the requirements of Part VI.D.E.j of the 2012 Permit are "necessary to meet federal requirements," the Water Boards cite the general federal NPDES permit application regulations. WB Comments at 115-16. Neither of the cited regulations, however, provides explicitly or expressly for the specific requirements in the Permit, nor the scope and detail of those requirements. The first regulation cited, 40 CFR § 122.26(d)(2)(iv)(D)(3), provides that the permit application must include a "description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality." Nothing in that regulation requires the detailed prescriptions of Part VI.D.8.j. The second set of regulations cited, subsections of 40 CFR § 122.26(d)(2)(i), relate solely to the legal authority required of permittees, and does not require the provisions in the 2012 Permit at issue.[55]

For the reasons discussed above, citation to the Permit Improvement Guide is inapposite, since the Guide does not serve as a font of federal authority for MS4 permit requirements.

The Water Boards also argue that "[p]rovisions for the inspection of construction sites" are included in the Boise and Albuquerque permits. WB Comments at 116. However, as set forth in

[55] Again, as noted above, the LARWQCB cited neither regulation as authority for this provision in the Fact Sheet of the 2012 Permit, but to provisions in 40 CFR Part 122.34, which expressly do not apply to Phase I MS4 permits such as the 2012 Permit.

Exhibit 1 to the Ashby Declaration, the Albuquerque permit's construction site inspection requirements are similar but less prescriptive than those in the 2012 Permit while the Boise permit, while it also requires inspections of construction sites, does not require the development of inspection procedures.

With respect to the 2001 Permit, the Commission found that the inspections provisions, based on these same regulations, were state mandates. Los Angeles County SOD at 46-47. The same rule applies here.

c. *The Inspection Provisions are a "Program"*

The inspection provisions in 2012 Permit Part VI.D.E.j constitute a "program" for purposes of subvention under article XIII B, section 6 of the California Constitution. The Water Boards argue (WB Comments at 116) that there are construction requirements in the Caltrans MS4 permit and that private parties enrolled under the CGASP are required to conduct inspections. Neither of these facts means that the construction site inspection requirements in the 2012 Permit, which are different from those in the Caltrans and GCASP permits, is not a governmental function. The inspection requirements are specifically tied to the permittees' municipal function of overseeing land uses and development within municipal borders. In fact, final inspection requirements are made a condition for issuance by the permittees of a Certificate of Occupancy. 2012 Permit Part VI.D.8.j(2)(c). As such, the requirements "carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

Again, the Commission found that the inspection provisions in the 2001 Permit were a new program or higher level of service within the meaning of article XIII B, section 6. Los Angeles County SOD at 46-47. The same analysis and rule applies here.

5. *Permittee Staff Training Requirements*

Part VI.D.8.l.i and ii of the 2012 Permit requires non-District permittees, including Claimants, to ensure training for "all staff whose primary job duties are related to implementing the construction storm water program," including plan reviewers and permitting staff with regard to the "technical review of local erosion and sediment control ordinance, local BMP technical standards, ESCP requirements, and the key objectives of the State Water Board QSD program." Permittees are further required to ensure that erosion sediment control/storm water inspectors are knowledgeable in inspection procedures consistent with various standards, as well as on local BMP technical standards and ESCP requirements. Additionally, if outside parties conduct inspections or review plans, each permittee, including Claimants, is required to ensure that such staff are trained under the same requirements.

a. *The Staff Training Requirements are a New Program and/or Require A Higher Level of Service*

The Water Boards contend (WB Comments at 117) that Part 4.E.5 of the 2001 Permit were the "basis" for the training requirements in the 2012 Permit and therefore Parts VI.D.8.l.i and ii of the 2012 Permit are not a new program or higher level of service. Again, however, the Commission has already found that Part 4.E.5 of the 2001 Permit is a state mandate. Los Angeles County SOD

at 47-48. If Parts VI.D.8.l.i and ii are a continuation of those requirements, then Parts VI.D.8.l.i and ii remain a state mandate.

In fact, Parts VI.D.8.l.i and ii impose additional training requirements on claimants. Whereas the 2001 Permit required permittees to train employees regarding requirements of the stormwater management program, the 2012 Permit also requires training of employees with regard to the "technical review of local erosion and sediment control ordinance, local BMP technical standards, ESCP requirements, and the key objectives of the State Water Board QSD program;" that inspectors be knowledgeable in inspection procedures consistent with the QSD program or to designate a staff person trained in the objectives of the QSD program or the Qualified SWPPP Practitioner program; and that each inspector be knowledgeable regarding local BMP technical standards and ESCP requirements. Finally, the 2001 Permit did not require that if outside parties conducted inspections or review plans, each permittee was required to ensure that such staff was trained under the same requirements.

As the Commission has found, such an expansion of requirements constitutes a new program or requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Staff Training Requirements are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 117) again cite the NPDES permit application regulations in 40 CFR § 122.26(d)(2)(iv)(D),[56] which contain general requirements relating to municipalities having procedures to identify priorities for site inspections, arguing that an "important element of such procedures is training for the individuals tasked with implementing the program." *Id.* The federal NPDES regulations, however, contain no requirements for the training of staff that are contained in Part VI.D.8.l of the 2012 Permit. The regulations contain no explicit or express requirement for such training. Under *Dept. of Finance II*, they do not constitute federal authority for the provisions in the 2012 Permit. 18 Cal.App.5th at 683. *See also* Los Angeles County SOD at 43-46.

No federal authority is provided in the Permit Improvement Guide, as previously discussed. The Water Boards also assert that the requirements are federally required because they can be found in the Boise permit. In fact, as set forth in Exhibit 1 to the Ashby Declaration, the Boise permit's training requirements apply only to "key staff" and not to the requirement that all staff, public and private, involved in the construction program, be trained, the requirement found in the 2012 Permit.

c. *The Staff Training Requirements Constitute a "Program"*

The Water Boards repeat their argument that because there are training elements in the Caltrans MS4 permit and the GCASP, the staff training requirements in the 2012 Permit are "not unique to local government." WB Comments at 117-18. Again, however, the Commission has

[56] As noted above, the LARWQCB did not cite these regulations as authority for Part VI.D.8 in the 2012 Permit Fact Sheet.

already found this type of training to be a state mandate. Los Angeles County SOD at 47-48. That holding applies here.

Moreover, the staff training requirements in the 2012 Permit assure that the public receives the benefits of these pollution reduction programs. As such this training provides a service to the public and, as such, is a "program" within the meaning of article XIII B, section 6 of the California Constitution. *San Diego Unified School Dist., supra*, 33 Cal. 4th at 874.

G. *Public Agency Requirements*

Part VI.D.9 and, with respect to the Flood Control District only, Part VI.D.4 of the 2012 Permit contains numerous separate requirements relating to the operation of Claimants' and the other copermittees public agency facilities. All of these requirements are new requirements or represent a higher level of service, are not necessary to implement federal law and are not subject to other exceptions from a subvention of funds.

1. *Public Facility Inventory Requirements*

Parts VI.D.4.c.iii and VI.D.9.c require the Flood Control District and the other permittees to maintain an "updated inventory" of all permittee-owned or operated facilities that are potential sources of stormwater pollution, including 24 separate categories of non-District permittee facilities and eight separate categories of District facilities that are required to be in the inventory. The inventory must include the name and address of the facility, contact information, a narrative description of activities performed and potential pollution sources, and coverage under any individual or general NPDES permits or waivers. The inventory must be updated at least once during the five-year term of the Permit with information collected through field activities or other means. The District must also maintain a map of its inventoried facilities.

a. *These Requirements Are a New Program and/or Are Higher Levels of Service*

The Water Boards argue (WB Comments at 119-20) that the inventory requirements are not new because the 2001 Permit included a requirement to inventory a smaller subset of privately owned commercial and industrial facilities and that the requirement in the 2012 Permit to "develop an inventory of public facilities" is "necessary in order to ensure that other provisions of the permit are implemented, and to enable the Permittee to report its stormwater control activities at these facilities in its annual report." But neither this argument, nor the argument that the 2001 Permit "clearly included both public and private [commercial and industrial] facilities" (WB Comments at 119) demonstrate that the 2001 Permit included a public facilities inventory requirement. It did not: the facilities that are included in the 2012 Permit's inventory list were not present in the 2001 Permit. The requirements at issue in the 2012 Permit were new.

Moreover, even were the requirements an expansion of similar but less specific requirements in the 2001 Permit, this still would represent a new program and/or higher level of service. *See* SD County SOD at 53-54.

b. *These Requirements Are Not Necessary to Implement Federal Law*

As they have argued earlier, the Water Boards cite the general federal permit applications regulations contained at 40 CFR § 122.26(d)(2)(iv) in support of their argument that these inventory requirements are a federal mandate. WB Comments at 120. As set forth above, the test as to whether a federal regulation imposes a federal mandate is whether the regulation "'expressly' or 'explicitly' [requires] the condition imposed in the permit." *Dept. of Finance II,* 18 Cal.App.5th at 683. Nowhere in the text of 40 CFR § 122.26(d)(2)(iv) is there any "explicit" or "express" requirement for the inventory of public facilities required in the 2012 Permit.

The Permit Improvement Guide, cited again by the Water Boards as authority for the proposition that the inventory provisions are "necessary to meet federal requirements," provides no such support because the Guide is not binding on Claimants, and cannot therefore represent any font of federal authority. *See* discussion in Section II.C.1.c, above.

Finally, with respect to the Massachusetts General MS4 permit, cited by the Water Boards as evidence that the inventory provisions "is necessary to meet federal requirements," the Massachusetts permit is a "Phase II" MS4 permit, applicable to smaller MS4s systems under a regulatory scheme entirely separate from that applicable to the 2012 Permit. The Massachusetts permit cannot provide evidence of federal authority for the Water Boards' argument.

c. *Other Mandate Exceptions Do Not Apply*

The Water Boards argue (WB Comments at 121) that based on various assumed facts not supported by any reference to the record, "the costs to implement these provisions is *de minimis* and therefore not entitled to subvention." While the specific costs of the inventory provisions are not broken out (and are not required to be broken out) in the Section 5 Narrative Statements, the total increased costs identified by the Claimants for the public agency requirements were, for the city Claimants, $3.172 million in FY 2012-13 and $4.070 million in FY 2013-14.[57] These costs certainly are not de minimis.

The Water Boards further contend (WB Comments at 121) that at a meeting held on April 25, 2012, the District "presented its written proposal" for requirements in Part IV.D of the 2012 Permit, and that the LARWQCB "accepted the LACFCD written proposal in large part." To the contrary, the "written proposal" was simply a markup by the District of provisions in the draft 2012 Permit that it felt were not applicable to an agency which does not have the same land use jurisdiction as the County or the city permittees. [58] The markup were comments on the LARWQCB draft permit.

The provision of comments on a draft permit (some of which were not accepted, as the Water Boards acknowledge) does not constitute the voluntary agreement to permit terms. Were it to do so, there would be no incentive for permittees to comment, which is a right established by

[57] Cities Narrative Statement at 30.

[58] RB-AR3065-84.

the CWA regulations.[59] It would also be counterproductive from a policy standpoint. As comments often are aimed at drawing the attention of the regional board to draft permit provisions which are impracticable or inordinately costly, such comments can reduce the scope of any subsequent test claim seeking a subvention of state funds under article XIII B, section 6.

2. *Retrofitting Requirements*

Part VI.D.9.d of the 2012 Permit contains various requirements relating to the retrofitting of areas of existing development. Part VI.D.9.d.i requires permittees to develop an inventory of "retrofitting opportunities" in existing development. Part VI.D.9.d.ii requires them to screen existing areas of development "to identify candidate areas for retrofitting using watershed models or other screening level tools." They must then evaluate and rank areas of existing development to prioritize retrofitting candidates. Part VI.D.9.d.iv requires permittees to consider the results of the evaluation by giving "highly feasible" projects a "high priority" to implement source control and treatment control BMPs in the permittee's Storm Water Management Plan ("SWMP") and considering high priority retrofit projects as candidates for off-site mitigation for new development and redevelopment projects. Finally, Part VI.D.9.d.v requires permittees to cooperate with private landowners to "encourage site specific retrofitting projects." The permittees must consider demonstration retrofit projects, retrofits on public lands and easements, education and outreach, subsidies for retrofit projects, requiring retrofit projects as enforcement, mitigation or ordinance compliance, public and private partnerships, fees for existing discharges to the MS4 and reduction of such fees for retrofit implementation.

a. *These Requirements are a New Program and/or Require a Higher Level of Service*

The Water Boards argue that the requirements in Part VI.D.9.d are not new programs or a higher level of service. The Water Boards base this argument on the requirements in the 2001 Permit to have new and redevelopment projects maximize "the percentage of pervious surfaces to allow percolation of storm water into the ground," the requirement in the 2001 Permit's Storm Water Quality Management Program ("SQMP") that permittees comply with the general stormwater program requirements of 40 CFR § 122.26(d)(2), and the requirement that the SQMP be implemented to reduce the discharges of pollutants in stormwater to the MEP. WB Comments at 122.

First, as the Water Boards concede, nothing in the 2001 Permit placed these requirements on existing development; in the 2001 Permit "these provisions were limited to new development and redevelopment projects . . ." WB Comments at 122. The Water Boards do not argue that these requirements were explicitly or expressly required by the regulation. Thus as the Water Boards concede this extension was new.

Second, even were the 2001 Permit requirements related to the retrofitting requirements in the 2012 Permit, under the Commission's own holding in the San Diego County Statement of Decision, the addition of the numerous and expanded requirements in the 2012 Permit rendered them a new program or one requiring a higher level of service. *See* SD County SOD at 53-54

[59] 40 CFR § 124.12 (attached in Section 7 Rebuttal Documents at Tab 2).

(even though previous MS4 permit required adoption of Model SUSMP and local SUSMPs, requirement in succeeding permit to submit a Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

b. *These Requirements are Not Necessary to Implement Federal Law*

Nothing in the Water Boards' argument about the alleged federal law necessity of the retrofitting requirements (WB Comments at 122-23) bears scrutiny under *Dept. of Finance* and *Dept. of Finance II.* First, the language in the Code of Federal Regulations cited by the Water Boards, that the NPDES permit application set forth a management program with a "comprehensive planning process" and a "description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas" (WB Comments at 122) certainly does not expressly or explicitly require the retrofitting requirements in Part VI.D.9.d of the 2012 Permit. *Dept. of Finance II,* 18 Cal.App.5th at 683.

Second, the fact that much of the jurisdiction covered by the 2012 Permit may be built-out, (WB Comments at 122) does not support inclusion of the specific requirements set forth in the 2012 Permit. Again, the Water Boards do not point to any statute or regulation that expressly or explicitly imposes this requirement. And, again, the Water Boards' citation to the Permit Improvement Guide (*Id.* at 122-23) provides no source of federal authority, as that is guidance, and not to be used for enforcement purposes.

The Water Boards again cite requirements in the Massachusetts General Permit (WB Comments at 123) in support of their federal necessity argument. As discussed above, this Phase II permit does is not relevant to the requirements for Phase I permits such as the 2012 Permit.

c. *No Other Mandate Exceptions Apply*

The Water Boards make speculative arguments about whether the costs of these requirements are "de minimus." Again, while the specific costs of the inventory provisions are not broken out (and are not required to be broken out) in the Section 5 Narrative Statements, the total increased costs identified by the Claimants for the public agency requirements were, for the city Claimants, $3.172 million in FY 2012-13 and $4.070 million in FY 2013-14.[60] These costs certainly are not de minimis. And, arguments not supported

3. *Integrated Pest Management Program Requirements*

Parts VI.D.4.c(vi) (applicable to the District) and VI.D.9.g(ii) (applicable to all other permittees) of the 2012 Permit requires the permittees, including Claimants, to implement an Integrated Pest Management ("IPM") program, including restrictions on the use of pesticides, restricting treatments only to remove the target organism, selection of pest controls that minimize risks to human health, "beneficial non-target organisms" and the environment, partnering with other agencies and organizations to "encourage" the use of IPM and adopt and "verifiably implement" policies, procedures and/or ordinances requiring the minimization of pesticide use and

[60] Cities Narrative Statement at 30.

encouraging the use of IPM techniques for public agency facilities and activities. Additionally, permittees in such policies must commit and schedule to reduce the use of pesticides that cause impairments of surface waters by preparing and updating annually an inventory of pesticides, quantify pesticide use by staff and contractors and demonstrate implementation of IPM alternatives where feasible to reduce pesticide use.

a. *These Requirements are a New Program and/or Require a Higher Level of Service*

The Water Boards (WB Comments at 124-125) argue that the IPM requirements do not constitute a new program or higher level of service because they "simply reflect[] the prevailing approach to pesticide management." The Water Boards also cite to "pesticide-related" requirements in the 2001 Permit and argue that the 2012 Permit IPM requirements "ground the permit in the well-established IPM approach to pest control." *Id.* at 124.

A comparison of the 2001 Permit with the 2012 Permit, however, shows that the 2012 Permit requirements were not in the 2001 Permit. The 2001 Permit did not require permittees to implement an IPM program or IPM techniques. The IPM requirements in the 2012 Permit are new requirements and/or requirements for a higher level of service.

b. *These Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the federal regulations require permittees to have, as part of their management program, a program to reduce to the maximum extent practicable pollutants "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." WB Comments at 125, quoting 40 C.F.R. 122.26(d)(2)(iv)(A)(6). The Water Boards also cite to an example permit in the Permit Improvement Guide which includes IPM requirements. WB Comments at 125-26.

40 C.F.R. 122.26(d)(2)(iv)(A)(6), however, does not expressly or explicitly require the requirements set forth in Parts VI.D.4.c(vi) and VI.D.9.g(ii) of the 2012 Permit. As such it is not a ground for finding that it mandates these permit requirements. *Dept. of Finance II*, 18 Cal.App.5th at 683. For the reasons discussed above, to the Permit Improvement Guide also carries no weight as a basis for finding a federal mandate. The IPM requirements in the 2012 Permit were not required by federal law.

c. *The IPM Requirements Are a "Program"*

The Water Boards argue that the IPM requirements in the 2012 Permit are not "unique to local government" because IPM elements are in an MS4 permit applicable to Caltrans and because a federal law authorized federal agencies to promote IPM techniques. WB Comments at 126. It is unclear what the Water Boards are contending. The IPM requirements in the 2012 Permit apply to a variety of local municipal activities, including landscape, park and recreational facilities

management.[61] As such, they are "programs that carry out the governmental function of providing services to the public." *San Diego Unified School Dist. supra*, 33 Cal. 4th at 874. Thus, this fact alone qualifies the IPM requirements as "programs," and thus eligible for a subvention of funds under article XIII B, section 6 of the California Constitution.

Additionally, the IPM requirements are unique to an essential governmental function, the maintenance of these public facilities. The fact that a Caltrans permit may have some similar IPM requirements does not render the IPM requirements in the 2012 Permit as not uniquely governmental. The Water Boards' citation to the Food Quality Protection Act of 1996 is completely inapposite, as it does not prove that the 2012 Permit IPM requirements apply "generally to all residents and entities in the state." *San Diego Unified, supra*, 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards again contend (WB Comments at 126) that the Flood Control District "proposed to the Los Angeles Water Board its own set of permit provisions." The Water Boards refer to the same April 25, 2012 proposal discussed in Section II.G.1.c above. The Water Boards contend that "the LACFCD proposed that it implement these requirements and the Board accepted the LAFCD's proposal." WB Comments at 127.

Again, the record does not support this assertion. The District's "proposal" was simply comments on a draft of the 2012 Permit. And in fact, the LARWQCB accepted only some of those comments, as reflected on RB-AR3071-73. This does not constitute voluntary agreement to permit requirements that might constitute an exception to a mandated cost.

4. *Trash Excluder Requirements*

Part VI.D.9.h.vii of the 2012 Permit requires Claimants, in areas not subject to a Trash TMDL, to install trash excluders, or equivalent devices, on or in catch basins or outfalls, except where such installation would cause flooding. Claimants may also employ alternative or enhanced BMPs that "provide substantially equivalent removal of trash." If alternative means are employed, the permittee must demonstrate that such BMPs "provide equivalent trash removal performance as excluders."

a. *The Trash Excluder Requirements are a New Program or Higher Level of Service*

The Water Boards contend (WB Comments at 127) that the trash excluder requirements in the 2012 Permit are merely an "elaboration" of the requirement in the 2001 Permit that permittees implement "the most effective combination of BMPs for storm water/urban runoff pollution control."

The absence of any discussion of trash excluders or equivalent technology in the 2001 Permit disproves this argument. Moreover, as previously discussed, this argument also ignores the test set forth by the Commission in the San Diego County Statement of Decision that

[61] 2012 Permit, Part VI.D.9.g.ii.

"elaboration" (here, a completely new provision) on an existing permit provision still can constitute a new program or requirement for a higher level of service. SD County SOD at 53-54.

b. *The Trash Excluder Requirements are Not Necessary to Implement Federal Law*

In support of their argument that federal law necessitates the trash excluder requirements, the Water Boards argue (WB Comments at 127-28) that the general NPDES permit application regulations "identify the need to develop, implement, and enforce controls to reduce the discharge of pollutants from MS4s." The Water Boards further cite regulatory language requiring MS4 permittee management programs include "maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from MS4s" and that trash excluder provisions in the 2012 Permit are "consistent with these regulations."

The Water Boards cite no federal statute or regulatory language that expressly or explicitly requires the trash excluder requirements in the 2012 Permit. Absent such authority, there is no support for the Water Boards' argument. *Dept. of Finance II,* 18 Cal.App.5th at 683.[62]

c. *The Trash Excluder Requirements are a "Program"*

The Water Boards assert that since trash capture devices are required in a Caltrans permit under a statewide water quality policy concerning trash, the trash excluder requirement in the 2012 Permit "is not unique to local government." WB Comments at 128. Again, the test for whether the requirements represent part of a "program" for which a subvention of funds is required is, in relevant part, whether the requirements are "programs that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

As discussed in Section I.E.1 above, MS4 operators, such as Claimants, are required to operate MS4s to protect their residents' life and property from flooding. This is a governmental function of providing services to the public. The trash excluder requirements themselves provide services to the public in collecting trash and minimizing its impact. As such, these trash excluder requirements are a program under article XIII B, section 6.

d. *No Other Mandate Exceptions Apply*

The Water Boards assert that permittees, including Claimants, have "significant flexibility" to choose structural controls and/or non-structural BMPs that are not trash excluders to satisfy the trash excluder requirements of the 2012 Permit. The Water Boards do not, however, explain how this constitutes an exception to the requirement for a subvention of funds. The trash excluder requirements are requirements, and there are increased costs associated with their satisfaction. *See* Cities Narrative Statement at 30; County-District Narrative Statement at 21.

[62] The Water Boards also cite (WB Comments at 128) a U.S. EPA publication on "Trash and Debris Management." This document does not even appear to constitute a guidance document, but only a fact sheet. In any event, it does not provide federal authority for the trash excluder requirements in the 2012 Permit.

5. *Pesticide Training Requirements*

Parts VI.D.4.c.x.(2) (applicable to the District) and VI.D.9.k.(ii) (applying to all other permittees) require Claimants to train all employees and contractors who use or have the potential to use pesticides or fertilizers. This training shall address the potential for pesticide-related surface water toxicity; the proper use, handling, and disposal of pesticides; least toxic methods of pest prevention and control, including IPM; and the reduction of pesticide use.

a. *The Pesticide Training Requirements Are a New Program and/or Higher Level of Service*

The Water Boards assert that the 2001 Permit contained requirements for permittees to implement landscaping protocols and to ensure proper application of pesticides, and the requirement for the training of employees and contractors contained in the 2012 Permit merely "clarifies expectations under the 2001 Permit." On this basis, the Water Boards argue that the new training requirements do not constitute a new program or higher level of service. WB Comments at 129.

As discussed earlier, however, this assertion does not pass muster under governing authority. First, training in pesticide use handling and disposal, IPM techniques and reduction in pesticide use were new to the 2012 Permit and not part of the requirements under the former permit. Second, under the Commission's decision in the San Diego County test claim, even were the pesticide training requirements considered to be additive to the pesticide requirements set forth in the 2001 Permit, they still would be considered to be a new program and/or require a higher level of service. SD County SOD at 53-54.

b. *The Pesticide Training Requirements Are Not Required to Implement Federal Law*

The Water Boards, citing general NPDES permit application regulatory language which does not explicitly require training in pesticide issues, argue that the training requirements in the 2012 Permit are required by federal law, because"[t]raining programs for the application of pesticides are necessary to comply with these regulations." WB Comments at 129.

Applying the tests set forth by the Supreme Court and the Court of Appeal in *Dept. of Finance* and *Dept. of Finance II*, nothing in the federal regulations cited by the Water Boards expressly or explicitly requires the specific training requirements in the 2012 Permit. As such, they are not federally required.

Nor do the Water Boards explain how the regulations require these as opposed to other training requirements or how the regulations can be met solely through these requirements. The Water Boards do not cite to any evidence in the record in support of their contention.

The Water Boards also cite language in regulations covering smaller "Phase II" MS4s, which are not applicable to the Phase I MS4s that are subject of the 2012 Permit. WB Comments at 130. Even were this regulatory language to apply to Claimants, the language does not expressly or explicitly require the pesticide training requirements in the 2012 Permit. Finally, the Water

Boards cite the Permit Improvement Guide as authority. WB Comments at 130. For the reasons previously discussed, the Guide does not set forth binding federal requirements.

c. *The Pesticide Training Requirements are a Program*

The Water Boards again argue that the pesticide training requirements in the 2012 Permit are "not unique to local government" because a Caltrans permit contains similar, but much less specific, pesticide training requirements. WB Comments at 130.

The requirement to train municipal employees and contractors in the correct use of pesticides while engaged in applying these pesticides to municipal facilities such as parks and recreation areas, however, constitutes part of programs "that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. As such, the pesticide training requirements in the 2012 Permit represent a mandated "program" for which a subvention of funds under article XIII B, section 6 of the California Constitution is required.

d. *No Other Mandate Exceptions Apply*

The Water Boards (WB Comments at 131) assert that, with regard to 2012 Permit Part VI.D.4.c.x.(2), "the LACFCD proposed that it implement these requirements and the Board accepted the LACFCD proposal." As discussed in Section II.G.1.c above, however, the LACFCD presented a markup of a draft of the 2012 Permit *prepared by the LARWQCB.* This is evident from the Administrative Record.[63] That record shows also that the LARWQCB expressly did not incorporate some of the District's comments. The District was not making a "proposal." It was providing comments (a right granted to all permittees, and non-permittees) on draft permit language. There was no voluntary provision of permit language, only edits in existing draft language, many of which were not accepted.

H. *Illicit Connections and Illicit Discharges Elimination Program Requirements*

Part VI.D.4.d.v (with respect to the Flood Control District) and Part VI.D.10.d (with respect to the County and city permittees) of the 2012 Permit requires Claimants to revise signage adjacent to open channels, to develop and maintain written procedures to document how complaint calls are received, documented and tracked and to maintain documentation of complaint calls. Part VI.D.4.d.vi for the District and Part VI.D.10.e for the County and city permittees require specific requirements for spill response plans.

The Water Boards first argue that since Claimants can and have prepared a WMP or EWMP that would incorporate illicit connection and discharge detection program control measures in a customized watershed-specific fashion, the choice to implement Parts VI.D.4.d and VI.D.10 rather than alternatives (as allowed by the Permit), was a "choice" to implement those provisions and thus not a mandate. WB Comments at 132.

[63] *See* RB-AR3076-77.

This argument, however, ignores the fact that the permittees must still meet the requirements of VI.D.4.d.v and vi and Part VI.D.10.d and e. Permittees entering into a WMP or EWMP must assess these requirements and incorporate or customize them to meet these part's requirements. 2012 Permit Part VI.C.5.b.iv. These requirements are therefore still mandates.

The Water Boards also again argue that because the District "proposed" certain changes in language in the draft 2012 Permit, which were in part accepted by the LARWQCB, this means that the District is not entitled to a subvention of funds. WB Comments at 132-33. As previously discussed, the District was making comments on a draft of the 2012 Permit.[64] These comments, along with a number of other comments, were aimed at making the permit language fit the factual circumstances of the District's operations. That does not make the comments a voluntary assumption of permit responsibilities. Under the Water Boards' argument, any test claimant which commented on a permit (the right of any party regarding a proposed NPDES permit[65]) and had that comment accepted would waive any right to seek funding for the permit requirements. That is not the law.

1. *Signage for Open Channel Requirements*

Part VI.D.10.d.iii of the 2012 Permit requires non-District permittees to "ensure that signage adjacent to open channels . . . include information regarding dumping prohibitions and public reporting of illicit discharges."[66]

a. *The Public Reporting Signage Provisions Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend that the requirements for signage concerning public reporting of spills was not a new program and/or a requirement for a higher level of service because, under the 2001 Permit, permittees were required to post signs discouraging illegal dumping pursuant to 2001 Permit Part 4.B.1.(a). WB Comments at 133. The 2001 Permit, however, did not require that the signs require information concerning public reporting of illicit discharges or improper disposal.

The 2012 Permit requires new signs with the new required information. If a permittee did not comply, it could not simply assert that the signs were in compliance with the prior permit. This is, therefore, a new mandate. Alternatively, to the extent that this new signage is considered an expansion of the 2001 signage program, the Commission has held that an expansion of an existing program constitutes a new program or requirement for a higher level of service. SD County SOD at 53-54.

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[64] *See* RB-AR3082-83.

[65] Pursuant to 40 CFR § 124.12(c), "[a]ny person may submit oral or written statements and data concerning the draft permit." This requirement applies to state programs pursuant to 40 CFR § 123.25.

[66] Permit Part VI.D.10.d.iii states that the signage is as referenced in "Part F.8.h.vi." There is no such part in the 2012 Permit. It is presumed that this reference should have been to Part VI.D.9.h.vi.(4), which is referenced by the Water Boards in their comments. WB Comments at 133.

b. *The Public Reporting Signage Provisions Are Not Required to Implement Federal Law*

The Water Boards cite two NPDES MS4 permit application regulations and the afore-mentioned Permit Improvement Guide in support of their argument that the public reporting signage requirements are required to implement federal law. WB Comments at 133-34. As discussed previously, the Permit Improvement Guide is guidance, not federal requirements. The two regulations, 40 CFR § 122.26(d)(2)(iv)(B)(5) and (6), provide:

> (5) 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 [MS4s];
>
> (6) A description of . . . public information activities . . . to facilitate the proper management and disposal of used oil and toxic materials . . . .

Id.

The plain language of these regulations reveals that neither explicitly nor expressly requires the particular signage requirements set forth in Parts VI.D.4.d.v.(2) or VI.D.10.d.iii, nor the scope and depth of those requirements. Thus, federal law does not mandate them. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

Additionally, 2012 Permit Parts VI.D.4.d.v.(2) and VI.D.10.d.iii mandate how Claimants are to comply with the federal regulations. In doing so, the LARWQCB usurped Claimants discretion given to them under the regulations and directed the specific manner in which Claimants were to comply. By doing so, the LARWQCB imposed a state mandate. *Long Beach Unified School District,* 225 Cal.App.3d at 173.

c. *No Other Mandate Exceptions Apply*

The Water Boards argue that since signage is required regarding illegal dumping under other provisions in the 2012 Permit, the requirements of Part VI.D.10.d.iii are "essentially equivalent" and thus, additional costs to comply are "*de minimus*" and not entitled to subvention. WB Comments at 134. The Water Boards cite to no evidence in the record to support this argument.

2. *Written Procedures for Complaint Call Responses*

Part VI.D.4.d.v.(3) of the 2012 Permit requires the District to develop and maintain written procedures that document how complaint calls are received, documented and tracked "to ensure that all complaints are adequately addressed." Such procedures must be "evaluated to determine whether changes or updates are needed to ensure that the procedures adequately document the methods employed by the LACFCD."

Part VI.D.10.d.iv of the 2012 Permit requires the non-District permittees to develop and maintain written procedures that document how complaint calls are received, documented and tracked "to ensure that all complaints are adequately addressed." Such procedures must be "evaluated to determine whether changes or updates are needed to ensure that the procedures adequately document the methods employed by the Permittee."

a. *The Complaint Call Procedures Requirements Are a New Program or Require a Higher Level of Service*

The Water Boards contend that the requirements for procedures regarding complaint calls were "consistent" with the 2001 Permit Part 4.G's requirements for documenting, tracking and reporting illicit connection/illicit discharge ("IC/ID") events. WB Comments at 135.

Again, however, the 2001 Permit did not contain any of the specific requirements set forth above regarding how permittees were to develop and maintain written procedures for the handling of complaint calls, or for their evaluation. The requirements in the 2012 permit were completely new, and thus constitute a new program and/or a requirement for a higher level of service.

b. *The Complaint Call Procedures Requirements Were Not Necessary to Implement Federal Law*

The Water Boards argue that because Parts VI.D.4.d.v.(3) and VI.D.10.d.iv are "consistent" with the Permit Improvement Guide and the Boise Permit, this "demonstrates these provisions are required to implement federal law." WB Comments at 136.

As previously discussed, the Permit Improvement Guide cannot, by its own terms, be used to compel any permit condition choices by permittees. The Boise permit contains only general requirements to coordinate the response to spills, including documentation, tracking and reporting. Nothing in that permit duplicates the specific provisions at issue in the 2012 Permit. *See* Ashby Decl. at ¶ 15 (spill response plan requirements not as prescriptive as those in 2012 Permit.) Moreover, the provisions in the Boise permit were a product of EPA's discretion afforded under the CWA to determine, in the circumstances of the facts surrounding that permit, what would meet the MEP standard. As a discretionary act, the contents of a federal permit do not constitute a federal mandate.

3. *Maintaining Documentation of Complaint Call Requirements*

Part VI.D.4.d.v.(4) of the 2012 Permit requires the District to maintain documentation of complaint calls and internet submissions and to record the location of the reported spill or illicit discharge and the action undertaken in response, including referrals to other agencies. Part VI.D.10.d.v requires the non-District permittees to maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action undertaken in response.

a. *The Documentation Requirements are a New Program and/or a Requirement for a Higher Level of Service*

The Water Boards (WB Comments at 136-37) argue that these provisions of the 2012 Permit are not new programs because they are allegedly consistent with requirements in 2001 Permit Part 4.G, including Part 4.G.1(b), which required that permittees map illicit connections and discharges to their MS4s.

The requirements in the 2012 Permit, however, are broader, and require documentation of the content of all complaint calls as well as actions taken to address IC/ID complaints, including referrals to other agencies. Because these are new requirements, they represent a new program and/or requirement for a higher level of service.

b. ***The Documentation Requirements are Not Necessary to Implement Federal Law***

The Water Boards cite CWA Section 402(a)(2) as authority for the documentation requirements in the 2012 Permit. WB Comments at 137. The general language of the statute, however, requiring that any NPDES permit include conditions "on data and information collection, reporting, and such other requirements," is not an explicit or express mandate for the documentation requirements in the 2012 Permit nor a mandate for the scope and detail of the permit requirements. *Dept. of Finance II,* 18 Cal.App.5th at 683; *Dept. of Finance,* 1 Cal. 5th at 771.

The Water Boards also cite the Boise permit, which contains a requirement that permittees must maintain a record documenting complaints and responses to illicit discharges. WB Comments at 137. This recording requirement is less detailed than in the 2012 Permit and in any event were imposed as a matter of discretion by EPA. Significantly, similar requirements were not found in other EPA-issued permits, again supporting the fact that the documentation requirements were not a federal mandate, but merely a requirement imposed at the discretion of EPA.

4. ***Illicit Discharge and Spill Response Plan Requirements***

Part VI.D.4.d.vi.(1) of the 2012 Permit requires, in pertinent part, that the District implement an "ID and spill response plan" for all sewage and other spills that may discharge into its MS4, which, at a minimum, must (a) require coordination with spill response teams "throughout all appropriate departments, programs and agencies so that maximum water quality protection is provided;" (b) respond to IDs and spills within four hours of become aware of the ID or spill, or if on private property, within two hours of gaining legal access to the property and (c) report spills that may endanger health or the environment to appropriate public health agencies and the Office of Emergency Services ("OES").

Permit Part VI.D.10.e.i requires, in pertinent part, that non-District permittees implement a "spill response plan" for all sewage and other spills that may discharge into its MS4. The spill response plan must identify agencies responsible for spill response and cleanup, phone numbers and e-mail addresses for contacts and shall further address coordination with spill response teams "throughout all appropriate departments, programs and agencies so that maximum water quality protection is provided."

Permit Part VI.D.10.e.i.(3) and (4) requires the non-District permittees to respond to spills for containment within four hours of becoming aware of the spill, or if on private property, within two hours of gaining legal access to the property and reporting of spills that may endanger health or the environment to appropriate public health agencies and the OES. This requires the permittees to assemble and have available sufficient staff and equipment to meet these requirements.

a. ***The Spill Response Plan Requirements are a New Program and/or a Requirement for a Higher Level of Service***

The Water Boards contend that the spill response plan requirements in the 2012 Permit are not a new requirement, because the 2001 Permit required a response plan for overflows of sanitary sewers in permittees' jurisdiction, an implementation plan for dealing with IC/ID and a requirement that permittees respond within one business day of discovery or a report of a suspected

illicit discharge, with activities to abate, contain, and cleanup such discharges. WB Comments at 138-39.

Again, however, the requirements of the 2012 Permit are more complex and far-ranging. Those requirements include intra-permittee coordination among all responsible departments, identification of agencies responsible for spill response, including contact information, response to spills (not just from sanitary sewers) with containment within 4 hours of becoming aware, or within 2 hours of gaining legal access to private property, and requirements for reporting spills of all types (not just from sanitary sewers) that pose a threat to health or the environment.

Whereas the 2001 Permit had more limited spill response requirements, the broader and more comprehensive requirements set forth in the 2012 Permit constitute a new program and/or requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Spill Response Plan Requirements are Not Necessary to Implement Federal Law*

The Water Boards cite the general requirement in the CWA that permittees must "effectively prohibit non-stormwater discharges" into their MS4s. WB Comments at 139. This general requirement, however, does not require the "scope and detail" of the 2012 Permit requirements, nor does it explicitly or expressly mandate those requirements. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683. The Water Boards also cite the Permit Improvement Guide but, for the reasons already discussed, this document provides no support for the proposition that the 2012 Permit requirements were mandated by federal law.

Finally, the Water Boards cite 40 CFR § 122.26(d)(2)(iv)(B)(4), one of the general NPDES MS4 permit application regulations, as additional authority for their argument that federal law mandates the spill response plan requirements. This regulation, which requires MS4 permits to include a "description of procedures to prevent, contain, and respond to spills that may discharge into the [MS4]," again does not contain the scope and detail of the 2012 Permit requirements or explicitly or expressly mandate the permit requirements. The regulation does not constitute a federal mandate for those requirements. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

c. *The Spill Response Plan Requirements Constitute a "Program"*

Citing the Caltrans permit, the Water Boards again argue that the spill response plan requirements are not "unique to local government," and therefore do not constitute a "program" under article XIII B, section 6, of the California Constitution. As previously discussed, the activities set forth in the spill response plan requirements are those of governmental agencies "that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. As such, the spill response plan requirements in the 2012 Permit represent a mandated "program" for which a subvention of funds under article XIII B, section 6 of the California Constitution is required.

The Water Boards also argue that the reporting of illicit discharges and spills to public health agencies is "consistent" with Water Code §§ 13271 and 13272, which are applicable to persons who discharge hazardous substances or sewage or oil or petroleum products to waters of

the state. The difference is that in the case of the 2012 Permit, the reporting obligation applies to permittees not with respect to their own discharges, but when the discharger is a third party. In this way, permittees are being treated differently than other dischargers.

REBUTTAL TO COMMENTS OF WATER BOARDS AND DEPARTMENT OF FINANCE

IV. CLAIMANTS LACK FEE AUTHORITY TO FUND THE MANDATES IMPOSED BY THE 2012 PERMIT

Test claimants are entitled to reimbursement for a mandated program or increased level of service unless they have the authority to levy service charges, fees or assessments sufficient to pay for the program or service. Govt. Code § 17556(d). Because the fee authority is an exception to payment, like the exception for federal mandates set forth in Govt. Code § 17556(c), the State bears the burden of proving that the Joint Test Claimants have this authority, and not otherwise.[67] As the Supreme Court stated with respect to the federal mandate exception, "the State must explain why" the Joint Test Claimants can assess service charges, fees or assessments to pay for the mandates set forth above. *Dept. of Finance,* 1 Cal. 5th at 769.

The Water Boards and the DOF have not met this burden. The Water Boards' chief contention is that Claimants can levy fees to pay for the programs at issue in these Joint Test Claims. WB Comments at 36-38. DOF's chief contention, also raised by the Water Boards, is that the fact that Claimants must seek voter approval pursuant to Proposition 218, articles XIII C and D of the California Constitution, to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Govt. Code § 17556(d). DOF Comments at 1-2; WB Comments at 39.

Neither of these contentions meets the State's burden of explaining why Claimants can assess charges, fees or assessments to fund the mandates in this Joint Test Claim. First, under article XIII C of the California Constitution, when providing services or conferring benefits, Claimants cannot assess a fee that covers more than the reasonable cost of providing the benefit, privilege, service or product. Additionally, the manner in which those costs are allocated to a payor must bear a fair and reasonable relationship to the payor's burdens or benefits received from the governmental activity. In this regard, when assessing a fee, Claimants bear the burden of proving by a preponderance of the evidence that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. Cal. Const., article XIII C § 1(e). Otherwise the fee would be considered a tax subject to the requirements of article XIII C of the California Constitution. Cal. Const., article XIII C § 1(e). *See Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, 261.

[67] The Water Boards argue that "Claimants must establish that they are required to use tax monies to pay for implementation of the contested provisions." WB Comments at 35. This was done in the Section 6 Declarations submitted in support of the Joint Test Claims. *See* Cities Declarations at ¶ 16.

The mandates at issue in this Joint Test Claim are not the types of programs for which the Claimants can assess a fee. Implementation of TMDL requirements, evaluation and control of non-stormwater discharges, public information programs, investigation of illicit connections and discharges, are all programs intended to improve the overall water quality in the Los Angeles basin, which benefits all persons within the jurisdiction. It is not possible to identify benefits that any individual resident, business or property owner within the jurisdiction would be receiving that is distinct from benefits that all other persons within the jurisdiction are receiving.

Likewise, 2012 Permit requirements that apply to Claimants' own activities as municipal governments address requirements imposed on Claimants themselves. Again, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements.

Similarly, Claimants would have difficulty assessing a fee for inspection of industrial or construction sites, at least to the extent those sites hold general industrial or general construction stormwater permits for which the State Board already assesses a fee to pay for inspections and where the state has not itself inspected the facilities. This issue is relevant to the mandate in the 2001 Permit for inspection of industrial and commercial facilities. The State assesses a fee for these inspections, pursuant to Water Code § 13260(d)(2)(B).

Second, any assessment would be considered to be a "special tax," and, as such, could not be imposed without a vote of the electorate. Under the Constitution, a tax is defined to be "any levy, charge, or exaction of any kind imposed by a local government . . . ." Cal. Const., article XIII C, § 1(e). A "special tax" is defined to be "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." *Id.,* article XIII C § 1(d). Under the Constitution, "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Cal. Const., article XIII C § 2(d).

Article XIII C, section 1(e), sets forth certain charges that are excepted from the definition of a tax. Those exceptions are:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Cal. Const., article XIII C § 1(e).

None of these exceptions applies here. As discussed above, any fee or assessment to pay for implementation of TMDL requirements, evaluation and control of non-stormwater discharges, public information programs, or investigation of illicit connections and discharges would be a fee or assessment to pay for the costs of a general program, not one directed towards a specific benefit, privilege, service or product. As for the other mandates, such as discharges from commercial, industrial or construction sites, the State is already regulating or has the authority to regulate those activities.

Article XIII D of the California Constitution also restricts the Claimants' ability to assess property-related fees. Under article XIII D, section 3(a), no tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership, unless it is for "property-related services"[68] or certain other exceptions, except upon a two-thirds vote of the electorate. Under article XIII D, section 6(c), except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed unless approved by a majority vote of property owners of the property subject to the fee or charge or by two-thirds vote of the electorate residing the affected area. In *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354,[69] the Court of Appeal held that a general stormwater fee is a property-related fee that is not excepted as a charge for water or sewer services, but instead is a property-related fee subject to the two-thirds electoral vote requirement. *Id.* at 1354-55, 1357-59.

The Water Boards cite a newly adopted statute, Senate Bill 231, which took effect on January 1, 2018, and which amended the definition of "sewer" in Govt. Code § 53750 as support for their argument that Claimants have authority under article XIII D to impose a property-related fee (WB Comments at 37). This legislation seeks to legislatively clarify the meaning the article XIII D of the Constitution and overrule *Howard Jarvis Taxpayers Assn.* Its constitutionality has not yet been tested. Significantly, however, even if upheld by the courts, it would not affect any amounts spent by Claimants and the other permittees under the 2012 Permit during the period up to January 1, 2018.

Accordingly, the Claimants do not have the authority to levy fees or assessments to pay for the mandates that are the subject of this Test Claim. Such fees or assessments can be levied only upon the vote of the electorate.

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[68] "Property-related services" means "a public service having a direct relationship to property ownership." Article XIII D, § 2(h).

[69] Attached in Section 7 Rebuttal Documents, Tab 1.

The DOF and the Water Boards contend that even though Cal. Const. articles XIII C and D require Claimants to submit a fee to the electorate for approval, this does not mean that Claimants lack authority to assess a fee. This contention also lacks merit. Indeed, the Commission has already considered and rejected this contention. In the San Diego County test claim, DOF and the Water Boards made the same contention that they make here, that municipalities have authority to levy service charges, fees or assessments within the meaning of Govt. Code § 17556(d), even though they lack such authority under articles XIII C and D unless the charges, fees or assessments are submitted to the electorate and approved by a two-thirds vote. The Commission held:

> 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.' . . . 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 "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 taxing and spending limitations that articles XIII A and XIII B impose."

SD County SOD at 106 (emphasis in original; citation omitted).

In reaching this result, the Commission rejected the Water Boards' contention, also made here, that *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, in which the court held that economic impracticability is not a bar to levying charges or fees within the meaning of section 17556, was applicable. The Commission held:

> 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.

SD County SOD at 107 (emphasis added).[70]

The Commission reached the same conclusion in that test claim with respect to property-related fees under article XIII D of the Constitution. To the extent that any fees imposed for the programs at issue here would be considered property-related fees, rather than a special tax, the fee would still be subject to voter approval or approval by a majority of property owners under article XIII D, section 6(c). *See Howard Jarvis Taxpayers Assn., supra,* 98 Cal.App.4th at 1354. As the Commission found in the San Diego County Test Claim, this requirement also means that Claimants lack authority to impose fees for property-related services. SD County SOD at 106-07.

The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5 [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4,* Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014).[71] In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, "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)." Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

For these same reasons, Assembly Bills 2554 and 1180[72] (WB Comments at 37-38) also do not give Claimants authority to assess a fee or charge within the meaning of Government Code § 17556(d). These two bills, which authorize the Los Angeles County Flood Control District to levy a tax or fee in accordance with article XIII D or articles XIII C or D, respectively, of the Constitution, still require a vote of the people. See Los Angeles County Flood Control Act, Section 2, paragraph 8a.[73] Because there is no authority absent voter approval, these bills do not, therefore, provide authority to assess a fee or charge. SD County SOD at 107. Additionally, the two bills do not provide authority to the other Claimants.

The Water Boards also cite to Health and Safety Code § 5471 and Public Resources Code § 40059(a). Neither of these statutes provide authority either. Health and Safety Code § 5471

[70] As a result, the Commission found the following state mandates in the San Diego County stormwater permit to be reimbursable: (1) street sweeping; (2) street sweeping reporting; (3) conveyance system cleaning; (4) conveyance system cleaning reporting; (5) educational programs; (6) watershed activities and collaboration in the Watershed Urban Runoff Management Program; (7) the Regional Urban Runoff Management Program; (8) program effectiveness assessment; (9) long-term effectiveness assessment; and (10) permittee collaboration requirements. *Id.* at 1-2.

[71] Attached in Section 7 Rebuttal Documents, Tab 4.

[72] Attached in Section 7 Rebuttal Documents, Tab 3.

[73] Attached in Section 7 Rebuttal Documents, Tab 3.

applies to sanitation and sewer districts. It does not apply to Claimants. Public Resources Code § 40059(a) was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board, to ensure that local trash collection agreements would not be affected by the IWMB legislation. In *Waste Resource Technologies v. Department of Public Health* (1994) 23 Cal.App.4th 299[74] the court held that the statute reflected Legislature's intent to allow for local regulation of waste collection. *Id*. at 308-09 (validating city's exclusive refuse contract). The statute does not give local agencies authority to impose fees for stormwater control.

The Water Boards and DOF nevertheless contend that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Govt. Code § 17556(d). (WB comments at 39; DOF comments at 1).

Clovis is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so. 188 Cal.App.4th at 810. In those circumstances, the Court of Appeal held that the Controller's office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id*. at 812. Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted this argument, article XIII B, section 6 would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds. Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.[75]

The Water Boards and DOF have not met their burden of showing that Claimants have the authority to levy service charges, fees or assessments sufficient to pay for the mandated programs at issue here. Govt. Code § 17556(d) does not apply.

[74] Attached in Section 7 Rebuttal Documents, Tab 1.

[75] The Water Boards reference the decision made by some jurisdictions to impose local stormwater fees and attach excerpts from stormwater fee ordinances adopted by the Cities of Alameda and Palo Alto. WB Comments at 18 and Attachments 8 and 9. Neither of the excerpts supports the Water Boards' argument. First, the excerpt of the Alameda ordinance only refers to inspections. A local agency can recover reasonable fees for the cost of inspections related to stormwater compliance, provided that the fee is in accord with the requirements of the California Constitution. Second, the Palo Alto stormwater fee ordinance was passed by the voters in 2005 in compliance with the requirements of the California Constitution, not simply imposed by the city council. *See* Exhibit G to Burhenn Declaration, an excerpt from a Question and Answer document prepared by the City describing the background of its stormwater fee ordinance. Claimants request that the Commission take administrative notice of this document pursuant to Evidence Code § 452(b) as a legislative enactment issued by a public entity in the United States.

V. CONCLUSION

For the foregoing reasons, each of the mandates at issue in these Joint Test Claims are state mandates for which Claimants are entitled to reimbursement. Claimants respectfully request that the Commission find that Claimants are entitled to a subvention of funds for each mandate in accordance with article XIII B, section 6, of the California Constitution.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge and belief.

Dated: January 29, 2019

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REBUTTAL COMMENTS OF CLAIMANTS COUNTY OF LOS ANGELES AND LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, ORDER NO. R4-2012-0175, 13-TC-01 and 13-TC-02

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I. INTRODUCTION

Test Claimants County of Los Angeles ("County"), and Los Angeles County Flood Control District ("District") file this Rebuttal to the comments of the State Water Resources Control Board and the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB") (collectively, "Water Boards") and the Department of Finance ("DOF") concerning Test Claims 13-TC-01 and 13-TC-02, *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175* (the "Test Claims").[1]

This Rebuttal addresses each of the comments made by the Water Boards and the DOF. In summary, the Water Boards contend that Claimants are not entitled to a subvention of state funds for the mandates contained in Order No. R4-2012-0175 (the "2012 Permit") because:

(a) the mandates were neither "new programs" nor represented "higher levels of service" (Water Boards' Comments ("WB Comments") at 22-30);

(b) the mandates were federal, not state in nature (WB Comments at 30-35);

(c) Claimants had fee authority to fund the mandates (WB Comments at 35-40); and

(d) by participating in a Watershed Management Program ("WMP") or Enhanced Watershed Management Program ("EWMP"), Claimants have voluntarily undertaken 2012 Permit requirements (WB Comments at 40-44).

The Water Boards apply these contentions to each mandate at issue (WB Comments at 44-140). The DOF argues only that the Claimants had fee authority to fund the mandates, and does not otherwise address the Test Claims. DOF Comments at 1-2.

Although the Water Boards' and DOF's comments are lengthy, the test claims are governed by these established principles:

1. The test as to whether a mandate is new is whether the local government or agency was previously required to comply with the requirement at issue. This is determined by comparing the requirement with the pre-existing scheme. *See San Diego Unified Dist. v. Commission on State Mandates* ("*San Diego Unified School Dist*.") (2004) 33 Cal.4th 859, 878. As set forth below, the mandates at issue were not previously required.

[1] The County and Flood Control District are separate legal entities. They are filing together these joint comments. These Comments are similar to the comments filed by the Cities in Test Claim No. 13-TC-01, but also address the permit requirements specifically applicable to the County and Flood Control District.

2. The test as to whether a mandate is a higher level of service is whether there is "an increase in the actual level or quality of government services provided." *San Diego Unified School Dist.*, 33 Cal.4th at 877. Each of the mandates here increases the level or quality of government services provided

3. The test as to whether a mandate is a program within the meaning of article XIII B, section 6, is whether its requirements are "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." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Each of the requirements at issue here provides services to the public. Moreover, they do not apply generally to all residents.

4. The test as to whether a mandate is a federal or state mandate is "if federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. . . [I]f federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federal mandated." *Department of Finance v. Commission on State Mandates* ("*Dept. of Finance*") (2016) 1 Cal.5th 749, 765. . Federal law does not impose or compel the mandates at issue here.

5. The test as to whether a federal regulation creates a federal mandate is whether the regulation "expressly" or "explicitly" requires the provision at issue. *Department of Finance v. Commission on State Mandates* (*Dept. of Finance II*") (2017) 18 Cal.App.5th 661, 683. No federal regulation expressly or explicitly requires the provisions at issue here.

6. The State has the burden of showing a requirement is mandated by federal law or that it falls under any other exception to reimbursement. *Dept. of Finance I*, 1 Cal.5th at 769. A Water Board finding that a challenged requirement was federally mandated is not entitled to deference unless the Water Board finds, when imposing the disputed permit requirement, that it was the *only* means by which the maximum extent practicable standard could be implemented. *Id.* at 768. This finding must be case specific and supported by legal authority or the record. *Id.* The Water Boards have not shown that the requirements at issue here are the only means by which the maximum extent practicable standard can be implemented.

7. A state mandate can also be created where the State usurps a local agency's discretion and directs the means to comply with federal law, *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, or if the State freely chooses to shift the cost of a federal program onto the local agency. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594. As discussed below, the state has directed the means to comply with the CWA or shifted costs of compliance from itself to the local agencies for many of the mandates at issue.

8. 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. Gov't. Code §17565. This is the case for the mandates where activity took place before the adoption of the 2012 Permit.

9. The test as to whether local agency has fee authority is whether the local agency can impose a fee without voter or property owner approval. *In re Test Claim on: San Diego Regional Water Quality Control Order No. R9-2007-0001*, Case No. 07-TC-09 (2010), Statement of Decision ("SD County SOD") at 107.[2] Claimants do not have fee authority here.

In Section II below, Claimants address the Water Boards' general comments on the Test Claims. WB Comments at 1-35, 40-44. In Section III, Claimants address the Water Boards' comments on the specific mandates at issue (WB Comments at 44-140). Section IV contains Claimants' response to the comments of the Water Boards and the DOF on Claimants' fee authority (WB Comments at 35-40; DOF Comments at 1-2).

REBUTTAL TO COMMENTS OF WATER BOARDS

I. RESPONSE TO GENERAL COMMENTS

A. *The Supreme Court's Decision in* Department of Finance v. Commission on State Mandates *Applies Directly to the Test Claims*

The Water Boards first argue (WB Comments at 4-6) that the issues in these Test Claims can be distinguished from those before the California Supreme Court in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749 ("*Dept. of Finance*"), the seminal case on what constitutes a state versus federal mandate in the context of a stormwater permit issued under the federal Clean Water Act ("CWA"). In relevant part, the Water Boards argue that, notwithstanding the Supreme Court's holding that the Commission should not defer to Regional Board findings unless the Regional Board finds that the permit requirements were the *only* means by which the CWA's maximum extent practicable ("MEP") standard could be implemented, *Dept. of Finance*, 1 Cal.5th at 768, the Commission should nevertheless defer the Regional Board's findings here. WB Comments at 5.

As will be discussed in Section I.F.1 below, the LARWQCB did not in fact make findings that would allow this Commission to defer to the Board's judgment as to what constituted a federal mandate.[3] Those findings did not find that the 2012 Permit's requirements were the only means to implement the MEP standard and fall far short of the standard established in *Dept. of Finance.*

[2] The issue of whether a Claimant has fee authority if it has to first hold a protest hearing is currently in litigation.

[3] The other alleged distinctions raised by the Water Boards relate to issues not decided by the Supreme Court in *Dept. of Finance* (WB Comments at 5-6) and are addressed below. These are that the requirements in the 2012 Permit are not new programs or higher levels of service, that *Dept. of Finance* allegedly did not address other federal mandates, that none of the requirements in the former permit were found in EPA-issued MS4 permits and that the question of fee authority was not addressed.

Dept. of Finance directly applies to these Test Claims, and most particularly these three holdings:[4]

- *How is a mandate in a stormwater permit determined to be "federal" or "state"?*

The Supreme Court set forth this test:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," that requirement is not federally mandated.

1 Cal. 5th at 765. In so holding, the Court noted the wide discretion afforded the State in determining what requirements would meet the maximum extent practicable standard. *Id.* at 768.

- *Must the Commission defer to the Water Boards' determination of what constitutes a federal mandate?*

The Supreme Court refused to grant such deference. The Court found that in issuing the former 2001 Los Angeles County stormwater permit ("2001 Permit"), "the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* at 768. The Court cited as authority its opinion in *City of Burbank v. State Water Resources Control Board* (2005) 5 Cal. 4th 613, 627-28 ("*City of Burbank*"), where it held that a federal National Pollution Discharge Elimination System ("NPDES") permit issued by a regional water board (such as the 2012 Permit) may contain State-imposed conditions that are more stringent than federal law requirements.

The Court squarely addressed the Water Boards' argument, made again here (WB Comments at 30-34), that the Commission should defer to the LARWQCB's determination that the challenged requirements in the 2012 Permit were federal mandates. Finding that this determination "is largely a question of law," the Court distinguished circumstances where the question involved the regional board's authority to *impose* specific permit conditions from those involving the question of who would *pay* for them. In the former circumstance, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768. But, the Court held,

> Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law

[4] *See also* discussion in Section 5 Narrative Statement in Support of Test Claim 13-TC-02 ("County-District Narrative Statement") at 8-9.

> to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

Id. at 769.

- *Who Has the Burden of Establishing an Exception to Reimbursement of State-Mandated Costs?*

The Supreme Court placed on the State the burden of establishing that a mandate was in fact federal. In placing that burden, the Court held that because article XIII B, section 6 of the Constitution established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.* at 769.

The Supreme Court concluded that requiring the Commission to defer to a regional board would "leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." *Id.* Looking to the policies underlying article XIII B, section 6, the Court concluded that the Constitution "would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question." *Id.*

The Court held that the *only* circumstance under which deference to the Water Boards' expertise would be appropriate was if a regional board had "found, when imposing the disputed permit conditions, that those conditions were *the only means* by which the [MEP] standard could be implemented," which must be a "case specific" finding, taking into account "local factual circumstances." 1 Cal. 5th at 768 and n.15 (emphasis supplied). As discussed in Section I.F.1 below, there are no such explicit findings in the 2012 Permit.

The Supreme Court further found that in assessing whether federal law or regulation required a particular provision, it was important to examine the scope of the regulatory language. In discussing inspection requirements in the federal stormwater regulations for example, the Court rejected the Water Boards' argument that all permit-required inspections were federally mandated "because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* at 771. The Court held instead that the mere fact that the federal regulations "contemplated some form of inspections, however, does not mean that federal law required *the scope and detail* of inspections required by the Permit conditions." *Id.* (emphasis supplied).

This last holding is important in assessing the federal versus state character of the requirements at issue in these Test Claims. Repeatedly, the Water Boards cite general federal regulatory language as mandating the LARWQCB to impose the specific and prescriptive requirements at issue in these Test Claims. However, as the Supreme Court held, the existence of general federal permit regulations does not mean that those regulations "required the scope and detail" of the 2012 Permit provisions at issue.

B. *The Court of Appeal's Opinion in* Dept. of Finance II *Reinforces Claimants' Position on This Test Claim*

The issue of federal authority for provisions in a similarly complex MS4 permit was addressed in detail by the court in *Dept. of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, *review denied,* (April 11, 2018) 2018 Cal. LEXIS 2647 ("*Dept. of Finance II"*). This case provides an even clearer roadmap for the Commission to follow in assessing the federal mandate arguments raised by the Water Boards.

The test claim in *Dept. of Finance II* concerned a 2007 stormwater permit adopted by the San Diego Water Board. 18 Cal.App.5th at 671. In the permit, the board recited that it contained "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." *Id.* In attempting to distinguish the former Los Angeles County MS4 permit at issue in *Dept. of Finance,* the State argued that "the San Diego Regional Board here made a finding its requirements were 'necessary' in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make." *Id.* at 682.

The Court of Appeal found this distinction to be of no importance:

> The use of the word "necessary" also does not distinguish this case from *Department of Finance.* By law, a regional board cannot issue an NPDES permit to MS4's without finding it has imposed conditions "necessary to carry out the provisions of [the Clean Water Act]. That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the condition it imposed had done so. . . .
>
> Third, the Supreme Court in *Department of Finance* rejected the State's argument that the permit application somehow limited a board's discretion or denied it a true choice. "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit." . . .
>
> The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the [MEP]. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

Id. at 683 (citations omitted).

Under *Dept. of Finance II,* the fact that a water board may have determined that permit conditions were "necessary" to meet the MEP standard (and the Water Boards here argue a similar point, WB Comments at 5) is irrelevant to the question of whether those conditions were federal mandates. Instead, the test is whether the Regional Board had a choice as to whether to impose the condition at issue. *Id.* ("The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce stormwater pollutants to the

maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.")

Dept. of Finance II directly applies to how the mandates in these Test Claims should be analyzed. First, the opinion is firmly rooted in the Supreme Court's opinion. The court cited *Dept. of Finance* in all of its holdings, and stated specifically that it was "[f]ollowing the analytical regime established by *Department of Finance."* 18 Cal.App.5th at 667. In upholding the Commission, the court stated that it reached that conclusion "on the same grounds the high court in *Department of Finance* reached its conclusion." *Id.* Indeed, much of the opinion consists either of direct quotation of *Dept. of Finance* or a detailed description of the high court's analysis. *Id.* at 668-70; 676-80. These facts, and the fact that the Supreme Court denied review, establish that *Dept. of Finance II* represents controlling law.

Second, *Dept. of Finance II* affirmed the Supreme Court's holding that the language of general regulations describing what must be included in an NPDES permit application did not establish a federal mandate:

> To be a federal mandate for purposes of section 6 [of article XIII B of the California Constitution], however, the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit.

Id. at 683. In particular, the court found that the federal stormwater permit application regulations in 40 CFR § 122.26(d) did not render any of the permit conditions to be federal mandates. *Id.* at 684-89. This holding is directly relevant to these Test Claims, as the Water Boards have justified the bulk of the 2012 Permit provisions at issue by reference to these same regulations. *See* WB Comments at 58-59, 62, 71-72, 76-77, 82, 84-85, 89, 95-96, 99-100, 102, 104, 107, 110-111, 112-114, 115, 117, 120, 122, 125, 127, 129, 134, 137 and 139 (discussing provisions in 40 CFR § 122.26(d) as authority for 2012 Permit provisions).[5]

Third, unlike in *Dept. of Finance*, where the Court considered only limited provisions of the former Los Angeles County permit dealing with the placement of trash receptacles and facility inspections, *Dept. of Finance II* considered several complex programmatic permit conditions, including the permittees' jurisdictional management programs, watershed management programs, urban runoff management programs and assessment programs. *Id.* at 671-72. *Dept. of Finance II* thus has direct application to the specific provisions of the 2012 Permit at issue in these Test Claims, which are in concept and detail similar to the permit provisions at issue in that case.

[5] The Water Boards have also relied on an EPA guidance document and regulations governing so-called Phase II MS4 permits, which regulate smaller MS4 operators, but not the Claimants in these Test Claims. *See* discussions in Section II, below. Neither the guide nor the Phase II regulations provide authority for the provisions in the 2012 Permit at issue in these Test Claims.

C. *The Water Boards Incorrectly Set Forth the Legal Basis for the 2012 Permit*

In discussing the "Regulatory Overview of the Clean Water Act MS4 Program" (WB Comments at 7-14), the Water Boards fail to set forth a complete account of the statutory and regulatory basis for the 2012 Permit.

First, a state with authorization to issue permits acts *in lieu* of federal requirements and not as *an arm* of U.S. EPA. The CWA "allows the EPA director to 'suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems *that operate under those state's own laws in lieu of the federal framework." Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 522 (emphasis supplied).[6] The State is not acting as a mere arm of the federal government when it issues a MS4 permit.

Second, while EPA maintains oversight over California's NPDES permitting programs, that oversight is limited to the permit's compliance with *federal* requirements. If a permitting authority, such as the LARWQCB, elects to use its federal and state law authority to issue more stringent conditions in an NPDES permit than are required under federal law and regulations, EPA has no oversight authority over such conditions, which are purely a matter of state law. *See Dept. of Finance,* 1 Cal. 5th at 757 ("California's permitting system now regulates discharges under both state and federal law.")

The Water Boards also fail to discuss how *Dept. of Finance* and *Dept. of Finance II* have clarified the meaning of the MEP standard as it may apply to test claims. The Water Boards contend that MEP is an "ever evolving, flexible and advancing concept." WB Comments at 11. This is not, however, the test that California courts (and this Commission) must employ. As discussed in further detail in Section I.F below, the question of whether a permit condition is a federal or state mandate is one which requires an examination of the regulatory or statutory authorization for that provision and whether that authorization was "express" or "explicit." If not, the provision is a state mandate. *See generally, Dept. of Finance II,* 18 Cal.App.5th at 683.

The Water Boards further contend that the final clause in 33 U.S.C. § 1342(p)(3)(B)(iii), providing that MS4 permits "shall require . . . such other provisions as the Administrator or the State determines appropriate for the control of such pollutants," means that permit requirements under the authority of this part of the statute are federal mandates. WB Comments at 12-13.

This is not correct. According to the Ninth Circuit, that clause is a "discretionary provision." 191 F.3d at 1166, cited with approval in *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 886. Thus, because this last phrase is a grant of discretion, not a mandate, permit requirements imposed under it are also discretionary and not a mandate. *Defenders of Wildlife v. Browner ("Defenders"),* 191 F.3d 1159, 1166 (9th Cir. 1999).[7]

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[6] *See also* Cities Narrative Statement at 5; County-District Narrative Statement at 5-6.

[7] The Water Boards also make claims regarding the federal law basis for Total Maximum Daily Loads ("TMDL") requirements. WB Comments at 13. These assertions are addressed in Section II.A below. The

D. *The Permit's Background*

The Water Boards' discussion of the development of the 2012 Permit and predecessor MS4 permits (WB Comments 14-20) is also not accurate. The Water Boards argue that various mandates in the 2012 Permit do not impose "new programs" or require "higher levels of service" because prior permits allegedly contained provisions "that were very similar or equivalent" to those in the 2012 Permit (WB Comments at 15). The Water Boards concede, however, that there was a lack of specificity in the 1990 and 1996 permits (WB Comments at 16).

Because these permits did not contain the specific programs at issue here, it cannot be said that those prior permits mandated these programs. The Commission has already held that if a pre-existing MS4 requirement is expanded in a succeeding permit, that expansion represents a new program or higher level of service. *In Re Test Claim On: San Diego Regional Water Quality Control Board Order No. R9-2007-0001 Permit CAS0108758,* Test Claim No. 07-TC-09 ("SD County SOD") at 49.[8] That holding applies here.

The Water Boards also ignore *Defenders, supra,* in their discussion of the requirement for permittees to meet numeric receiving water quality standards (WB Comments at 16-17). The Water Boards state that a precedential State Board order (Order WQ 99-05) "reflects" a U.S. EPA requirement. *Id.* The requirements of the CWA, however, are set forth in *Defenders,* which held that the CWA does not require municipal stormwater permits to comply with water quality standards or contain numeric effluent limits, and if the permitting agency chooses to include such provisions, their inclusion is a discretionary choice, not a statutory mandate. *Defenders,* 191 F.3d 1166. In fact, State Water Board Order WQ 99-05 was issued before EPA and the State Water Board received the guidance set forth in the Ninth Circuit's holding in *Defenders* that MS4 permittees were not required to meet water quality standards or numeric water quality standards. 191 F.3d at 1164-65.

Finally, while the Water Boards set forth in detail the rationale for the regulatory approaches followed in the 2012 Permit (WB Comments at 19-20), that rationale is not relevant to the issues in these Test Claims. The issue in these Test Claims is not whether the Water Boards should have included in the 2012 Permit the requirements at issue here. As the Supreme Court held in *Dept. of Finance,* the question before the Commission "is who will pay for them." 1 Cal. 5th at 769, *i.e.* are they state mandates for which Claimants are entitled to as subvention of funds pursuant to Article XIII B, section 6, of the Constitution.

E. *The Mandates Set Forth in the Test Claims Are New Programs and/or Represent Requirements for Higher Levels of Service*

Article XIII B, section 6 of the California Constitution requires that the Legislature provide a subvention of funds to reimburse local agencies when the Legislature or a state agency "mandates

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Water Boards also argue generally (with no reference to specific 2012 Permit provisions) that federal law requires monitoring and reporting requirements in NPDES permits. The discussion of why those requirements constitute an unfunded state mandate can be found in Section II.

[8] Included in Section 7 Rebuttal Documents, Tab 4.

a new program or higher level of service on any local government." The Water Boards assert that the 2012 Permit provisions in these Test Claims do not impose new programs or require higher levels of service by the Claimants (WB Comments at 21-30.) This assertion is supported neither by the facts nor the law.

1. *The Requirements of the 2012 Permit in These Test Claims Represent a "Program"*

The Water Boards first argue that the CWA requires all dischargers of stormwater, including municipalities, private industry and state and federal government, to obtain NPDES permits. WB Comments at 21. Thus, claim the Water Boards, "Local government is not singled out." *Id.*

This very argument has, however, already been addressed – and rejected – by the Commission. In the SD County SOD, the Commission stated: "The State Board and Regional Board filed joint comments . . . alleging that the permit . . . is not unique to government because NPDES permits apply to private dischargers also." SD County SOD at 30. The Commission rejected that argument, noting that the focus on the inquiry of whether a reimbursable program exists must be on the *executive order itself, e.g.,* the permit: "[W]hether 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." SD County SOD at 36 (emphasis supplied). *See also In re Los Angeles County Regional Water Quality Control Board Order No. 01-182, Permit CAS004001,* Test Claim No. 03-TC-09, 03-TC-19, 03-TC-20, 03-TC-21 ("LA County SOD") at 48.[9]

The Commission was applying the decision of the Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919, where the court dismissed a similar argument: [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." *Id.*

The Commission found that the San Diego County permit applied only to municipalities, that no private entities were regulated thereunder, and that the permit provided a service to the public through its requirement for the permittees "to reduce the discharge in urban runoff to the maximum extent practicable." SD County SOD at 36. Those same facts, and the Commission's analysis, apply as well to the 2012 Permit.

The Water Boards argue (WB Comments at 23-24) that the 2012 Permit does not carry out a governmental function of providing services to the public, one of the two definitions of a "program" under article XIII B, section 6. *County of Los Angeles v. State of California, supra,* 43 Cal.3d at 56; *see also San Diego Unified School Dist.,* 33 Cal. 4th at 878. Reprising their "all dischargers must have NPDES permits" argument, the Water Boards contend that since Claimants were required to obtain NPDES permits for their MS4 discharges, they were obtaining an NPDES

[9] Attached in Section 7 Rebuttal Documents, Tab 4.

permit as just another point source discharger under the CWA, not as a governmental entity. WB Comments at 23.

As noted, this argument has already been addressed, and rejected, by the Commission. Most importantly, this argument does not analyze the specific permit provisions at issue in this test claim, which the Court in *County of Los Angeles v. Commission on State Mandates* called for. 150 Cal.App.4th at 919 ("T]he applicability of permits to public and private dischargers does not does not inform us about whether a particular permit *or an obligation thereunder* imposed on local governments constitutes a state mandate necessitating subvention . . .") (emphasis added). Whereas some Permit provisions might be analogous to provisions in permits issued to private parties, others, including the ones at issue here, are not: they provide a governmental service to citizens of Los Angeles County that private parties are not called upon to provide. This is discussed in more detail in the section addressing each specific permit provision.

The Water Boards, not surprisingly, criticize the Commission's findings in the LA County SOD,[10] arguing that the Commission's approach "fails to appropriately focus on whether the permit mandates functions peculiar to government" and "obscures" the CWA's focus on the regulation of pollutant discharges. *Id.* The Water Boards then argue that they have "issued hundreds, if not thousands, of NPDES permits to both public and private entities." (WB Comments at 24).

Again, that criticism misses the point made by the court in *County of Los Angeles, supra,* and the two previous MS4 test claim SODs issued by this Commission. The fact that NPDES permits may be issued to both public and private dischargers does not render the NPDES permit at issue in these Test Claims, an MS4 permit applicable *only* to municipalities and addressing specific municipal requirements, not a "program." The "hundreds, if not thousands" of NPDES permits issued by the Water Boards did not require their permittees to:

- Implement and monitor TMDLs relating specifically to discharges from MS4 systems operated only by municipalities;

- Prohibit the discharge of certain non-stormwater discharges through the MS4s to receiving waters and conduct related monitoring, including coordinating with local water purveyors, developing a coordinated outreach and education program to minimize irrigation water discharge and conducting special evaluation of monitoring data;

- Undertake enhanced public information programs, including providing means for public reporting of clogged catch basin inlets or illicit dumping, organizing events to educate the public on stormwater and non-stormwater pollution problems, conducting public service announcements, providing public education materials, including at various retail outlets and schools, ensuring that ethnic communities within the municipality are identified and provided with appropriate culturally effective methods;

[10] The Water Boards do not discuss the analysis adopted in the later-decided SD County SOD.

- Inventory and inspect industrial and commercial dischargers, including tracking of nurseries and nursery centers, inspecting various commercial facilities, including restaurants, automotive service facilities, gasoline stations, and nurseries twice during the permit term, with such inspections to meet criteria outlined in the permit, and inspecting industrial facilities and evaluating best management practices ("BMPs") at those facilities;

- Track and inspect post-construction BMPs and enforce requirements for new development and re-development BMPs, including requiring municipalities to implement an electronic system to track development projects with post-construction BMPs, inspecting development sites before issuance of an occupancy certificate to confirm proper installation of BMPs installed for various purposes, and developing a post-construction BMP maintenance inspection checklist for permittee facilities and inspect such BMPs every two years;

- Inspect and inventory construction sites, including developing an electronic system to inventory municipal construction permitting activities, developing and implementing review procedures for construction plan documents, developing and implementing technical standards for the selection, installation and maintenance of construction BMPs, making technical standards readily available to the development community, inspecting construction sites of one acre or greater at specified intervals and evaluating the effectiveness of site BMPs, among other factors, and conducting staff training on specified topics for staff who may review plans and issue permits;

- Conduct various activities relating to permittee-owned municipal facilities and retrofitting, including inventorying permittee owned or operated facilities that may be potential sources of stormwater pollution, developing an inventory of retrofitting opportunities for existing development, screening existing development areas to identify candidate areas for retrofitting and to evaluate and rank candidate areas, requiring permittees to cooperate with private landowners to encourage site specific retrofitting projects using specified factors, implementing an integrated pest management program, installing trash excluders in areas not subject to a Trash TMDL or alternative measures and training all employees or contractors that use or have the potential to use pesticides or fertilizers regarding the proper use, handling and disposal of pesticides, less toxic methods of pest prevention and control and the reduction of pesticide use; and

- Address illicit connections and discharges to municipal storm drain channels, including ensuring that open channel signage includes public reporting of illicit discharges, developing and maintaining written procedures documenting how complaint calls are handled and tracked, maintaining documentation of complaint calls and recording the location of a spill or discharge and the action taken in response, implementing a spill response plan for sewage and other spills that may discharge into the MS4, requiring identification of responsible agencies and contact information in spill response plans and addressing coordination with spill response teams through departments, programs and agencies of the municipality and containing spills within four hours of becoming

> aware of the spill or within two hours of obtaining legal access to spills on private property.[11]

The scope of these exclusively municipal and governmental requirements also completely refutes the second prong of the Water Boards' "program" argument, that the 2012 Permit does not impose "unique requirements on local governments." WB Comments at 24-27. No private party is required to perform the activities described above. These requirements are imposed uniquely on Claimants.

As set forth above, the Commission previously has held that MS4 permits, such as the 2012 Permit, do impose unique requirements on local agencies. *See* SD County SOD at 36. *See also* LA County SOD at 49. As the Commission held in the latter, "the issue is not whether NPDES permits generally constitute a 'program' within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim . . . constitutes a program because this permit is the only one over which the Commission has jurisdiction." *Id.* These holdings apply here.

The Water Boards nevertheless argue that the CWA is a "law of general applicability." WB Comments at 24. The Water Boards argue that the "state policy" implemented by the 2012 Permit is that the CWA and Chapter 5.5 of the state Porter-Cologne Act require NPDES permits "be consistent with the Clean Water Act," a policy which "applies generally to all residents and entities in the state and does not apply uniquely to local governments." *Id.*[12]

Again, this argument has already been rejected by the Court in *County of Los Angeles v. Commission on State Mandates* and this Commission in the San Diego and Los Angeles County SODs. *County of Los Angeles*, 150 Cal.App.4th at 919 ("[T]he applicability of permits to public and private dischargers does not does not inform us about whether a particular permit *or an obligation thereunder* imposed on local governments constitutes a state mandate necessitating subvention . . .") (emphasis added); SD County SOD at 36 ("[W]hether 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."). *See also* LA County SOD at 48.

Indeed, the Water Boards' argument ignores the fact that the requirements of the CWA and its implementing regulations directed to MS4 owners and operators *are completely separate* from

[11] *See* County-District Narrative Statement at 9-35.

[12] The Water Boards allege that "[n]umerous provisions of the 2012 Permit are requirements of general applicability" which are "similar" to those in permits issued to private dischargers (WB Comments at 24), but nowhere specifically identify those alleged requirements or how they are the same as those for private dischargers. For example, while both private NPDES permittees and MS4 permittees are required to monitor discharges, the Water Boards nowhere show that those monitoring requirements are identical, or that there are not unique monitoring requirements imposed on local government. To the contrary, private NPDES permittees are not required to inspect third-party facilities, develop plans for development, address multiple types of public facilities or discharges into public storm drain channels, all of which, and more, are required in the 2012 Permit. *See also* County-District Narrative Statement at 9-35.

the NPDES requirements applicable to other dischargers. In addition to the fact that there are specific requirements in the statute applicable to MS4s, relating to programs designed specifically to address the operation of MS4s, the federal CWA implementing regulations for MS4 permits are contained in a completely separate section (40 CFR § 122.26).

Further, it cannot be disputed as a matter of fact that the 2012 Permit is "imposed uniquely upon local government." The first page of the permit states that the County, the District and 84 incorporated cities within the coastal watersheds of Los Angeles County "are subject to waste discharge requirements as set forth in this Order." 2012 Permit at 1. The remainder of the requirements in the permit, including those at issue in these Test Claims, are exclusively directed to those permittees, including the Claimants. The 2012 Permit is imposed uniquely on local agencies, and it serves a public purpose, *e.g.*, the regulation of pollutants in discharges. *See* 2012 Permit Section II.A (Nature of Discharges and Sources of Pollutants), 2012 Permit at 13.

The 2012 Permit, moreover, is directed at regulating the performance by local governments of a core duty of local governments, the protection of the life and property of residents from flood waters. Unlike industrial or commercial NPDES permittees, whose only legal responsibility is the lawful discharge of effluent from their facilities, municipalities must ensure the safe conveyance and discharge of stormwater in order to protect public health and property. An industrial facility can choose not to discharge by changing or ceasing its operations. A local agency operating an MS4 has no such choice when storms arrive. It must safely handle stormwater or face inverse condemnation and tort liability for flooding resulting from a failure to do so. *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.[13] Thus, an MS4 operator is legally compelled to obtain an MS4 permit so it can continue to carry out the uniquely governmental function of safely handling and discharging stormwater.

The Water Boards cite *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51 in support of their argument that the requirements of the 2012 Permit do not constitute a "program." WB Comments at 25-26. *City of Sacramento*, however, is inapposite. The Supreme Court there was considering whether a state statute which had the effect of requiring local governments to provide unemployment compensation to their own employees represented a "program." The Court concluded that simply requiring local governments to cover the unemployment costs of their employees, a requirement "'indistinguishable in this respect from private employers,'" was not a requirement imposed uniquely on local government. *Id.* at 67 (quoting *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 58). The Court noted, however, that "our standards [still] require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb." *Id.* at 70 (emphasis in original).

The requirements at issue in these Test Claims are precisely those which "the state freely chooses to impose on local agencies," particularly governmental costs "which they were not previously required to absorb." Unlike the unemployment compensation statute at issue in *City of Sacramento*, the 2012 Permit mandates local governments to undertake various public activities while undertaking the "peculiarly governmental" role of undertaking flood control to protect

[13] Attached in Section 7 Rebuttal Documents, Tab 1.

public health and safety. Again, as the Commission has held, it is the requirements of the 2012 Permit which constitutes the "program" under review, and the requirements of that permit are not generally applicable. *See* SD County SOD at 36; LA County SOD at 49.

City of Richmond v. Commission on State Mandates (1998) 64 Cal.App.4th 1190, also cited by the Water Boards (WB Comments at 26), is equally inapposite. *City of Richmond* involved a statute which removed a limit on the right of survivors of deceased public employees from receiving both public retirement and workers compensation benefits. As a result, the city alleged that a state mandate had been created, since it was now responsible for the payment of increased survivor benefits. *Id.* at 1194. The court found that the resulting higher cost to the local government for compensating its employees was "not the same as a higher cost of providing services to the public." *Id.* at 1196. The court distinguished cases like *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, where "executive orders applied only to fire protection, a peculiarly governmental function." *Id.* That phrase precisely defines the 2012 Permit, which applies only to the operation and discharge of municipal storm drain systems, another "peculiarly governmental function."

City of Richmond also is distinguishable because it involved a statute which covered a subject of general application, employment benefits. By removing the limitation on the rights of survivors, "the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no 'unique requirements' on local governments." *Id.* at 1199. *City of Richmond* is simply a variation on *City of Sacramento,* and as irrelevant to these Test Claims as the earlier case.

The Water Boards ask the Commission to speculate on what the Commission would hold if the Regional Board issued "identical NPDES permits to local governments and industrial dischargers." It is undisputed, however, that the permit obligations at issue in this Test Claim are not identical to permit requirements issued to industrial dischargers. As the Commission held in the proceedings arising from the 2006 San Diego stormwater permit, "the only issue before the Commission is whether the *permit in this test claim* constitutes a program." SD County SOD at 36 (emphasis supplied). *See also* LA County SOD at 48.[14]

Finally, the Water Boards' argument that NPDES requirements are "[l]aws of general applicability" (WB Comments at 24) ignores the fact that both the California Supreme Court and the Court of Appeal have decided mandates cases involving stormwater NPDES permits and in so doing have interpreted the California Constitution. Were these permits "laws of general

[14] The Water Boards note (WB Comments at 27) that in the *Dept. of Finance* case on remand from the Supreme Court, the trial court found that the mandated programs at issue in the 2001 Permit were not subject to a subvention of funds because, even though the requirements of an MS4 permit were in fact "unique" to local governments, such requirements were merely "incidental" to laws which allegedly applied to all residents. The trial court, however, ignored the structure of the CWA and its implementing regulations and the holdings of *County of Los Angeles v. Commission on State Mandates, supra,* and *Dept. of Finance II* in reaching this holding. Moreover, the trial court ignored the undisputed fact that the LARWQCB exercised its discretion to impose such requirements, hardly an "incidental" act and, under *Dept. of Finance II,* indicative of a state mandate. 18 Cal.App.5th at 683. Claimants have filed a Notice of Appeal with respect to that decision.

applicability," the courts could have avoided performing an extensive constitutional analysis when a fairly simple statutory analysis would have sufficed.

2. *The Mandated Programs Set Forth in the Test Claim Represented "New Programs" as a Matter of Fact and Law*

In Section II, Claimants respond in detail on whether specific 2012 Permit requirements represent a new program or higher level of service. But the following points can be made here. As the Water Boards concede, a "program is 'new' if the local government had not previously been required to institute it." WB Comments at 27, citing *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189. All of the mandated programs identified in the Test Claim are "new" in that they were not previously required to be performed by Claimants under the 2001 Permit.

Arguing that the requirements of the 2012 Permit were not new programs, the Water Boards simply contend, without citation to either the 2012 Permit or previous MS4 permits issued to Claimants, that "many, (if not all) of the requirements at issue in the Test Claims are not new." WB Comments at 27. The Water Boards cite no such allegedly non-new programs, relying instead on the argument that the "inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the Clean Water Act and these new and advanced measures do not constitute a new program." WB Comments at 28.[15] This argument has previously been rejected by the Commission. The Commission's test is whether the *specific requirements* of the 2012 Permit at issue in these Test Claim were also included in previous stormwater permits. As the Water Boards themselves concede ("these new and advanced measures", WB Comments at 28), they were not. Whether "the inclusion of new and advanced measures . . . is anticipated under the Clean Water Act" (WB Comments at 28) may go to whether the measures are federal or state, but it does not go to whether they are new.

The Commission has held that any new requirements not contained in a previous permit, even when those programs were only expanding on a program contained in the previous permit, constituted a new program or higher level of service. *See* SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model Standard Urban Storm Water Mitigation Plan ("SUSMP") and local SUSMPs, requirement in succeeding permit to submit an Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service). The same analysis applies to the requirements at issue in these Test Claims.

3. *The Mandated Programs Identified in the Test Claims Imposed Higher Levels of Service on the Claimants*

Claimants have demonstrated that the requirements of the 2012 Permit at issue were new programs, eligible for a subvention of funds. Having established this, Claimants need go no further. Yet, to the extent that such requirements instead represented a "higher level of service,"

[15] The failure of the Water Boards to support their argument with facts in the record violates the requirements of the Commission's own regulations, which require that if "representations of fact are made, they shall be supported by documentary or testimonial evidence . . . ." 2 Cal. Code Reg. § 1183.2(c)(1).

this fact also has been established. In the Narrative Statements, Claimants set forth precisely how the requirements of the 2012 Permit were additional to those in the 2001 Permit. These additional requirements imposed separate and additional increased costs on Claimants. In fact, as noted above, the Commission has found that even enhancement of requirements found in previous MS4 permits constitutes a "higher level of service" in the subsequent permit. SD County SOD at 53-54.

As they argued in contending that the 2012 Permit and its requirements were not a "program," the Water Boards improperly collapse the Permit's multiple and complex requirements into a simple requirement for "better water quality," a goal which has remained the same over the history of MS4 permitting. WB Comment at 28. Again, it is not the overall goals of the CWA and Porter-Cologne which is the focus. Those "overall goals" are not the "program" before the Commission. As set forth in Section I.E.1, the 2012 Permit requires specific, different and enhanced services to the public by the permittees, including the preparation of planning documents, extra training in stormwater issues of the public employees that process permits, inspections of commercial and industrial facilities and construction sites that involve more intense review, tracking and inventorying. These requirements all involve providing enhanced services to the public and increased costs to the permittees, as set forth in the Section 6 Declarations.[16]

The fact that these requirements are exclusive to the permittees under the 2012 Permit will be discussed with regard to each item in Section II. And, while the Water Boards may attempt to characterize these requirements where they expand on a requirement from the 2001 Permit as "merely refinements of existing requirements" (WB Comments at 28), the Commission has held that such expansions on existing requirements in fact are higher levels of service, as noted above. SD County SOD at 53-54.

In fact these requirements were not simply "refinements" of existing Claimant responsibilities, as the Water Boards argue, WB Comments at 28, or a requirement that "municipalities reallocate some of their resources in a particular way." WB Comments at 29. The Water Boards never explain how, with appropriate documentary or testimonial evidence, the mandates at issue in the Test Claim could be paid for if Claimants "reallocate" local agency resources. Indeed, the Water Boards do not even argue that amount of money required to comply with the 2012 Permit is the same or less than the money required to comply with the 2001 Permit. *Id.* Instead, the requirements in the 2012 Permit imposed actual and distinct increased costs on Claimants, as set forth in the Narrative Statements and accompanying Claimant declarations.

For this reason, the Water Boards' citation of *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 (WB Comments at 29 nn. 161 and 162) is inapposite. In that case, the court held that a state requirement that county law enforcement officers be trained in domestic violence did not impose a higher level of service because the mandate involved adding a single course to "an already existing framework of training." *Id.* at 1194. The mandate, concluded the court, "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training." *Id.*

[16]*See* Section 6 Declarations in Support of Test Claim 13-TC-02 ("County-District Declarations), ¶¶ 8(f), 9(g), 10(e), 11(d), 12(d),13(i), 14(i) and 15(f) (County); ¶¶ 8(f), 9(f), 10(d) and 11(e) (District).

This is not what the LARWQCB did in mandating the 2012 Permit programs at issue here. As discussed more fully below, the LARWQCB in the 2012 Permit did not redirect a reallocation of funds. It added new programs and higher levels of service, with new and higher costs.

The Water Boards contend that the "iterative process" for refining MS4 permits means that higher levels of permit specificity do not constitute a higher level of service. WB Comments at 29. The Commission, however, has already rejected this argument. In the San Diego County test claim, the DOF similarly argued that the additional permit requirements were necessary for the claimants to continue to comply with the CWA and reduce pollutants to the MEP, and therefore they were not new requirements. SD County SOD at 49.

In response, the Commission stated that it did "not read the federal [CWA] so broadly" and that "[u]nder the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service." *Id.* The Commission rejected that standard and found that the requirements in question in fact represented a new program or higher level of service. *Id.* at 49-50. The test for whether a requirement is new or a higher level of service is whether the local government or agency was previously required to comply with it. *See San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 ("the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 . . ."). Whether a requirement is a result of the iterative process does not go to this question; at best it goes to the question of whether the CWA compelled it.

The Water Boards also argue that the "costs incurred must involve programs previously funded exclusively by the state." WB Comments at 29. This argument is erroneous. To the contrary, the state can create new programs not previously funded by the state, and impose them on local agencies, resulting in a reimbursable mandate. *See e.g., Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172 (Executive Order requiring school districts to develop a reasonably feasible plan to address segregation constitutes a reimbursable state mandate); *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at 537 (Executive Order requiring local agencies to purchase protective clothing and equipment for fighters constituted a program within the meaning of article XIII B, section 6). As the court held in *County of Los Angeles v. Commission on State Mandates, supra,* 110 Cal.App.4th at 1194, "the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, *or forcing a new program on a locality* for which it is ill-equipped to allocate funding." (Emphasis added.)

The cases cited by the Water Boards (WB Comments at 29), which involved the shifting of costs from one local agency to another, do not hold otherwise. For example, *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 involved a statute which authorized counties to charge cities and other local entities for the costs of booking persons into county jails. The court determined that the financial and administrative responsibility for the operation of county jails and detention of prisoners had been the sole responsibility of counties prior to adoption of the statute. The shifting of responsibility was thus from the *county* to the cities, not from the *State* to the cities, and because of that, the statute did not impose a state mandate. *Id.* at 1812. Here, the requirements in the Joint Test Claims involved imposition of a mandate by a state agency, *e.g.*, the LARWQCB,

on local government, *e.g.*, Claimants. As such, they fall well within the purpose of article XIII B, section 6.

County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264 likewise is inapposite. The court found there that the statute at issue merely reallocated property tax revenues for public education, which for years had been a shared state and local responsibility, and that there was no evidence of any increased costs imposed on local government by operation of the statute. *Id. at* 1283. By contrast, these Test Claims involve the adoption of specific new provisions in an executive order which require the Claimants to incur new costs. *See* County-District Narrative Statement at Sections IV.A.4-H.4; County-District Declarations, ¶¶ 8(f), 9(g),10(e), 11(d), 12(d),13(i), 14(i) and 15(f) (County); ¶¶ 8(f), 9(f), 10(d) and 11(e) (District).

The Water Boards ignore the holdings of this Commission in prior test claims, mischaracterize the evidence set forth in these Test Claims and misapply cases that are inapposite to the factual and legal issues presented here. The requirements of the 2012 Permit at issue represent the imposition of a higher level of service on the Claimants.

F. *The Water Boards Have Not Met the Burden of Establishing That Federal Law Mandated the Requirements in the 2012 Permit*

The Supreme Court has held that water boards have the burden of establishing that a requirement in a stormwater permit is federally mandated. *Dept. of Finance*, 1 Cal. 5th at 769. The Water Boards have not met that burden here.

Dept. of Finance sets forth a clear and specific test to determine the potential existence of a federal, as opposed to state, mandate in an MS4 permit.

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

1 Cal. 5th at 765. In *Dept. of Finance*, the Supreme Court rejected the State's argument that deference should be afforded the regional board's determination that requirements in an MS4 permit were federally mandated. Calling that determination "largely a question of law," the court concluded:

> Had the Regional Board found, when imposing the disputed Permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the Board's expertise in reaching that finding would be appropriate.

Id. at 768. Such a finding, cautioned the Court, "would be case specific, based among other things on local factual circumstances." *Id.* at 768 n.15. Thus, blanket statements by a regional board that

a permit, or a particular provision of that permit, is a federal mandate do not pass muster under *Dept. of Finance.*

Dept. of Finance II provides further guidance to the Commission, and the court there is no more deferential to the Water Boards. In explaining what it means for federal law to "compel" the state to impose a requirement, the Court of Appeal held that "the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit." 18 Cal.App.5th at 683 (*citing Dept. of Finance,* 1 Cal. 5th at 770-71). Thus, held the court, citing to "regulations broadly describing what must be included in an NPDES permit application by an MS4" was not the same as "express mandates directing the San Diego Regional Board to impose the requirements it imposed." *Id.*

The court then examined each of the provisions raised by the permittees in the San Diego County MS4 permit test claim, and found that none was expressly or explicitly required by the federal permit application regulations. As a result, the court concluded that the San Diego County MS4 permit requirements were state, not federal, mandates. 18 Cal.App.5th at 684-89. (The fact that the general MS4 permit application regulations do not expressly or explicitly require the measures at issue in these Test Claims is discussed in Section II below.)

The Water Boards argue (WB Comments at 31) that, although the LARWQCB "exercised its discretion," the requirements it imposed were nevertheless federal rather than state mandates because the LARWQCB believed the requirements were "necessary." Again, that is not the test. The test is not whether the LARWQCB believed the requirements were necessary, but whether the requirements were compelled by federal law, i.e., the *only* means to implement federal law, or whether the LARWQCB imposed the requirement by virtue of a true choice. *Dept. of Finance,* 1 Cal. 5th at 765. As the court said in *Dept. of Finance II*, "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the [MEP] standard establishes only that the San Diego Regional Board exercised its discretion. . . . .its use of the word 'necessary' did not equate to finding the permit requirement was the *only* means of meeting the standard." 18 Cal.App.5th at 682 (emphasis in original). The record of the 2012 Permit is devoid of any findings by the LARWQCB that the permit requirements at issue were the only means by which the MEP standard might be attained.

1. *The Permit Findings Cited by the Water Boards Do Not Require the Commission To Defer to the Water Boards on the Question of Whether the Mandates are Federal or State*

The Water Boards argue that, unlike the 2001 Permit at issue in *Dept. of Finance,* "in issuing the 2012 Permit, the LARWQCB made specific findings throughout the Permit that its provisions are based on federal law and are necessary to meet CWA standards under the factual circumstances presented." WB Comments at 31 (emphasis in original).

Two responses are in order. First, none of the findings meet the *Dept. of Finance* standard that the specific requirement at issue was, as a matter of fact, the *only* means by which the federal permitting standard could be achieved. Second, the findings cited by the Water Boards (WB Comments at 31-33) do not in fact support their contention.

The following are the findings cited by the Water Boards and Claimants' response:

- "This Order is issued pursuant to CWA section 402 and implementing regulations adopted by the USEPA *and chapter 5.5, division 7 of the California Water Code (commencing with section 13370).* This Order serves as an NPDES permit for point source discharges from the Permittees' MS4s to surface waters."[17]

Response: First, the finding itself refers to a section of the California Porter-Cologne Act providing for state implementation of NPDES permits, and which includes Water Code § 13377. That statute provides in relevant part that water boards issue state permits (called "waste discharge requirements") which shall include not only requirements needed to comply with federal requirements but also "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." "Water quality control plans," sometimes called "basin plans," are plans devised by the Water Boards to implement water quality control within various basins. *See generally City of Burbank, supra,* 35 Cal. 4th at 619, discussed in SD County SOD at 4. This finding by itself is sufficient to rebut the assertion that the permit is based solely on federal law.

Second, the Water Boards omitted the second part of the quoted finding. It reads: "This Order also serves as waste discharge requirements (WDRs) pursuant to article 4, chapter 4, division 7 of the California Water Code (commencing with Section 13260)."[18] Division 7 of Porter-Cologne sets forth *State* authority under the Porter-Cologne Act (not the CWA) to issue WDRs for discharges into waters of the state. **Thus, the very finding cited by the Water Boards in support of their argument that the 2012 Permit merely implements federal law contradicts that argument. That finding also specifies that the 2012 Permit is a State-issued WDR, implementing the provisions of the state Porter-Cologne Act.**

- "This Order implements the federal Phase I NPDES Storm Water Program requirements. These requirements include three fundamental elements: (i) a requirement to effectively prohibit non-storm water discharges through the MS4; (ii) requirements to implement controls to reduce the discharge of pollutants to the maximum extent practicable, and (iii) other provisions the Regional Water Board has determined appropriate for the control of such pollutants."[19]

Response: This finding does not constitute the type of finding required in *Dept. of Finance* and *Dept. of Finance II* to afford deference to the Water Boards. In fact, the reference to "other provisions the Regional Water Board has determined appropriate for the control of such pollutants" only reinforces the fact that the Board was exercising discretion to impose permit conditions as a "true choice," not that it was compelled to do so.

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[17] 2012 Permit Finding H, at 20 (AR SB-AR-013313) (italics added).

[18] *Ibid.*

[19] 2012 Permit Finding I, at 20 (AR SB-AR-013313).

- "[T]he Regional Water Board finds that the requirements in this permit are not more stringent than the minimum federal requirements."[20]

Response: This conclusory statement, without any reference to a specific permit requirement or facts in the record, and which does not indicate that the permit requirements were the only means by which the MEP standard could be complied with, also does not constitute the case specific finding, based on local factual circumstances, required by the Supreme Court and Court of Appeal to afford deference to the Water Boards.

- "This Order includes programmatic requirements in six areas pursuant to 40 CFR section 122.26(d)(2)(iv) as well as numeric design standards for storm water runoff from new development and redevelopment consistent with the federal MEP standard (see State Water Board Order WQ 200-11, the 'LA SUSMP Order'). This Order also includes protocols for periodically evaluating and modifying or adding control measures, consistent with the concept that MEP is an evolving and flexible standard."[21]

Response: This finding again does not refer to any specific permit requirements or facts in the record. It is not a case specific finding for which deference is appropriate. The argument that permit requirements are a federal mandate because the MEP standard is "an evolving and flexible standard" has previously been rejected by the Commission. *See* SD County SOD at 49.

- "The Regional Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. . . . .The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR § 122.26 or in USEPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in Clean Water Act section 402(p)(3)(B)(ii) and (iii) and the related federal regulations and guidance. Consistent with federal law, all of the conditions in this Order could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits."[22]

Response: As with previous findings, this is a conclusory statement by the LARWQCB, without reference to specific Permit requirements, and therefore not entitled to deference. Moreover, the test is not whether the requirements could have been included in a permit adopted by USEPA, but whether "the federal law or regulation . . . expressly or explicitly require the condition imposed in the permit." *Dept. of Finance II*, 18 Cal.App.5th at 683. Unless the CWA or federal regulations[23] "expressly or explicitly" require the permit provisions at issue, they are not federally mandated. *Id.*

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[20] 2012 Permit Finding S, at 26 (AR SB-AR-013319).

[21] 2012 Permit Fact Sheet, Part IV.B, at F-34 (AR SB-AR-013606).

[22] 2012 Permit Fact Sheet, Part VIII, at F-141 (AR SB-AR-013713).

[23] "USEPA guidance" does not constitute a law or regulation. As discussed in Section II.C.1.c, such guidance is prefaced by a statement that it is not to be relied upon as authority binding on any party, including a permittee.

- "The Regional Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan . . ."[24]

Response: Like the first finding cited by the Water Boards, this finding demonstrates that the 2012 Permit includes requirements to implement State, not solely federal, law. The reference to the "Basin Plan" includes all of the *State-mandated* water quality objectives and beneficial uses assigned to various waters within the basin in question. This is a State requirement, and one mandated by Water Code § 13263 for every WDR: "The requirements [of the WDR] shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected . . . ." Water Code § 13263(a).

- "The requirements of the Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the maximum extent practicable and to protect water quality. The Regional Water Board finds that the requirements of the Order are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate."[25]

Response: This finding does not meet the requirements of *Dept. of Finance*. It does not refer to specific requirements of the 2012 Permit, cite to evidence in the record, cite to case specific local circumstances or find that the permit requirements were the *only* way in which to meet the MEP standard. Indeed, this finding is an example of what the Supreme Court in *Dept. of Finance* found to be an improper assumption by the Water Boards of jurisdiction over what constituted an unfunded mandate: "The State's proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." 1 Cal. 5th at 769. The finding also ignores the fact that the Legislature placed with the Commission exclusive jurisdiction to determine if a mandate is entitled to reimbursement under article XIII B, section 6. Govt. Code § 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333. This finding, like the others cited by the Water Boards, does not require deference.

Finally, the Water Boards cite an excerpt of another finding in the 2012 Permit Fact Sheet ("Fact Sheet Excerpt"), a finding which asserts, *inter alia*, that "it is entirely federal authority that forms the legal basis to establish the permit provisions."[26] WB Comments at 33. That finding, however, is boilerplate, not case specific. It can be found in almost identical language in other MS4 permits and/or permit fact sheets adopted by regional boards across the state prior to adoption of the 2012 Permit. *See* Declaration of David W. Burhenn, Attachment 1 hereto ("Burhenn Decl.") and Exhibits A-B. This language can be found in a permit issued by the Central Valley Water Board to the City of Modesto[27] and by the San Francisco Bay Water Board to permittees

[24] 2012 Permit Fact Sheet, Part VIII, at F-141 (AR SB-AR-013713).

[25] 2012 Permit Fact Sheet, Part IX, at F-159 (AR SB-AR-013731).

[26] 2012 Permit Fact Sheet, Part IX, at F-158 (AR SB-AR-013730).

[27] *Compare* Waste Discharge Requirements for City of Modesto, Order No. R5-2008-0092, Finding 30 at 6-7 *with* Fact Sheet Excerpt at F-158. An excerpt of this permit is attached as Exhibit A to the Burhenn

discharging to San Francisco Bay.[28] The fact that this language is boilerplate demonstrates that it is not case specific as required by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 768 and n.15.

The Water Boards also argue that the LARWQCB "determined that the requirements in the Permit were practicable," Claimants allegedly did not present evidence that they were impracticable, and therefore "the Commission must defer to the board's findings." WB Comments at 33. This contention again ignores the controlling case law. Under that law, it is the Water Boards, not Claimants, which have the burden of demonstrating that a federal mandate exists, either through an express finding that the permit requirement is the "only means" by which the MEP standard can be achieved or by demonstrating that federal law or regulation expressly or explicitly requires the inclusion of the requirement in the permit. *Dept. of Finance,* 1 Cal. 5th at 768-769; *Dept. of Finance II,* 18 Cal.App.4th at 683. Moreover, *Dept. of Finance II* holds that the fact that a regional board found the "permit requirements were 'necessary' to meet the [MEP] standard establishes only that the [regional board] exercised its discretion." 18 Cal.App.5th at 682.

Were the Water Boards correct, all a regional board would have to do is to proclaim, as they have done here without reference to the evidence or the record, that permit requirements were practicable. That is not the law. The burden lies with the Water Boards to demonstrate, with case-specific findings based on local circumstances and evidence in the record, that the permit requirements are mandated by federal law. 1 Cal. 5th at 769.

2. *The Holdings of* Dept. of Finance *and* Dept. of Finance II Apply to All Requirements of the 2012 Permit

The Water Boards contend (WB Comments at 33-34) that *Dept. of Finance* and *Dept. of Finance II* were limited to a consideration of the MEP standard as it applied to requirements in the former Los Angeles County and San Diego County MS4 permits. Thus, they argue, the holdings in those cases do not extend to the separate CWA requirements requiring the effective prohibition of the discharge of non-stormwater to the MS4, provisions relating to TMDLs and provisions relating to monitoring and reporting. WB Comments at 34.

This argument, however, ignores the plain language of *Dept. of Finance* and the analysis performed by the Supreme Court to identify whether a mandate was federal or state. In formulating that test, the Court analyzed three unfunded mandates cases, none of which involved stormwater permits: *City of Sacramento, supra*, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564. *See Dept. of Finance,* 1 Cal. 5th at 765 ("From *City of Sacramento, County of Los Angeles, and Hayes,* we distill the following principle").

Decl. As with all such exhibits, the Commission may take administrative notice of this evidence pursuant to Evidence Code § 452(c) (official acts of the legislative departments of any state of the United States), Govt. Code § 11515 and Cal. Code Regs., tit. 2, section 1187.5, subd. (c).

[28] *Compare* Fact Sheet, Order No. R2-2009-0074 (San Francisco Water Board) at App I-12 to 13 *with* Fact Sheet Excerpt at F-158. An excerpt of this fact sheet is attached as Exhibit B to the Burhenn Decl.

The Supreme Court's statement of that principle, that if "federal law gives the state discretion whether to impose a particular implement requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated," is without any linkage to stormwater permit requirements, much less the MEP standard. And, to illustrate the principle, the Court cited yet another non-CWA case, *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal. App. 3d 794.

Further, the requirement that federal law or regulation "must 'expressly' or 'explicitly' require the condition imposed in the permit" set forth in *Dept. of Finance II*, 18 Cal.App.5th at 683, was without reference to the MEP standard. This separate and independent test applies as well to the non-stormwater, TMDL and monitoring and reporting provisions at issue in these Test Claims.

The holdings in *Dept. of Finance* and *Dept. of Finance II* apply to all requirements at issue in these Test Claims.

3. *Similar Provisions in an EPA-Issued Permit Do Not Necessarily Support an Argument that the Mandates in these Test Claims Are Federally Mandated*

The Water Boards contend that U.S. EPA has "issued permits requiring either equivalent or substantially similar provisions to the contested provisions of this Permit," thus demonstrating that "the Los Angeles Water Board effectively administered federal requirements concerning permit requirements." WB Comments at 35.

The presence of a requirement in an EPA permit does not establish that the requirement is federally mandated. Under the CWA, EPA has the same discretion as a state to include requirements that go beyond CWA requirements. *See* 33 U.S.C. § 1342(p)(3)(B)(iii) ("and such other provisions as the *Administrator* or the State determines appropriate for the control of such pollutants.") (Emphasis added). As the Ninth Circuit held in *Defenders*, this section gives EPA discretion to include in municipal stormwater permits provisions that the CWA does not require. 191 F.3d at 1166-67 (CWA does not require inclusion of compliance with water quality standards in municipal stormwater permits, but EPA has discretion to so include this requirement).

Thus, while the Supreme Court found that the absence of a particular permit provision in EPA-issued permits undermines "the argument that the requirement was federally mandated" *Dept. of Finance*, 1 Cal. 5th at 772, the presence of a particular requirement does not necessarily establish a federal mandate. Instead, because EPA also has discretion, the test as to whether a requirement that is also in a federal permit is a federal mandate is whether the CWA or its regulations compel or expressly or explicitly require the permit condition imposed. *Dept. of Finance II*, 18 Cal.App.5th at 682. [29]

[29] The Water Boards also argue that had the LARWQCB not issued a permit meeting federal standards, U.S. EPA could have objected to the 2012 Permit. WB Comments at 35. U.S. EPA's only role, however, is to ascertain whether the permit meets federal, not state, requirements. 33 U.S.C. § 1342(d)(2) (review to

With respect to the EPA-issued MS4 permits cited by the Water Boards, the Declaration of Karen Ashby and Exhibits 1-5 thereto (Attachment 2 to the Rebuttal Comments) filed herewith demonstrate that the specific mandates at issue in these Test Claims are *not* in fact present in the permits cited by the Water Boards. *See* discussion of individual 2012 Permit mandates in Section II.A-H below. The Supreme Court rightly cited the lack of such evidence as undermining "the argument that the requirement was federally mandated." 1 Cal. 5th at 772. And, as set forth above, although the Water Boards might contend that some provisions similar to (but not the same as) those in the 2012 Permit might be found in certain of the EPA-issued MS4 permits, that by itself does not establish that those provisions are federal mandates.

G. *Claimants Lack Fee Authority to Fund the Mandates at Issue in the Test Claim*

Claimants respond to the funding arguments made by the Water Boards on pages 35-40 of the WB Comments in Section III, Response to the Comments of the DOF and the Water Boards' Regarding Fund Issues ("Funding Rebuttal"), below.[30]

H. *Participation in a WMP or EWMP Does Not Preclude a Subvention of Funds for the Development and Implementation of a WMP or EWMP or for Compliance with Permit Parts III.A.4, VID.4 through VI.D.6 and VI.D.8 through VI.D.10*

The Water Boards contend that the costs to develop and implement a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) are not recoverable (WB Comments at 40-42). The Water Boards further contend that participation in a WMP or EWMP precludes a subvention of funds for compliance with Permit Parts III.A.4 (non-stormwater discharges), VI.D.4 through VI.D.6, and VI.D.8 through VI.D.10 (minimum control measures except planning and land development) (WB Comments 42-44). The Water Boards do not contend that participation in a WMP or EWMP precludes a subvention of funds for compliance with TMDLs.

The Water Boards' arguments lack merit. Essentially, the Water Boards seek to promote form over substance. All of the planning and implementation costs arising from participation in a WMP or EWMP, and all of the costs for complying with the permit provisions, would be incurred

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determine if permit is "outside the guidelines and requirements of this chapter.") EPA does not address whether the state mandates in the permit are appropriate. Accordingly, EPA's oversight of the permit to determine compliance with federal requirements does not address whether the permit also contains discretionary, state mandates. As the court held in *Dept. of Finance II*, the fact that a regional board is required to ensure that any NPDES permit issued by it meets the requirements of the CWA does not mean that all of its requirements are federal mandates. 18 Cal.App.5th at 682-83.

[30] The Water Boards argue, in a single sentence and without citation to any evidence, that the increased costs to implement the mandates at issue in these Test Claims "are *de minimis"* and therefore not entitled to subvention. WB Comments at 35. As a matter of fact, the actual increased costs to implement those mandated requirements are not *de minimis*, as reflected in the Section 6 Declarations filed in support of the Test Claims.

regardless of whether claimants participated in a WMP, EWMP, or not. These costs, therefore, are not voluntarily incurred.

As set forth in Claimant's Narrative Statement (Narrative Statement at 9-11), under the permit Claimants can either comply directly with a specific provision or comply through a WMP or EWMP. As the Water Board states, "participation in a WMP or EWMP encourages implementation of the permit on a watershed scale (WB Comments at 40). As such, WMP and EWMP participation is encouraged, not discouraged.

Significantly, participation in a WMP or EWMP does not relieve Claimants' compliance with the permit. With respect to Permit Part III.A.4 (non-stormwater discharges), Claimants participating in a WMP or EWMP must "include strategies, control measures and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A and VI.D.10 [minimum control measures concerning illicit connection and illicit discharges]." Permit, Part VI.C.5.b.iv.(2). With respect to Permit Parts VI.D.4 through VI.D.6 and VI.D.8 through VI.D.10 (minimum control measures ("MCMs") Claimants which participate in a WMP or EWMP must assure that compliance with those sections is achieved in any WMP or EWMP also. If a permittee elects to eliminate a control measure identified in one of these sections because it is not applicable to the permittee, the permittee must provide justification for its elimination. Permit Parts VI.C.b.iv.(1)(a) and (c).

The discretion of Claimants participating in a WMP or EWMP is thus constrained by the Permit, here the non-stormwater and minimum control measure requirements. Claimants must comply with these permit requirements, whether through a WMP, EWMP, or not.

For this reason, the cost for meetings, staff time, work by consultants and submittals to the Water Boards in conjunction with a WMP or EWMP is just as much a function of the mandates of the permit as if these costs were incurred to comply directly with the non-stormwater discharge prohibitions and the MCMs. If a Claimant was not participating in a WMP or EWMP, it still would have to conduct meetings, incur staff time, hire consultants to achieve compliance, and make submissions to the Water Boards to demonstrate its compliance. Merely because this work is included in a document titled "Watershed Management Program" or "Enhanced Watershed Management Program," rather than "Report on Compliance" or "Annual Report" simply elevates form over substance. Because the staff time, meetings, consultant costs and submittals are for compliance with the mandates of the permit, which have to be complied with whether in the form of a WMP, EWMP or directly, these costs are being incurred to comply with the mandates of the permit. They are not voluntary.

The Water Boards appear to argue that Claimants that participate in a WMP or EWMP are only required to develop and implement programs required by federal regulations. WB Comments at 42. In fact, the permit does not limit Claimants' compliance obligations solely to federal regulations. As the Water Boards themselves concede, Claimants must also either comply directly with the non-stormwater discharges (Part III.A.4) and the minimum control measures (Parts VI.D.4 through VI.D.6 and VI.D.8 through VI.D.10) or through customized actions (WB Comments at 43). Thus, again, the actions being performed under the WMPs or EWMPs are not voluntary. They are all undertaken to comply with specific mandates of the permit.

III. SPECIFIC RESPONSES

A. *TMDL Requirements*

Permit Section VI.E.1 requires Claimants to comply with the TMDL requirements set forth in Permit Attachments L through R. The Water Boards contend that these requirements are "necessary," that they are not new programs or higher levels of service, and that they are not unique to local government (WB Comments at 44). These contentions lack merit.

1. *The TMDL Requirements are Neither Necessary nor Federally Mandated*

The Water Boards contend that inclusion of the TMDL requirements are necessary and federally mandated by reason of a federal regulation, 40 CFR § 122.44(d)(1)(vii)(B), which provides that, when developing water-quality based effluent limits, the effluent limits should be consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by EPA. As set forth in Claimants' Narrative Statements however,[31] the Water Boards were not required to include these water quality based effluents, which are based on water quality standards, in the permit.

First, TMDL provisions are solely for the purpose of meeting water quality standards. Federal law does not require municipal stormwater permits to contain provisions to meet water quality standards. *Defenders, supra,* 191 F.3d at 1164-65. Instead, municipal permits must only contain controls "to reduce the discharge of pollutants to the maximum extent practicable . . . ." 33 U.S.C. § 1342(p)(3)(B)(iii). Therefore, the CWA does not require in MS4 permits TMDL provisions, which go only to compliance with water quality standards,

Second, EPA or a state has the *discretion* to require compliance with water quality standards pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii), which provides that municipal stormwater permits shall contain "such other provisions as the Administrator or the State *determines appropriate* for the control of such pollutants." (Emphasis added.) This, however, is discretionary. As discussed above, it is not required. Because requiring compliance is discretionary, it is not a federal mandate. *Defenders,* 191 F.3d at 1166-67.

Similarly, 40 CFR § 122.44(d)(1)(vii)(B) does not require that municipal stormwater permits contain TMDL provisions. This regulation provides that NPDES permits are to include conditions consistent with the assumptions and requirements of TMDL waste load allocations "when applicable." 40 CFR § 122.44. Because MS4 permits are not required to contain provisions to comply with water quality standards, TMDL wasteload allocations intended to achieve such standards are not "applicable."

The Fact Sheet adopted by the LARWQCB in support of the 2012 Permit recognized that the Board's inclusion of the TMDL provisions was not mandated but was adopted pursuant to the discretionary portion of 33 U.S.C. § 1342(p)(3)(B)(iii). (Permit Attachment F, p. F-84.) The Fact Sheet also cited two California statutes as support for the incorporation of the TMDLs, Water Code

[31] *See* County-District Narrative Statement at Sections IV.A.4-H.4; County-District Declarations, ¶¶ 8(f), 9(g),10(e), 11(d), 12(d),13(i), 14(i) and 15(f) (County); ¶¶ 8(f), 9(f), 10(d) and 11(e) (District).

§§ 13263 and 13377, which provide that permits shall include more stringent effluent standards or limitations to implement water quality control plans. *Id.* These facts demonstrate that the LARWQCB's inclusion of the TMDL provisions was a discretionary decision, based in part on state law, not a federal mandate necessitated by federal law.

The Water Boards also quote from page F-36 of the Fact Sheet to the effect that "the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates." WB Comments at 45. As previously discussed, this Fact Sheet discussion is part of boilerplate language being inserted in MS4 permits across the state. *See* Modesto and San Francisco Bay permit and fact sheet excerpts attached as Exhibits A-B to the Burhenn Declaration. It is not the type of specific finding that the Supreme Court provided in *Dept. of Finance* should be given deference. This boiler-plate finding is not entitled to any such deference.

The Water Boards also cite a 2014 guidance memorandum from U.S. EPA allowing, under certain circumstances, for the inclusion of numeric effluent limitations as necessary to meet water quality standards. WB Comments at 49-50. As previously noted, EPA guidance is not binding on the Water Boards, a fact noted in the 2014 guidance memorandum itself: "This memorandum is guidance. It is not a regulation and does not impose legally binding requirements on EPA or States." Guidance at 1. Indeed, the Department of Justice has expressly forbidden federal prosecutors from using guidance to form the basis for enforcement actions, as discussed in Section II.C.1.c below.

In fact, as set forth in the Ashby Declaration at ¶ 18, no EPA-issued MS4 permit includes the specific requirements set forth in the 2012 Permit. Although those EPA-issued permits contain provisions directed at achieving water quality standards, they do not take the same approach or impose the same requirements as the 2012 Permit. The Boise, Boston and Worcester permits contain no TMDL requirements or other numeric effluent limits. They do not incorporate any TMDLs. The Albuquerque permit provides that permittees must develop a stormwater management program designed to reduce the discharge of pollutants to the maximum extent practicable, including BMPs consistent with the assumptions and requirements of adopted TMDLs but, unlike the 2012 Permit, contains no numeric effluent limits. No TMDL specific monitoring is required. The D.C. permit requires development of a consolidated TMDL implementation plan and monitoring to assess whether waste load allocations are being attained, but contains no strict timetables and also no numeric effluent limits.

2. *The TMDL Requirements Are New Programs and/or a Higher Level of Service*

Although the Water Boards concede that "certain specific TMDL-related provisions may be new to the 2012 Permit" (WB Comments at 52), the Boards nevertheless argue that they are not new programs or higher levels of service because the 2001 Permit had provisions that reflected the Los Angeles River Trash TMDL (WB Comments at 51-52).

A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists where the mandate results in an increase in the actual level or quality of governmental services

provided. *San Diego Unified School Dist., supra*, 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.

Here, with the exception of the LA River Trash and Marina del Rey dry weather bacteria TMDLs, none of the TMDL requirements were present in the 2001 Permit. The other TMDL requirements are therefore a new mandate or a higher level of service. And with respect to the Los Angeles River Trash TMDL, under the 2001 Permit, permittees were required to be in compliance with the applicable interim or final effluent limitations for that TMDL as identified in 2001 Permit. 2001 Permit, Part 7.1.B.2. Those interim or final effluent limitations required a reduction of trash to 30 percent of the baseline load calculated as a rolling 3-year annual average. *See* LARWQCB Resolution No. 2007-012, Attachment A, Table 7.2.3. The 2012 Permit has amended those implementation requirements; permittees must now reduce trash to *zero* percent of the baseline allocation. Permit Attachment O, Part A.3. These implementation requirements are thus also new.

The Water Boards also argue that the TMDL requirements should not be treated as new because the 2001 Permit required Claimants to take actions to meet water quality standards, and the TMDL requirements simply provide a timeframe in which to reach those standards. WB Comments at 52. The 2001 Permit, however, did not impose specific, numeric waste load allocations or place a date on which those allocations must be met. Again, these were new requirements, requiring new and more expensive programs. Certainly by imposing TMDL requirements where none had previously existed, the Water Boards required Claimants, at a minimum, to undertake a higher level of service.

3. *The TMDL Requirements Are Unique to the Test Claimants*

Finally, the Water Boards argue that the TMDL requirements are not unique to the Test Claimants because TMDL requirements in general could apply to non-governmental parties. WB Comments at 54. Again, the Water Boards ignore the specific requirements at issue in the 2012 Permit. The TMDL requirements are imposed on MS4 dischargers, i.e., the Test Claimants only. These specific waste load requirements are not imposed on any non-governmental entity, and the Water Boards do not identify any non-local governmental entity that is subject to them. These particular TMDL waste load requirements are imposed on municipal dischargers, not other, non-governmental entities. As a matter of fact, these particular TMDL requirements are imposed uniquely on governmental entities.

4. *The TMDL Monitoring Requirements Are Also New Programs or Higher Levels of Service*

Finally, the TMDL monitoring requirements are also new programs or a higher level of service. The Water Boards make the same arguments with respect to monitoring that they make with respect to the TMDL requirements themselves, specifically, that the requirements, although not previously required, are similar to other monitoring requirements under the 2001 Permit (WB Comments at 55-60).

Under the 2001 Permit, however, only the Los Angeles Flood Control District was required to monitor, and that monitoring constituted only "mass-emission" monitoring at 5 stations in major

rivers. In the 2012 Permit, the monitoring obligation is imposed on all 84 permittees, and is in addition to the mass-emission monitoring that the District is required to continue to perform. And unlike the mass-emission monitoring, the TMDL monitoring is at "outfalls," i.e., where the MS4 discharges to a water of the United States (Permit, Attachment E.VII and VIII). Again, these are new requirements that Claimants had not had to implement before. Thus, these monitoring requirements are newly imposed on Claimants.

These monitoring requirements are also unique. The Water Boards do not dispute that only the Claimants have to perform this monitoring. It is not imposed on any other entity; the monitoring is imposed only on Claimants.

B. *Requirements Regarding Non-Stormwater Discharges*

Part III.A.1 of the 2012 Permit requires the permittees, including Test Claimants, to prohibit certain non-stormwater discharges "through the MS4 to receiving waters." For non-exempted non-stormwater flows, the permittees, including Claimants, are required to develop and implement various procedures relating to such flows. Such requirements either exceed the requirements of the CWA and federal stormwater regulations or specify the means of compliance with the Act and the regulations, and consequently are state mandates.

1. *Requirement Concerning Prohibition of Non-Stormwater Discharges*

Part III.A.1 of the 2012 Permit requires the permittees, including Test Claimants, to prohibit certain non-stormwater discharges "through the MS4 to receiving waters." The Water Boards assert that this requirement was not new, that it is necessary to implement federal law and is not unique to local government. WB Comments at 61-65.

First, with respect to whether Part III.A.1 is a new program, the requirement in the 2001 Permit was to "*effectively* prohibit non-storm water discharges . . . ." 2001 Permit, Part 1.A (emphasis supplied). The absolute prohibition in Part III.A.1 is new.

Second, the CWA itself does not require permittees to address non-stormwater discharges "through the MS4 to receiving waters." As the Water Boards concede, the statute instead requires only that MS4 permits "include a requirement to effectively prohibit non-stormwater discharges 'into the storm sewers.'" WB Comments at 62 (quoting 33 U.S.C. § 1342(p)(3)(B)(ii)). The Water Boards allege that language in a preamble to the federal stormwater regulations implicitly requires such controls, but the regulatory language itself, like the statute, refers to control of illicit discharges "to" the MS4. 40 CFR § 122.26(d)(2)(i)(B). And, the fact that the State Board supported LARWQCB's language (WB Comments at 63) does not go to whether the requirements in Part III.A.1 were a state mandate.

Third, the fact that other stormwater permits might also contain provisions regarding the discharge of non-stormwater into the MS4 does not assist the Water Boards (WB Comments at 64-66) in that none of the three quoted permits contains the explicit requirement of municipalities to prohibit the discharge of non-stormwater "through the MS4 to receiving waters." This specific

requirement applies to local agencies as MS4 operators, and thus is a uniquely governmental function.

2. *Requirements Concerning Conditional Exemptions from Non-Stormwater Discharge Prohibition*

Part III.A.2 of the 2012 Permit, relating to conditional exemptions from the non-stormwater discharge prohibition, requires the non-Flood Control District Test Claimants to assure that appropriate BMPs are employed for discharges from essential non-emergency firefighting activities and, with regard to unpermitted discharges by drinking water suppliers, to work with those suppliers on the conditions of their discharges.

Part III.A.4.a of the 2012 Permit requires dischargers, including the Test Claimants, to "develop and implement procedures" to require non-stormwater dischargers to fulfill requirements set forth in Part III.A.4.a.i through vi.

Part III.A.4.b of the 2012 Permit requires the non-District permittees to "develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs." The non-District permittees are required to coordinate with local water purveyors, where applicable, to promote landscape water use efficiency requirements, use of drought tolerant native vegetation and the use of less toxic options for pest control and landscape management. The non-District permittees are also required to develop and implement a "coordinated outreach and education program" to minimize the discharge of irrigation water and pollutants associated with such discharge as part of the Public Information and Participation in Part VI.D.4.c of the Permit.

The Water Boards argue (WB Comments at 66-67) that the Test Claimants are given "significant flexibility" to customize their response to these requirements through the WMP or EWMP process. Because Claimants elected to implement a WMP or EWMP, the Water Boards argue, this was a "choice" and not a state mandate. WB Comments at 67.

Again, the Water Boards ignore the fact that the requirements in Part III.A.2 and A.4 do not vanish when the Test Claimants choose to implement a WMP or EWMP. As discussed in Section I.H above, the control measures set forth in those provisions must be reflected in the Watershed Management Program developed in the WMP or EWMP: "Where Permittees identify non-storm water discharges from the MS4 as a source of pollutants that cause or contribute to exceedance of receiving water limitations, the Watershed Control Measures shall include strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants *consistent with Parts III.A* . . . ." 2012 Permit Part VI.C.5.b.iv.(2) (emphasis added).

Thus, the provisions of Parts III.A.2 and III.A.4 are directly relevant and applicable to what is *required* of the permittees, including the Test Claimants.[32]

[32] The Water Boards further argue that pursuant to Part III.A.2, the Executive Officer of the LARWQCB can approve alternative conditions to those set forth in Part III.A for the conditionally exempt non-

a. *The Conditional Exemption Requirements are a Program and/or Represent a Higher Level of Service*

The Water Boards (WB Comments at 67-70) argue that the provisions of Parts III.A.2 and A.4 are not in fact new programs or represent a higher level of service. As set forth below, this argument is supported neither by the facts nor by the law.

First, concerning Part III.A.2.i (relating to discharges from essential non-emergency firefighting activities), the Water Boards argue that since this category was not conditionally exempt in the 2001 Permit, the requirements associated with it in the 2012 Permit require a "lesser standard." WB Comments at 68. This argument ignores the fact that the requirements in Part III.A.2.i are in fact new, never before having been required of the permittees. A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal.App.4th at 1189.

Second, concerning Part III.A.2.ii (relating to discharges from potable drinking water supply and distribution system releases) the Water Boards contend that this provision "carried over" a much more limited condition in the 2001 Permit. WB Comments at 68. In fact, the 2001 Permit only required that such discharges be "consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices." 2001 Permit Part A.1.2.(c)(2). The 2012 Permit requires implementation of BMPs based on a 2005 American Water Works Association manual or equivalent industry standard, and requires that permittees work with drinking water suppliers to ensure notice, monitoring and recordkeeping in the event of any discharge of 100,000 gallons or more. In addition, permittees are required to demand that suppliers keep detailed records of discharges, a demand which requires the permittees to work closely with the suppliers. All of these requirements represent new and/or higher levels of service.

Third, requirements in Part III.A.2.b relating to lake dewatering, landscape irrigation, swimming pool/spa discharges, fountain dewatering and residential car-washing and sidewalk rinsing, all of which discharges were exempt from regulation in the 2001 Permit, now mandate permittees to ensure that all such discharges meet the requirements set forth in Table 8 of the 2012 Permit. Compliance with these Table 8 required conditions represent a new program and/or higher level of service.

The Water Boards also make a further argument, contending that since under the 2001 Permit, the LARWQCB's Executive Officer could remove categories of exempt non-stormwater discharges or subject them to conditions, the above requirements in the 2012 Permit "clarified" the conditions for the exempt non-stormwater discharges. WB Comments at 69. This argument, however, does not assist the Water Boards since they identify no conditions imposed under the 2001 Permit by the Executive Officer on any of the non-stormwater discharges that were continued in the 2012 Permit. All of the referenced specific conditions, the "new programs" or requirements for a higher level of service, are new to the 2012 Permit.

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stormwater discharges. WB Comments at 67. This argument does not, however, make the requirements of Part III.A at issue in these Test Claims any less of a mandate. Instead of known written conditions, the Executive Officer can impose "alternative conditions." Those conditions still represent mandates.

With respect to street/sidewalk washing, the Water Boards argue that requirements contained in Resolution 98-08 were incorporated into the 2012 Permit. WB Comments at 69. It is undisputed, however, that street/sidewalk washing was conditionally exempt under the 2001 Permit, without reference to the requirements of Resolution 98-08. By explicitly incorporating the requirements of Resolution 98-08 into the 2012 Permit, the LARWQCB added new requirements that were not previously present, mandating a new program or higher level of service.

The Water Boards also contend that conditions imposed on non-stormwater exempt discharges were "based on what the Permittees were already doing under the 2001 Permit." WB Comments at 69. The Water Boards argue that some permittees had undertaken to require BMPs to address these non-stormwater discharges. WB Comments at 69-70. This argument, too, does not establish that the conditions in the 2012 Permit were not a new program or a requirement for a higher level of service. Under the Government Code, if a local agency voluntarily undertakes an obligation, and that obligation later becomes a requirement of an executive order, a state mandate still exists: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." Govt. Code § 17565.

b. *The Exempt Non-Stormwater Discharge Requirements are Not Necessary to Implement Federal Law*

The Water Boards discuss at length (WB Comments at 71-74) EPA's position on the effective prohibition of non-stormwater discharges into the MS4 and the requirement that MS4 permittees have a program to address such discharges. That is not the relevant inquiry in determining the existence of a state, versus federal, mandate. The question is, does federal law or regulation compel or "explicitly" or "expressly" require the exempt non-stormwater discharge conditions found in Part III.A.2 and A.4 of the 2012 Permit? *Dept. of Finance II,* 18 Cal.App.5th at 683. They do not.

The Water Boards allege that "[a]s required by federal law, the 2012 Permit specifies requirements" concerning discharges of non-stormwater to the MS4. WB Comments at 72. Again, applying the tests established in *Dept. of Finance* and *Dept. of Finance II,* federal law does not specify the requirements of Parts III.A.2 or A.4 at issue in these Test Claims. None of these requirements is called for in the CWA or in the implementing regulations in Title 40 of the Code of Federal Regulations. As discussed in Section I.F above, that is the test for determining whether a permit requirement is mandated by federal law. The Water Boards do not address this point.

The Water Boards contend (WB Comments at 72-73) that the LARWQCB identified a need for the conditions. Whether the regional board identified a need for a permit condition is not the question before the Commission. Again, as the Supreme Court held in *Dept. of Finance*, the question is not whether the Board had the authority to impose the conditions. It is, who will pay for them? *Dept. of Finance*, 1 Cal. 5th at 769.[33] The Water Boards also argue that had it not

[33] The Water Boards cite the U.S. EPA Permit Improvement Guide as authority for the Part III.A requirements. As discussed in detail in Section II.C.1.c below, the Guide is not a source of federal authority for this, or any other, 2012 Permit requirement.

imposed conditions on the exempt stormwater discharges, permittees "may incur more costs to implement a prohibition of all non-stormwater discharges" and cite a study apparently commissioned by the City of Los Angeles (not a Claimant) in support. This argument is speculative, and does not go to whether the requirements were compelled by federal law.

Finally, none of the stormwater permits issued by EPA contains these conditions. Ashby Decl. ¶ 10. The fact that EPA-issued permits do not contain similar prohibitions undermines the argument that the requirement is federally mandated. *Dept. of Finance,* 1 Cal. 5th at 772.

There is no support for the argument that federal law mandated the requirements of Parts III.A.2 and A.4 of the 2012 Permit. The State has the burden of proving that a mandate is federal. *Id*. at 769. The Water Boards have not met their burden here. The LARWQCB's imposition of this requirement is a state, not a federal mandate. *Dept. of Finance,* 1 Cal. 5th at 765.

c. *No Other Mandate Exceptions Apply*

The Water Boards (WB Comments at 74-75) appear to argue that because certain permittees, including some Claimants, participated in the development of a CAL Fire BMP handbook and an American Water Works Association BMP handbook separately from development of the 2012 Permit, that this somehow disqualifies them from receiving a subvention of state funds. Thus, argue the Water Boards, if a permittee ever cooperated in the development of a BMP, and that BMP later is separately incorporated into an MS4 permit, the permittee has somehow waived its ability to seek funding in a test claim. The Water Boards cite no authority for this proposition, and it is no different, conceptually, from the decision by a permittee to voluntarily undertake a BMP which then is later incorporated as a binding requirement in a permit. As noted above, the Government Code provides that in such a case, any costs incurred after the BMP was incorporated in the permit become subject to reimbursement. Govt. Code § 17565.

The Water Boards also argue that permittees were provided the option in the 2012 Permit to implement the requirements of an "equivalent" manual with respect to the requirements of Parts III.A.2.a.i and ii. WB Comments at 74. This option does not excuse the requirements of Part III.A.2 that the permittees employ BMPs developed for firefighting or water distribution activities, and thus cannot serve as an exception to the mandate requirements.[34]

3. *Non-Stormwater Evaluation Requirements*

Part III.A.4.c of the 2012 Permit requires Claimants to evaluate monitoring data collected pursuant to the 2012 Permit's Monitoring and Reporting Program (Attachment E) and "any other associated data or information" to determine if any authorized or conditionally exempt non-stormwater discharges identified in Permit Parts III.A.1, A.2 and A.3 are a source of pollutants

[34] The Water Boards further allege that the City of Los Angeles, which is not a Claimant herein, suggested certain proposed conditions for landscape irrigation, and that the LARWQCB adopted certain of those conditions in the 2012 Permit. WB Comments at 75. Even were the City of Los Angeles a Claimant, the provision of comments during development of a permit does not render the State's partial acceptance of those comments an exception to a mandate.

that may be causing or contributing to an exceedance of a receiving water limitation in Part V or water quality-based effluent limitation in Part VI.E.

Part III.A.4.d. requires that if these data show that the non-stormwater discharges are such a source of pollutants, Claimant are required to take further action to determine whether the discharge is causing or contributing to exceedances of receiving water limitations, report those findings to the LARWQCB, and take steps to effectively prohibit, condition, require diversion or require treatment of the discharge.

a. ***The Evaluation Requirements Relating to Non-Stormwater are a New Program and/or a Requirement for a Higher Level of Service and Are Not Necessary to Implement Federal Law***

The Water Boards argue that requirements that permittees, including Claimants, evaluate non-stormwater discharges was a carryover from the 2001 Permit and that they are necessary to implement federal law. WB Comments at 75-77. Neither proposition is correct.

First, the requirements in Part III.A.4.c and d are specific and detailed as to *how* the permittees, including Claimants, are to evaluate non-stormwater discharges. Nothing in the 2001 Permit required permittees to undertake those specific steps and these specific requirements are not contained in that permit. As the Water Boards themselves admit, there was no explicit requirement for an evaluation of non-stormwater discharges in the 2001 Permit. The permit requirements cited by the Water Boards (WB Comments at 75-76) refer either to general legal authority to carry out investigations and monitoring or general requirements relating to all discharges from the MS4 (not specific requirements related to exempt non-stormwater discharges).

At best, the Water Boards themselves describe these requirements, as they may apply to exempt non-stormwater discharges," as "implicit" and that the provisions at issue in the Test Claims "merely make explicit what was already required in the prior permit." WB Comments at 76. Even if it were the case that the 2001 Permit required, in general, the evaluation that 2012 Permit now explicitly requires, the very act of detailing precisely what steps permittees were required to take represents the imposition of a higher level of service on Claimants. *See* SD County SOD at 53-54 (additional requirements in program required under previous permit represent a higher level of service).

Second, while the Water Boards cite general federal regulatory provisions requiring MS4 permittees to address general "illicit discharges" into MS4s (which regulations do *not* explicitly or expressly require the specific mandates in Parts A.4.d), the exempt non-stormwater discharges addressed by Part A.4 of the 2012 Permit are in fact not considered "illicit discharges" unless they are identified by the municipality as sources of pollutants to waters of the United States." 40 CFR § 122.26(d)(2)(iv)(B)(1).

Moreover, 40 CFR § 122.26(d)(2)(iv)(B)(1) requires that if there is a finding of a significant pollutant source to waters of the United States, the permittee is required only to *address* the discharge. This can be done through public information and education or other means, and not necessarily through a strict prohibition of such discharges, imposition of BMPs, or permitting. The decision as to how to address the discharge is left to the municipality in the federal regulations.

By contrast, Part 4.d of the 2012 Permit requires specific actions by the permittees to prohibit, impose conditions in addition to those in Table 8, require diversion of the discharge to the sanitary sewer or require treatment of the discharge. By mandating those responses, the LARWQCB usurped the permittees' ability to design their own program and imposed requirements that exceed the federal regulation. *See Long Beach Unified, supra,* 225 Cal.App.3d at 173.

The requirements of 2012 Permit Parts 4.A.c and 4.A.d are both (1) new programs and/or requirements for higher levels of service and (2) not necessary to implement federal law.

C. *Public Information and Participation Program ("PIPP") Requirements*

Part VI.D.5 of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to undertake specific Public Information and Participation Program ("PIPP") activities, either individually or as part of a County-wide or Watershed Group sponsored PIPP.

Preliminarily, the Water Boards contend that Claimants mischaracterize the 2001 Permit by ascribing the PIPP responsibilities under the 2001 Permit to the Los Angeles Flood Control District, which was then Principal Permittee (WB Comments at 78-79). The Water Boards also contend that, even though under the 2001 Permit only the District was responsible for the programs at issue here, the 2012 Permit's imposition of these PIPP requirements onto other permittees was not a new program or higher level of service as to them.

First, none of the PIPP requirements at issue here were previously assigned to the other permittees. Under the 2001 Permit, the District was responsible for the public information program, with the exception that each permittee was to mark the storm drains they owned with a legible "no dumping" message, provide the District with contact information, and conduct educational and certain outreach programs relating to specific pollutants in specific watersheds (2001 Permit, Parts 4.B.1(a), (b), (c)(4), and (d), at 30-31). None of these 2001 Permit programs are the 2012 PIPP requirements at issue here.

The Water Boards nevertheless contend that under the 2001 Permit, each permittee was obligated to implement the Stormwater Quality Management Program (SQMP) and the PIPP program was a part of the SQMP (WB Comments at 78). This general obligation, however, did not make the other permittees responsible for the Principal Permittee's obligations. The 2001 Permit made this clear in Part 3.E, the same section on which the Water Boards rely. Part 3.E specifically states that "Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries (see Findings D.1, D.2 and D.3, *and not for the implementation of the provisions applicable to the Principal Permittee* . . . ." (Emphasis added.) Thus, contrary to the Water Boards' assertion, Claimants were not responsible under the 2001 Permit for the Flood Control District's obligations, including its PIPP obligations. This, and the plain language of Part 4.B of the 2001 Permit (e.g., the "Principal Permittee shall be responsible for developing and implementing the Public Education Program, as described in the SQMP," 2001 Permit at Part 4.B), plainly shows that it was *not* the responsibility of each permittee to undertake all PIPP requirements in the 2001 Permit.

The LARWQCB was well aware that under the 2001 Permit the other permittees were not performing the PIPP obligations that were assigned to the Flood Control District. For example, excerpts of the Annual Report for the City of Los Angeles for 2010-11 (attached as Exhibit C to

the Burhenn Decl.) show that the City (by far the largest permittee under the 2001 Permit) did not undertake a number of responsibilities under the permit, since those were reserved to the District.

Finally, as discussed in detail below, many of the specific PIPP requirements in the 2012 Permit were in fact not found in the 2001 Permit. Thus, they represent new, specific requirements for all permittees, not simply new requirements for non-District permittees.

The Water Boards argue further (WB Comments at 79) that the LARWQCB made "specific findings" concerning the alleged necessity of the PIPP requirements imposed by the Board to implement federal law and that those findings "are entitled to deference." To the contrary, none of the statements made in the Fact Sheet amounts to a specific finding by the LARWQCB, with a citation to evidence in the record, that the particular PIPP requirements imposed by the 2012 Permit were the only way that the federal MEP standard could be achieved.

The findings also quote a U.S. EPA fact sheet for Phase II permits, which is not applicable to Phase I permits like the 2012 Permit. As the Test Claimants set forth in their Narrative Statements,[35] the 2012 Permit was adopted as a "Phase I" permit, which apply to stormwater sewers serving larger population areas. Those Phase I permits are governed by regulations found at 40 CFR § 122.26(d). The regulations governing Phase II permits, covering "Small MS4s," are found at 40 CFR § 122.34. *See also* 40 CFR § 122.26(b)(18)(ii) (small MS4s are MS4s "[n]ot defined as 'large' or 'medium' [MS4s] . . . .") The Phase II regulations are inapplicable to Phase I permittees and cannot serve as a source of federal authority to argue that there is a federal "mandate."

The Water Boards also argue that because permittees can customize PIPP programs as part of their WMP or EWMP, the requirements of Part VI.D.5 do not constitute a state mandate. WB Comments at 79. Because the WMP or EWMP must assess the requirements of Part VI.D.5 and incorporate/customize all control measures set forth therein, unless their elimination is justified by the permittee as not applicable (Part VI.C.5.b.(iv)(c)), these PIPP requirements are still mandated, whether complied with through the WMP or EWMP or other means.

1. *General PIPP Implementation*

Part VI.D.5.a of the 2012 Permit requires the non-District permittees, including Claimants, to "measurably increase" the knowledge of target audiences about the MS4, adverse impacts of stormwater pollution on receiving waters and potential solutions to mitigate impacts, to "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" and to "involve and engage a diversity of socio-economic groups and ethnic communities" in Los Angeles County to participate in stormwater pollution impact mitigation.

Part VI.D.5.b requires the permittees to implement the PIPP activities by participating either in a County-wide or Watershed Group-sponsored PIPP or individually.

[35] Cities Narrative Statement at 5; County-District Narrative Statement at 6.

a. *The General PIPP Requirements are a New Program and/or Represent Higher Levels of Service*

The Water Boards argue (WB Comments at 80) that the requirements of Part VI.D.5.a and b do not constitute a new program or higher level of service since the requirements were largely carried over from the 2001 Permit. As discussed above, this argument ignores the fact that in the 2001 Permit, the public information requirements at issue here were assigned to the District as Principal Permittee. *See, e.g.*, 2001 Permit Part 4.B: "The *Principal Permittee* shall implement a Public Information and Participation Program (PIPP) . . . The *Principal Permittee* shall be responsible for developing and implementing the Public Education Program . . . ." (Emphasis added). By contrast, Part VI.D.5.a of the 2012 Permit mandates that "[*e]ach Permittee* shall implement a . . . PIPP. Further, *[e]ach Permittee* shall be responsible for developing and implementing the PIPP and implementing specific PIPP requirements." (Emphasis added.) Similarly, 2012 Permit Part VI.D.5.b requires implementation by all permittees through either a County-wide, Watershed Group or individual jurisdiction PIPP program. But whatever program option is chosen, implementation by each permittee is required.

The undisputed fact that the 2012 Permit imposed these requirements for the first time on all permittees, as opposed to only the District, makes them a new program and/or higher level of service with respect to all permittees other than the District.

b. *The General PIPP Requirements are a "Program"*

The Water Boards also contend (WB Comments at 80-81) that because there are PIPP elements in an MS4 Permit issued to Caltrans, the requirement to develop and implement a PIPP "is not unique to local government." This, however, is not the sole test for determining the existence of a "program" eligible for subvention under article XIII B, section 6 of the California Constitution. In *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874, the California Supreme Court repeated its holding in *County of Los Angeles, supra,* that the electorate had in mind two kinds of "programs" when article XIII B was adopted:

> We conclude that the drafters and the electorate hand in mind the commonly understood meanings of the term – [(1)] programs that carry out the governmental function of providing services to the public, or [(2)] 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.

San Diego Unified School Dist., supra, 33 Cal. 4th at 784, (quoting *County of Los Angeles, supra,* 43 Cal. 3d at 56).

The Supreme Court there established that if a governmental entity was, as is the case here, providing services to the public (here, by providing the public with information about stormwater pollution), it was performing a governmental function. As such, the PIPP qualifies as a "program" subject to a subvention of funds under article XIII B, section 6 of the California Constitution.

c. *The General PIPP Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the detailed requirements of 2012 Permit Part VI.D.5.a and b are "necessary to implement federal regulations." WB Comments at 81. This is not correct

First, federal law does not explicitly or expressly require these specific provisions. The federal NPDES MS4 permit application regulations require that an MS4 operator include in its management program "[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" 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 CFR § 122.26(d)(2)(iv)(B)(5-6). Nothing in these regulations explicitly or expressly requires the permit to contain the provisions set forth in in 2012 Permit Part VI.D.5.a and b. *Dept. of Finance II*, 18 Cal.App.5th at 683.

The Water Boards cite (WB Comments at 82) two additional regulations, 40 CFR § 122.26(d)(2)(v), which requires that permittees estimate "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," and 40 CFR § 122.42(c)(3), which requires that the annual report filed by the MS4 operator must include "[r]evisions, 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." Again, neither of these regulations explicitly requires the requirements in the 2012 Permit but, like the vast bulk of the NPDES regulations, set forth general parameters for the programs to be designed by the permittees.

The Water Boards also cite as authority documents or guidance which explicitly do not serve as federal requirements for the provisions in the 2012 Permit. WB Comments at 81-82. The first of these is the U.S. EPA Phase II Fact Sheet. This Fact Sheet applies only to Phase II permits, which are a completely different category of NPDES MS4 permits from the Phase I permit at issue here. See 33 U.S.C § 1342(p)(4); *compare* 40 C.F.R. § 122.26(d) (applying to large and medium size MS4s) with 40 C.F.R. § 122.30 et. seq. (small MS4s).

The Water Boards next cite the U.S. EPA MS4 Permit Improvement Guide ("Permit Improvement Guide.") What the Water Boards do not mention, however, is that the Guide cannot provide any binding authority from which the Water Boards could infer a federal mandate. As the Guide itself states, on page 3: "This Guide does not impose any new legally binding requirements on EPA, States, or the regulated community, and does not confer legal rights or impose legal obligations upon any member of the public."

Indeed, the United States Department of Justice has issued a policy expressly prohibiting federal prosecutors from using use their enforcement authority to "effectively convert agency guidance documents into binding rules" and also from using "noncompliance with guidance documents as a basis for proving violations of applicable law" in affirmative civil enforcement

cases.[36] If guidance documents cannot be used to establish a basis for compliance with federal law, they cannot be cited as federal authority for the Water Boards.[37] *See also City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, in which the court noted that two U.S. EPA guidance documents cited by plaintiffs in that case explicitly stated that they did not constitute legally binding requirements. The court accordingly did not apply the reasoning set forth in that guidance. 135 Cal.App.4th at 1429-30.

The Water Boards also cite three US EPA-issued MS4 permits. One of those permits, the permit issued for Small (Phase II) MS4s in Massachusetts is not relevant to these Test Claims because, as noted above, the 2012 Permit is a Phase I MS4 permit, not a Phase II Permit, which is subject to different regulatory requirements. The Phase II Massachusetts permit is not relevant to the 2012 Permit and will not be discussed further.

With respect to the other EPA-issued MS4 permits cited in the Water Boards' comments, while those EPA permits contain certain public information requirements, none contains as extensive or prescriptive requirements as those in the 2012 Permit. Ashby Decl. ¶ 11; *See also* Exhibit 1 to Ashby Decl. discussing 2012 Permit Provision VI.D.5.a. For example, the Albuquerque, Boston and Worcester permits require outreach to non-English speakers but do not compel measureable increases of changes or outcomes; the Boise permit does not require measureable change or outreach to non-English speaking residents; and the D.C. permit does not require outreach to non-English speakers or indicia of measureable change.

2. *Public Participation Requirements*

Part VI.D.5.c of the 2012 Permit requires non-District permittees, including Claimants, to provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and "general storm water and non-storm water pollution prevention information" through a telephone hotline, or in public information and the government pages of the telephone book. Part VI.D.5.c also requires Claimants to identify staff or departments serving as contact persons and providing current, updated hotline information. This part also requires permittees to organize events "targeted to residents and population subgroups" to "educate and involve the community in storm water and non-storm water pollution prevention and clean-up (e.g., education seminars, clean-ups, and community catch basin stenciling)."

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[36] Memorandum regarding Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, January 25, 2018, attached as Exhibit D to Burhenn Declaration. Claimants request that, pursuant to Evidence Code § 452(c), the Commission take administrative notice of the Memorandum as an official act of an executive department of the United States. While this memorandum was issued recently, it reflects jurisprudence going back a number of years. *See, e.g., Appalachian Power Co. v. EPA* (D.C. Circuit 2000) 208 F.3d 1015, where the Circuit Court of Appeals for the District of Columbia set aside an EPA guidance document relating to Clean Air Act emission monitoring on the ground that the guidance broadened a previous rulemaking and thus should have itself been subject to rulemaking procedures. 208 F.3d at 1028 (attached in Section 7 Rebuttal Documents, Tab 1).

[37] The Water Boards also cite (WB Comments at 82) a U.S. EPA document entitled "Development an Outreach Strategy, Minimum Measure: Public Education and Outreach on Stormwater Impacts: Developing Municipal Outreach Programs." This document is applicable only to Phase II stormwater permittees, and has no application to the 2012 Permit.

a. ***The Public Participation Requirements are a New Program and/or Require a Higher Level of Service***

While there are some similarities between the requirements in Part VI.D.5.c of the 2012 Permit and PIPP requirements in the 2001 Permit, there are also unique and/or expanded requirements which constitute a new program and/or higher level of service. Under the 2012 Permit, permittees are required to include a means for public reporting of non-stormwater pollution prevention information, to identify staff or departments who will serve as contact persons and provide that information on the permittee's website and organize events targeted to residents and population subgroups to educate and involve the community in storm water and non-storm water pollution prevention and clean-up, such as education seminars, clean-ups, and community catch basin stenciling. This outreach in the 2001 Permit was limited to the District as Principal Permittee. 2001 Permit, Part 4.B.1(c)(1)(vi).

The Water Boards contend (WB Comments at 84) that certain permittees were undertaking PIPP events within their jurisdictions under the 2001 Permit. This proves only that those permittees were in compliance with the more general requirements of the older permit, which provided that each permittee "shall conduct education activities within its jurisdiction . . . ." 2001 Permit Part 4.B.1(c)(4). Moreover, even were some of the specific PIPP requirements in the 2012 Permit being voluntarily undertaken by Claimants, this fact would not prevent eligibility for a subvention of funds. As discussed above, once such requirements were legally mandated, Claimants would be entitled to a subvention of state funds. Govt. Code § 17565.

b**.** ***The Public Participation Requirements are Not Necessary to Implement Federal Law***

The Water Boards (WB Comments at 84-85) cite several federal NPDES permit application regulations in support of their argument that the requirements in 2012 Permit Part VI.D.5.c are necessary to comply with federal law. None of those regulations, however, supports the Water Boards' argument.

The first regulations cited by the Water Boards (40 CFR § 122.26(d)(2)(iv)(B)(5) and (6)) require that a permittee must include in its stormwater management program "[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" 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." These regulations again do not explicitly or expressly require the specific public participation requirements of the 2012 Permit, nor the scope and detail of those requirements. *Dept. of Finance II,* 18 Cal.App.5th at 683; *Dept. of Finance,* 1 Cal. 5th at 771.

The next two regulations cited by the Water Boards also offer no support for their argument. 40 CFR § 122.26(d)(2)(iv) merely requires that the proposed management program including a "comprehensive planning process which involves public participation . . . ." 40 CFR § 122.26(d)(2)(iv)(A)(6) requires, *inter alia*, "educational activities" in association with reducing to the MEP pollutants from "the application of pesticides, herbicides and fertilizer . . . ." Finally,

40 CFR § 122.26(d)(2)(iv)(B)(6) requires 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." None of these regulations mandates the specific requirements of Part VI.D.5.c of the 2012 Permit. Nor does the annual reporting requirement in 40 CFR § 122.42(c)(3), which requires permittees to include in their annual reports a summary of the number and nature of public education programs. Since "public education" activities are limited to the management of used oil and toxic materials, this does not mean that the far broader public education requirements of the 2012 Permit are required by federal regulation.

The Water Boards' citation to the EPA Permit Improvement Guide is also unavailing. The citation to the Permit Improvement Guide is, for the reasons discussed in Section II.C above, inapposite, since the Guide expressly does not mandate any activity by any permittee.

The Water Boards cite provisions in the EPA-issued D.C. and Boise permits as support for their argument that the provisions in Part VI.D.5.c are required by federal law. WB Comments at 85-86. While the Boise permit requires establishment of a website to provide a mechanism for reporting of IC/ID and key agency contacts, it does not require organizing public effects and activities. The D.C. permit requires facilitation of public participation events, but not a means of public reporting of IC/ID or agency contacts. *See* Ashley Decl. at ¶ 10; Exh. 1 to Ashley Decl., Section IV.D.

3. *Residential Outreach Program Requirements*

Part VI.D.5.d of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to conduct stormwater pollution prevention public service announcements and advertising campaigns, provide public education materials on the proper handling of vehicle waste fluids, household waste materials, construction waste materials, pesticides and fertilizers (including integrated pest management ("IPM") practices), green waste and animal wastes; distribute "activity specific" stormwater pollution prevention public education materials at, but not limited to, automotive parts stores, home improvement centers, lumber yards and hardware and paint stores, landscaping and gardening centers and pet shops and feed stores; maintain stormwater websites or provide links to stormwater websites via each Claimant's website, which must include educational material and opportunities for public participation in stormwater pollution and cleanup activities; and, provide schools within each Claimant's jurisdiction with materials to educate K-12 students on stormwater pollution.

In each of the VI.D.5.d requirements, Claimants are required to "use effective strategies to educate and involve ethnic communities in storm water pollution prevention through culturally effective methods." Part VI.D.5.d.(6). This requires Claimants to identify such ethnic communities and appropriate culturally effective methods.

a. *The Residential Outreach Program Requirements Are a New Program and/or Represent a Higher Level of Service*

The Water Boards argue that the myriad requirements of 2012 Permit Part VI.D.5.d do not constitute a new program or a higher level of service "because all of the requirements and/or substantially similar requirements were in the 2001 Permit." WB Comments at 86.

First, regarding the Part VI.D.5.d.(1) requirement that each permittee conduct "storm water pollution prevention public service announcements and advertising campaigns," the Water Boards argue that this is a carry-over of requirements in the 2001 Permit. WB Comments at 86. In that permit, however, only the Principal Permittee was responsible for "advertising" and "public service announcements" (2001 Permit Part 4.B.c.(1), (3)), not each individual permittee. The Water Boards' reference to a Report of Waste Discharge ("ROWD") describing activities carried out by the District along with various cities does not change the fact that the 2001 Permit did not mandate such activities on the other Claimants. Any voluntary acts by Claimants prior to the 2012 Permit do not constitute a bar to subvention. Govt. Code § 17565.

Second, regarding the Part VI.D.5.d.(2) requirement that public education materials include information on the proper handling of various waste streams, the Water Boards argue (WB Comments at 87) that permittees under the 2001 Permit had requirements relating to the distribution of outreach materials on certain pollutants, depending on the watershed. 2001 Permit Part 4.B.1.d. The 2012 Permit requirements, however, expand on the 2001 Permit mandates by making each permittee responsible for producing the public information materials on the identified topics, none of which was required in the 2001 Permit, which made the Principal Permittee responsible, only in cooperation with the permittees, to "coordinate to develop outreach programs" focusing on the watershed-based pollutants. 2001 Permit Part 4.B.1(d). The Water Boards contend that various cities were undertaking public information activities regarding various waste types, as reflected in reports made by those cities to the LARWQCB. Again, that a permittee may have voluntarily undertake a public information program while under the aegis of a previous permit does not render that voluntary act as a mandate under that permit. Govt. Code § 17565.

Third, regarding the Part VI.D.5.d.(3) requirement that each permittee distribute "activity specific" stormwater pollution prevention materials at various retail outlets, the Water Boards argue (WB Comments at 87) that these specific requirements are a "refinement" of a 2001 Permit requirement for the Principal Permittee (the District) to distribute "How To" instructional material "in a targeted and activity-related manner." 2001 Permit Part 4.B.1.c.(iv). This requirement, however, was not a mere "refinement." The 2012 Permit requires specific outlets for the distribution of the materials, and makes that distribution requirement applicable to all permittees. These are additional requirements that were not present in the 2001 Permit. The Commission has held that a similar expansion of requirements in an existing program still represents a new program and/or requirement for a higher level of service. SD County SOD at 53-54.[38]

Fourth, concerning the Part VI.D.5.d.(4) requirement that permittees maintain stormwater websites or provide links to stormwater websites via the permittee's website, including education material and opportunities for the public to participate in stormwater pollution prevention and clean-up activities, the Water Boards (WB Comments at 87-88) again argue that this is a mere "refinement" of a requirement in the 2001 Permit. The earlier requirement, in 2001 Permit Part 4.B.1.b, however, required the District, as Principal Permittee, to gather public reporting contacts

[38] The Water Boards also cite the distribution in the Ballona Creek watershed of a pamphlet regarding stormwater pollution prevention. Distribution of this pamphlet was not required by the terms of the 2001 Permit, unlike the requirements of Part VI.D.5.d of the 2012 Permit at issue here.

from the permittees and make that available on a website. Nothing in the 2001 Permit required each permittee to provide education material and opportunities for public participation on the permittee's website.

Fifth, concerning Part VI.D.5.d.(5), which required each permittee to provide to independent, parochial and public schools materials to educate K-12 students on stormwater pollution, the Water Boards argue (WB Comments at 88) that this "carries over" a requirement in the 2001 Permit that the District "in cooperation with the Permittees" provide schools with materials to educate students. 2001 Permit Part 4.B.1.c.7. To the contrary, this requirement is not just a reiteration of the 2001 Permit requirement. The 2012 Permit now is much broader, now covering independent and parochial in addition to public schools, and now imposing this requirement on each permittee to provide these materials. This is a requirement for a higher level of service. The fact that two cities were voluntarily distributing videos under the 2001 Permit (WB Comments at 88) again does not make that a mandated activity under the earlier permit. Govt. Code § 17565.

Finally, concerning Part VI.D.5.d.(6), which requires that in implementing all activities in Part VI.D.5.d, permittees use "culturally effective methods," the Water Boards contend (WB Comments at 88) that this merely "carries over" a requirement in the 2001 Permit that the Principal Permittee "shall develop a strategy to educate ethnic communities and businesses through culturally effective methods." 2001 Permit Part 4.B.1.c.5. Again, the plain language of the two permits shows that the 2012 Permit requires an enhanced level of effort and that the responsibility for this task was expanded from the District to all non-District permittees. As such, it represents a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Residential Outreach Program Requirements Constitute a "Program"*

The Water Boards again argue that because the Caltrans MS4 permit includes a somewhat similar but less comprehensive public information program (one not directed to specific neighborhoods or specific populations), the public information programs in the 2012 Permit are not unique to local government. WB Comments at 89. As previously discussed, under California Supreme Court precedent, an executive order requirement can constitute a "program" subject to a subvention of funds under article XIII B, section 6, when it requires a local agency to provide services to the public. Here, the permittees are required to provide information on addressing stormwater pollution to the public, a service to the public clearly falling under the first of the two tests set forth in *San Diego Unified School Dist., supra,* 33 Cal. 4th at 847.[39]

[39] Moreover, any comparison should be between a local government and private parties, not between a state agency, Caltrans, and a local government. The fact that the state is imposing an obligation on local governments that is also am obligation of the state only proves that the state is attempting to shift its obligations to local governments, which would also constitute a basis for finding the requirement to be a state mandate. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.

c. *The Residential Outreach Program Requirements Are Not Necessary to Implement Federal Law*

The Water Boards argue (WB Comments at 89) that residential outreach "is necessary to meet federal standards applicable to MS4 discharges." After citing the federal regulations previously discussed (40 CFR § 122.26(d)(2)(iv) and 40 CFR § 122.26(d)(2)(iv)(A)(5-6)), none of which expressly or explicitly requires the provisions at issue in Part VI.D.5.d of the 2012 Permit, the Water Boards go on to essentially ignore those governing regulations. Instead, the Water Boards cite the afore-mentioned Permit Improvement Guide, Phase II regulations governing small MS4 permittees and various EPA guidance issued under the Phase II program as the source of federal authority. None of these, however, mandates the requirements in Part VI.D.5.d.

First, the Water Boards cite the Permit Improvement Guide as authority for provisions in Part VI.D.5.d.i. WB Comments at 89-90. As previously discussed, the Guide cannot provide the basis for federal authority for any 2012 Permit mandate. While the Water Boards defend these non-binding provisions as "consistent with the federal intent" regarding the tailoring of stormwater management programs based on pollutant sources within a permittee's "MS4 service area," there is no requirement in the CWA or the federal stormwater regulations expressly or explicitly requiring the specific requirements in the 2012 Permit. *Dept. of Finance II*, 18 Cal.App.5th at 683.

Second, the Water Boards cite a U.S. EPA "Storm Water Menu of BMPs" as support, but that Menu applies to Phase II permittees, not Claimants. WB Comments at 90-91. Similarly, citation to the Massachusetts MS4 permit is inapposite, since that is a Phase II, small MS4 permit, developed and subject to different regulatory requirements than the 2012 Permit.

With regard to the targeting of school children as part of the outreach program (Part VI.D.5.d.i(5)), the Water Boards cite to "Federal regulations" which are not, however, regulations applicable to the 2012 Permit.[40] WB Comments at 91. Those regulations apply to Phase II (small operators) not Phase I permits. 40 C.F.R § 122.34. A similar citation (WB Comments at 91) of a U.S. EPA "Storm Water Menu" also is inapposite, since the "menu" also applies to Phase II, not Phase I, permittees. ‘

The Water Boards cite requirements in the EPA-issued permit to Albuquerque as support for the federal nature of the Part VI.D.5.d requirements. WB Comments at 91. However, as set forth in Exhibit 1 to the Ashby Decl., while the Albuquerque permit requires an outreach effort that encompasses a range of mechanisms and approaches, it does not *prescribe* the specific requirements for such an effort.

With regard to the requirement that public education materials be distributed in culturally effective methods (Part VI.D.5.d.i.(6)), the Water Boards cite "federal regulations" (WB Comments at 92) but, again, those regulations are for Phase II, not Phase I, permittees.[41] The Water Boards also cite a U.S. EPA Fact Sheet on Public Education and Outreach Minimum Control Measures and a Fact Sheet on tailoring outreach programs to minority communities (WB

[40] The cited regulation, 40 CFR § 122.34(b)(1)(ii) applies, as noted above, only to Phase II permittees.

[41] *See* WB Comments at 92 n.546, citing 40 CFR § 122.34(b)(1)(ii).

Comments at 92). Again, both of the fact sheets are part of the Phase II permitting program, and do not constitute federal authority for the provisions in the Phase I 2012 Permit. Neither is the EPA "Storm Water Menu" quoted by the Water Boards at 92-93.

In summary, neither the CWA nor the federal regulations expressly or explicitly require the obligations set forth in Part VI.D.5.d of the 2012 Permit. Accordingly, these are not federal mandates. *Dept. of Finance,* 18 Cal.App.5th at 683.

D. *Industrial/Commercial Facilities Program Requirements*

Part VI.D of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to track and inspect various industrial and commercial facilities, including the creation and updating of an electronic database of such sources.

1. *Critical Industrial/Commercial Source Tracking*

Part VI.D.6 of the 2012 Permit requires the non-District permittees, including Claimants, to develop and implement an industrial/commercial source program following, at minimum, the requirements set forth in that part.

Part VI.D.6.b requires the tracking of nurseries and nursery centers in addition to other sources and the inclusion of information regarding the source, including the North American Industry Classification System ("NAICS") code, the status of exposure of materials to stormwater, the name of the receiving water, identification of whether the facility is tributary to a waterbody listed as impaired under CWA § 303(d) where the facility generates pollutants for which the waterbody is impaired, and whether the facility has filed a "No Exposure Certification" ("NEC") with the State Board. This provision requires Claimants to conduct field work to identify facilities and to collect information sufficient to fill the tracking database. Additionally, Claimants must update the inventory at least annually, through collection of information through field activities or through other readily available inter- and intra-agency informational databases.

a. *The Critical Industrial/Commercial Source Tracking Requirements are a New Program and/or Require a Higher Level of Service*

While acknowledging that the "specific information required under Part VI.D.6.b is slightly modified" from that of comparable requirements in the 2001 Permit, the Water Boards contend that the requirement to track critical source "is directly carried over" from Part 4.C.1 of the 2001 Permit. WB Comments at 94. This assertion, however, is not correct.

In particular, these requirements of Part VI.D.6.b were not contained in the 2001 Permit:

- Requirement of an electronic database for the tracking. Part VI.D.6.b.i. The Water Boards argue that this "simply builds" on a recommendation (not requirement) in the 2001 Permit. WB Comments at 94-95. Recommendations, however, are not requirements, and there were no requirements in the 2001 Permit for an electronic tracking database.

- Requirement for listing of NAISC code for facilities in addition to the SIC code. Part VI.D.6.b.ii.(4). The Water Boards argue that there are "crosswalk" tables to identify NAICS codes from SIC codes (WB Comments at 94), but this does not obviate the need to use those tables and populate the tracking database with the correct code.

- Requirement for indicating a facility's status for exposure of materials to stormwater. Part VI.D.6.b.ii.(7). The Water Boards claim that this information was required in the 2001 Permit, but cite to no provision therein. WB Comments at 94. In fact, this information was not required under the 2001 Permit. The Water Boards claim that documentation is available on exposure to stormwater on the State Water Board's database of GIASP permittees. *Id.* It is the permittees, including Claimants, who will have to locate and post that information. And, the 2001 Permit did not require permittees to make a qualitative evaluation of whether a facility *needed* to be covered under the GIASP (which would have involved an evaluation of its physical layout), only whether it *had* a GIASP.

- Requirement for indicating the receiving water for the facility. Part VI.D.6.b.ii.(8). The Water Boards argue that this information would already have been complied due to a requirement in 2001 Permit Part 4.C.3.b that permittees were to consider requiring facility operators to implement additional controls if they were in an environmentally sensitive area or discharged to a tributary to an impaired waterbody. WB Comments at 94 and n.559. But the 2001 Permit did not require permittees to list receiving waters or to make any assessment of whether the facility discharged pollutants for which the waterbody was listed as impaired.

- Requirement for indicating whether the facility has filed an NEC with the State Water Board. Part VI.D.6.b.ii.(11). The Water Boards argue (WB Comments at 94) that documentation on whether a certificate is available in the State Water Board's online database of GIASP enrollees. Again, this argument does not address the fact that the *permittees* are now required to undertake the review of that database and then populate the tracking database.

- Requirement to track nurseries and nursery centers, as well as "all other commercial or industrial facilities that the Permittee determines may contribute a substantial pollutant load to the MS4. Part VI.D. b.i.1.(d), VI.D.b.i.4. Neither of these requirements, new to the 2012 Permit, are addressed by the Water Boards in their comments.

For all of the reasons, the tracking requirements outlined above in Part VI.D.6 of the 2012 Permit constitute a new program and/or higher level of service.

b. *The Critical Industrial/Commercial Source Tracking Requirements Are Not Required to Implement Federal Law*

In arguing that the tracking requirements in Part VI.D.6.b are necessary to implement federal law, the Water Boards cite only one federal regulation, 40 CFR § 122.26(d)(2)(ii), which

provides that the MS4 permit application must contain "an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the [MS4], storm water associated with industrial activity." By its plain terms, this regulation neither explicitly nor expressly requires the detailed requirements at issue in the Test Claims nor its scope or detail. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

The Water Boards cite, and quote at length, from the Permit Improvement Guide (WB Comments at 95-96) but, for the reasons already discussed, the Guide cannot provide a source of federal authority for the mandates in the 2012 Permit. The Guide does not set forth enforceable requirements; its guidance is not a requirement or mandate.

The Water Boards also cite the Permit Improvement Guide (WB Comments at 96) to argue that the inclusion of nurseries and nursery centers was justified by federal requirements. Again, the Guide is not a source of federal authority, and nothing in the federal regulations requires the inclusion of nurseries or nursery centers as critical commercial sources. Equally, nothing in the regulations inhibits the LARWQCB's *discretion* to add those facilities to the tracking requirement. But it is that very exercise of discretion which demonstrates that the inclusion was not a mandate.

The Water Boards attempt to string together regulatory language requiring provision of a list of water bodies that receive MS4 discharges with another excerpt from the Permit Improvement Guide (WB Comments at 96-97) to argue that this is a "federal requirement" justifying the requirement to maintain an inventory. Again, nothing in the language or Guide constitutes a federal mandate for the specific requirements at issue in the Test Claims.

Next, the Water Boards cite the EPA-issued Boise permit as support for their claim that inventory and inspection requirements for industrial and commercial facilities is a federal requirement. WB Comments at 97. However, as set forth in Paragraph 11 of the Ashby Declaration, while the Boise permit requires development of an industrial/commercial inspection program, that requirement is not as extensive as that in the 2012 Permit. While it references agricultural sources, the Boise permit does not specifically require the inclusion of nurseries or nursery centers. *Id.* Moreover, the Boise permit does specify what facilities must be inspected, how often or when additional BMPs might be required. Exhibit 1 to Ashby Decl.

c. *No Other Mandate Exceptions Apply*

The Water Boards assert, without citation to the record beyond a 1994 ROWD excerpt involving a list of industries by SIC category, that the costs of complying with Part VI.D.6.b of the 2012 Permit are "*de minimis.*" WB Comments at 97. Nothing supports that assertion and it is rebutted by the declarations of Claimants attesting to the increased costs of implementing Part VI.D.6.[42]

The Water Boards also claim that "it is feasible and reasonable" for the Permittees to collect fees, and cite the LA County SOD regarding inspection requirements in the 2001 Permit. The

[42] *See* Cities Declarations at ¶ 11(d); County Declaration at ¶ 11(d).

requirements of Part VI.D.6.b, however, do not go to inspections but rather the establishment, population and updating of an electronic database, activities which are not "inspections of critical commercial and industrial sources." WB Comments at 97. Such activities are not related to the property-by-property inspection of facilities, where fees (so long as they are not double-collected, see discussion in Section II.D.2.c below), may be apportioned in certain circumstances,

2. *Critical Commercial and Industrial Source Inspection Requirements*

Part VI.D.6.d of the 2012 Permit requires that non-District permittees, including Claimants, inspect commercial facilities (restaurants, automotive service facilities (including automotive dealerships)), retail gasoline outlets and nurseries and nursery centers twice during the term of the Permit, with the first inspection to occur within 2 years after the Permit's effective date. In the inspection the permittees are required, among other things, to evaluate whether the source is implementing "effective source control BMPs for each corresponding activity" and to require implementation of additional BMPs where "storm water from the MS4 discharges to a significant ecological area . . . , a water body subject to TMDL provisions . . . or a CWA § 303(d) listed impaired water body." In addition to basic inspection obligations, this provision requires Claimants to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

Part VI.D.6.e requires Claimants to inspect industrial facilities, including the categories of facilities identified in 40 CFR § 122.26(b)(14)(i-xi) (the "Phase I facilities"), and facilities specified in 40 CFR § 122.26(d)(2)(iv)(C) (the "Specified Facilities"). Included among the inspection requirements are to confirm that each facility has a current Waste Discharge Identification ("WDID") number for coverage under the GIASP or has applied for and received a current NEC, and to require implementation of additional BMPs where "storm water from the MS4 discharges to a water body subject to TMDL Provisions . . . or a CWA § 303(d) listed impaired water body." For facilities discharging to MS4s that discharge to a Significant Ecological Area ("SEA"), the Permit requires that Claimants "shall require operators to implement additional pollutant-specific controls to reduce pollutants in storm water runoff that are causing or contributing to exceedances of water quality standards." In addition to basic inspection obligations, this provision requires Claimants to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

a. *The Critical Source Inspection Requirements Are New Programs and/or Require a Higher Level of Service*

The critical source inspection requirements in Part VI.D.6.d and e of the 2012 Permit, while similar in some respects to those in the 2001 Permit, differ in significant ways that constitute a new program or requirement for a higher level of service.

First, two entirely new categories of commercial/industrial facilities are required to be inspected, nurseries and nursery centers and all other commercial or industrial facilities that the permittee determines may contribute a substantial pollutant load to the MS4.

Second, regarding the inspection of critical commercial sources, the 2012 Permit additionally requires the inspector to confirm that non-stormwater BMPs are being effectively

implemented in compliance with municipal ordinances (the 2001 Permit required only review of stormwater BMPs), that the inspector verify that effective source control BMPs (as identified in Table 10 of the Permit) are being implemented for "each corresponding activity," and if the facility discharges to an MS4 which discharges to an SEA, a waterbody subject to TMDL provisions or a waterbody on the CWA section 303(d) list of impaired waterbodies, to require implementation of additional BMPs. By contrast, 2001 Permit Part 4.C.2.a required only review of stormwater BMPs and did not require review of source control BMPs. Moreover, Part 4.C.3.b of the 2001 Permit only required, with respect to MS4 discharges into Environmentally Sensitive Areas and 303(d) listed waters, that the permittee "consider requiring operators to implemental additional controls" to reduce pollutants.

Third, regarding the inspection of critical industrial sources, the 2012 Permit additionally requires that during the first mandatory inspection, permittees must identify facilities that have filed an NEC with the State Water Board and then, 3 to 4 years after the effective date of the permit, perform a second mandatory compliance inspection of at least 25 percent of the facilities that filed the NEC to verify the continuity of the no exposure status. 2012 Permit Part V.D.6.e.i.(1) and (3). Additionally, during the inspection the permittee must confirm that if applicable, the industrial facility has applied for and received a current NEC. 2012 Permit Part V.D.6.e.i.(2). The inspector must also verify that effective source control BMPs (as identified in Table 10 of the Permit) are being implemented and that if the facility discharges to an MS4 which discharges to a waterbody subject to TMDL provisions or which is on the CWA section 303(d) list of impaired water bodies, to require implementation of additional BMPs. The inspector must also require, for facilities discharging into MS4s which discharge into SEAs, that the facility implements additional pollutant-specific controls to reduce pollutants in storm water runoff that are causing or contributing to exceedances of water quality standards. 2012 Permit Part V.D.6.e.ii.(3).

None of the above requirements was contained in the 2001 Permit. The Water Boards in their comments (WB Comments at 98-99) do not address these specific additional requirements, but simply contend that the inspection requirements from the 2001 Permit "were largely carried over to the 2012 Permit." WB Comments at 98. However, the Commission has already found that the inspection requirements in the 2001 Permit were state mandates and so, even if they had not changed, they remain state mandates. Los Angeles County SOD at 40-42. In fact, while there was some carry over of the inspection requirements, the additional specific new requirements in the 2012 Permit are new, and therefore constitute a new program and/or requirements for a higher level of service, as the Commission found in the San Diego County Statement of Decision. SD County SOD at 53-54.

b. *The Critical Source Inspection Requirements Are Not Necessary to Implement Federal Law*

Though the Water Boards argue (WB Comments at 99-100) that the inspection requirements in the 2012 Permit are mandated by federal law, in fact the California Supreme Court already has found, that similar but less complex inspection requirements in the 2001 Permit were not mandated by federal law. *Dept. of Finance,* 1 Cal. 5th at 770-71. The Water Boards cite a 2008 letter from a U.S. EPA official in support (WB Comments at 99-100), but that very letter was considered, and dismissed as non-authoritative, by the Supreme Court. *Id.* at 771 n.16.

The Water Boards again cite the Boise permit as evidence that the requirements of Part VI.D.6.e are required by federal law. As noted in the Ashby Declaration (¶ 11) and Exhibit 1 thereto, this citation is not supported by the actual provisions in the Boise permit. While inspections are required in this permit, the number and scope of those facilities are more limited than in the 2012 Permit and no inspection is required to determine the possession of an NEC or a waste discharge identification number.

c. *No Other Mandate Exceptions Apply*

The issue of whether stormwater fees can pay for the inspections required by Part VI.D.6.d and e remains an open issue. The permittees in the 2001 Permit test claim have challenged the Commission's finding that fees would be available to pay for inspections, on the basis that since fees already are collected for enforcement of the GIASP, pursuant to Water Code § 13260(d)(2)(B)(ii). These issues remain the subject of pending litigation.

Additionally, there are requirements in the inspection provisions, including the requirement to follow-up with sources regarding BMP implementation and the review of NEC facilities, that may not be recoverable in inspection fees, since they are not directly related to inspections.

E. *Planning and Land Development Program Requirements*

Part VI.D.7.d.iv of the 2012 Permit requires Claimants, except for the District, to implement a tracking system and inspection and enforcement program for new development and redevelopment post-construction BMPs.

1. *Electronic Project Tracking System Requirements*

Permit Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X, require the permittees to implement a GIS or other electronic system for tracking projects that have post-construction BMPs, including such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.

a. *The Requirements Are a New Program and/or a Higher Level of Service*

The Water Boards (WB Comments at 102) contend that the 2012 Permit requirements at issue are merely a "refinement" of requirements in the 2001 Permit and Annual Reporting requirements. As even the Water Boards admit, however, the 2001 Permit did not require "all the fields of information" contained in the 2012 Permit. *Id.* In addition, the 2001 Permit did not require any formalized tracking of the fields set forth in the 2012 Permit, nor did it require electronic tracking of the information.

Again, as the Commission has found in test claims involving MS4 permits, the fact that a subsequent permit requirement expands (in this case, significantly) on similar but less specific requirements in the earlier permit makes those expanded requirements a new program and/or a

requirement for a higher level of service. SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model SUSMP and local SUSMPs, requirement in succeeding permit to submit a Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

b. *The Requirements Are Not Necessary to Implement Federal Law*

While the Water Boards contend (WB Comments at 102-03) that the inventory and tracking requirements are federally required, the authorities they cite do not support their contention. First, the general NPDES permit application regulations cited by the Water Boards, 40 CFR § 122.26(d)(2)(iv)(A)(2), do not require the specific inventory and tracking requirements set forth in the 2012 Permit. That regulation requires that MS4 permits include a "description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from [MS4s] which receive discharges from areas of new development and significant new redevelopment." Under the test in *Dept. of Finance II*, the regulations sets forth no express or explicit requirement for the inventory and tracking requirements in the 2012 Permit. *Dept. of Finance II*, 18 Cal.App.5th at 683. Nor does the regulation require the "scope and detail" of the requirements in the 2012 Permit. *Dept. of Finance*, 1 Cal. 5th at 771.

The Water Boards reference a statement by the LARWQCB in the Permit Fact Sheet that the "tracking system is deemed critical" to the success of the planning and development program, WB Comments at 102, is not determinative. That statement reflects the exercise of the Board's discretion to impose the tracking requirement, but does not demonstrate that it is expressly or explicitly required by the federal regulations. Indeed, if it was explicitly or expressly required, then the Water Boards would cite to the place in the regulations where it state that it is required. The Water Boards do not do so.

The Water Boards' reference to the Permit Improvement Guide is, again, inapposite, since the Guide cannot serve as federal authority for any permit requirement. *See* discussion in Section II.C.1.c., above.

The Water Boards again cite the Boise permit to argue that because it includes tracking of post-construction projects, this proves that the 2012 Permit requirements are federal in nature. However, as the Ashby Declaration states (Ashby Decl. at ¶ 12), the requirements in the Boise permit are less prescriptive than in the 2012 Permit. While post-development tracking is required, the Boise Permit does not specify the content of data to be included in the tracking requirements or the development of a maintenance checklist.

c. *The Requirements are a "Program"*

The Water Boards (WB Comments at 103) again repeat their argument that the inventory and tracking requirement is "not unique to local government," citing the fact that the Caltrans MS4 permit also contains a tracking requirement for BMPs installed on highway projects. But Caltrans

is required to track its own BMPs, not BMPs of third parties. State Water Board Order 2012-011-DWQ, as amended, at pp. 41-42. This requirement is therefore unique.

In any event, as set forth above, the fact that Caltrans keeps track of its own BMPs does not make the 2012 Permit requirements not a "program" for purposes of the subvention of state funds. The requirements to inventory and track BMPs is a governmental program associated with the permitting and development of municipal areas. As such, they are "programs that carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra*, 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards assert, without evidence or citation to the record, that the costs of the inventory and tracking requirements are "de minimis and therefore not entitled to subvention." WB Comments at 103. The Boards assert also that the tracking requirements require Claimants "to maintain information that they should already be obtaining . . . ." WB Comments at 104. Neither of these assertions establishes an exception to a subvention of funds. Claimants have established that they have incurred substantial costs to implement the requirements of these and other provisions in Part IV.D.7 of the 2012 Permit. *See* Cities' Declarations at ¶ 12(d); County Declaration at ¶ 12(d).

2. *Inspection of Development Sites*

Part VI.D.7.d(iv)(1)(b) of the 2012 Permit requires Claimants, except the District, to inspect all development sites upon completion of construction and before issuance of an occupancy certificate to "ensure proper installation" of LID measures, structural BMPs, treatment control BMPs and hydromodification control BMPs.

a. *The Inspection Requirements are a New Program and/or Higher Level of Service*

The Water Boards (WB Comments at 104) repeat the argument that the inspection requirements at issue in the 2012 Permit were "necessary to ensure implementation" of controls and were first required by the 2001 Permit. This is not the test as to whether the 2012 Permit establishes a new program or a requirement for a higher level of service. *First, there was no requirement in the 2001 Permit for these inspections now required by the 2012 Permit*. Thus, those inspection requirements are new. And, even if it were to be concluded that the inspection requirements were an enhancement of the 2001 Permit's requirements relating to post-construction BMPs, that enhancement would constitute a new program or higher level of service. SD County SOD at 53-54.

b. *The Inspection Requirements are Not Required to Implement Federal Law*

The Water Boards (WB Comments at 104-05) make several arguments that the post-construction inspection requirements in the 2012 Permit are required by federal law or regulation. None of those arguments supports that conclusion.

The Water Boards first argue that the inspection requirement "directly addresses" federal NPDES permit regulations. But, as discussed above, those regulations do not explicitly or expressly require the specific inspection requirements set forth in the 2012 Permit. As such, they cannot represent a federal mandate. *Dept. of Finance II*, 18 Cal.App.5th at 683. The Water Boards then cite federal regulations governing Phase II MS4 permits, regulations which *are not applicable* to the Phase I MS4 permit program, which governs the 2012 Permit.[43] WB Comments at 104-05. These regulations, which govern small MS4s, provide no federal regulatory authority to the Water Boards.

The Water Boards again cite the Permit Improvement Guide. WB Comments at 105. For the reasons discussed in Section II.C.1.c., above, the Guide is not a source of authority for the provisions in the 2012 Permit.

The Water Boards (WB Comments at 105) assert that provisions in the District of Columbia and Boise permits requiring post-construction inspections support the argument that the 2012 Permit provisions are federally mandated. In fact, as set forth in the Ashby Declaration (Ashby Decl. at ¶ 12), the provisions in those two permits are less prescriptive. In the DC Permit, the permit requires a formal process for site plan reviews and post-construction verification, including inspections, but does not require the specific inspection items in the 2012 Permit relating to LID and hydromodification BMPs. The Boise Permit requires inspection of permanent storm water management controls, but not specific LID and hydromodification features required of projects under the 2012 Permit.

c. *The Inspection Requirements Constitute a "Program"*

The Water Boards, citing an MS4 permit issued to Caltrans (which has no authority over private development projects or for or the issuance of certificates of occupancy), argue that because Caltrans has to inspect its own BMPs, the requirements in the 2012 Permit to inspect third-party properties are not "unique to local government." WB Comments at 105. As previously discussed with respect to the tracking database, however, the requirements imposed on Caltrans relate to its own BMPs, State Water Board Order 2012-011-DWQ, as amended, at p. 41, not BMPs of third parties. These inspections of third-party properties are therefore unique.

Moreover, performing inspections to assure third-party compliance provides a service to the public, here, the inspection of post-construction BMPs prior to the issuance of a Certificate of Occupancy, a uniquely local government-issued document. The public receives the benefits that come from these properly operating BMPs. Programs that provide services to the public are "programs" within the meaning of article XIII B, section 6. *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

[43] *See* discussion in Section II.C., above.

d. *No Mandate Exceptions Apply*

The Water Boards contend (WB Comments at 106) that because inspections may be required by other authorities, such as under building codes, the costs of fulfilling this mandate are "*de minimis*" and thus not subject to subvention. This assertion is speculative and ignores the fact that inspectors must be trained and checklists prepared to ensure that the specific BMP requirements of Part VI.D.7.d.iv.(1)(b) are met by the project. The same is true with respect to the Water Boards' other argument, that the completion inspection required under Part VI.D.8.j. means that the BMP inspection can be met "at no additional cost." The Part VI.D.8.j inspection requirements do not include post-construction BMPs, but instead are focused on construction BMPs. Thus, there are distinct costs associated with the fulfillment of the mandates in Part VI.D.7.d.iv.(1)(b).

3. *Post-Construction BMP Inspection Program Requirements*

Part VI.D.7.d(iv)(1)(c) of the 2012 Permit requires permittees, including non-District Claimants, to develop a post-construction BMP maintenance inspection checklist and inspect at an interval of at least once every two years permittee-operated post-construction BMPs to assess operation conditions.

a. *The Post-Construction BMP Inspection Requirements are a New Program and/or Higher Level of Service*

As they do with other post-construction BMP requirements in the 2012 Permit, the Water Boards (WB Comments at 106) argue that these requirements simply represent a "refinement" of completely unrelated, and less specific, requirements in the 2001 Permit. In fact, Part 4.D of the 2001 Permit contained no mandate that permittees develop a maintenance inspection checklist and then inspect permittee-operated post-construction BMPs at regular intervals. That requirement in the 2012 Permit is a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Post-Construction BMP Inspection Requirements Are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 106-07) contend that the post-construction BMP checklist and inspection requirements in the 2012 Permit are necessary to implement federal law. The federal NPDES permit application regulations cited by the Boards,[44] however, do not explicitly or expressly require the requirements in the 2012 Permit. The post-construction BMP checklist and inspection requirements are therefore not federal mandates. *Dept. of Finance II,* 18 Cal.App.5th at 683. Moreover, the general requirements in the federal regulations for a stormwater management program do not require the "scope or detail" of the post-construction BMP inspection requirements set forth in the 2012 Permit. *Dept. of Finance,* 1 Cal. 5th at 771.

The Boise Permit, cited by the Water Boards in support of their federal mandate argument, requires inspections only of "high priority locations." The 2012 Permit, by contrast, is more

[44] 40 CFR § 122.26(d)(2)(iv)(A)(1-2).

expansive. The 2012 Permit requires inspections (and associated checklists) of all post-construction BMPs.

c. *The Post-Construction BMP Inspection Requirements are a "Program"*

The Water Boards repeat the argument that, because Caltrans is required under its NPDES MS4 permit to inspect installed stormwater treatment BMPs, this demonstrates that "Claimants are not being treated differently than non-local government entities." WB Comments at 107. Again, however, Caltrans is required to inspect its own BMPs, State Water Board Order 2012-011-DWQ, as amended, at p. 41, not BMPs of third parties. The 2012 Permit's requirements are therefore unique.

Moreover, as also discussed above, post-construction BMP inspections provide a service to the public. As previously discussed, one criteria for identifying a "program" within the meaning of article XIII B, section 6, is if the program is the carrying out of "the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. The inspection of privately-owned BMPs assures that the public receives the benefit of these BMPs and does not suffer the injury from them being absent or inoperative. The inspection therefore provides a public service. The inspection of publicly owned post-construction BMPs whose sole function is to improve water quality within a municipality is also clearly a service to the public. These inspections thus constitutes a "program" eligible for a subvention of funds.

d. *No Other Mandate Exceptions Apply*

The Water Boards contend, without citation to the record (WB Comments at 107), that the post-construction BMP checklist and inspection requirement is "a minimal cost" and "a *de minimus* cost." These assertions are based on speculation and in any event are contradicted by the costs set forth by Claimants in the Section 5 Narrative Statements and Section 6 Declarations submitted in support of the Test Claims.[45]

The Water Boards also argue that (WB Comments at 108) that Part VI.D.7.d.iv.(1)(c) overlaps with provisions in Parts VI.D.4.c.vii.(7)(a) and VI.D.9.h.x.(1). The latter requirements only address the need for post-construction inspection and maintenance of the permittees' own treatment-control BMPs. The former requires development of a specific checklist and a schedule of inspections at least every two years, and with "particular attention" being required "to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation." The requirements of Part VI.D.7.d.iv.(1)(c) are more extensive and specific than those in Parts VI.D.4 and VI.D.9.

[45] *See* Cities Narrative Statement at Section IV.E.4; County-District Narrative Statement at Section IV.G.4; Cities Declarations at ¶ 12(d); County Declaration at ¶ 12(d).

F. *Development Construction Program Requirements*

Part VI.D.8 of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to follow requirements applicable to construction sites, including inspection of construction sites of one acre or more in size, creation of a construction site inventory and electronic tracking system, the development of technical standards for Erosion and Sediment Control Plans ("ESCP") and review of those plans, the development of procedures to review and approve construction site plan documents, and the training of permittee employees.

As discussed in Section I.H above, Claimants have the option to prepare a WMP or EWMP that would incorporate development construction program control measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.8 and incorporate/customize all control measures set forth therein, unless their elimination is justified by the permittee as not applicable (Part VI.C.5.b.(iv)(c)), the provisions set forth below are mandates.

In the Los Angeles County SOD, the Commission found that the inspection requirements of the 2001 Permit constituted state mandates. The Water Boards argue that this finding should not be honored because, according to the Water Boards, the construction requirements of both the 2001 and 2012 Permits stem from a 1996 Los Angeles County Stormwater Permit, and presumably are therefore not new. WB Comments at 109. This is an argument which was not made by the Water Boards in their comments in the 2001 Permit test claims.[46] Nor was this argument made by the Water Boards in their comments on the Draft Staff Analysis concerning these test claims.[47] Having not made the argument in the previous test claim proceedings that the 2001 Permit was an alleged continuation of the requirements in the 1996 Permit, and the Commission having found that such requirements were in fact new programs (LA County SOD at 48-49), the Water Boards waived or are estopped from making that argument now.

In any event, the 2012 Permit's construction development requirements are new and distinct from those in the 1996 Permit. The construction activity inspection program requirements in the 1996 Permit were far less prescriptive and detailed than those in Part VI.D.8 of the 2012 Permit that are at issue in this Test Claim. For example, the site inspection provisions of the 1996 Permit required only that the District (as Principal Permittee) develop a model construction activity inspection program, including checklists, which model must include procedures for construction site inspections, procedures to require corrective action be undertaken by contractors at noncomplying sites, procedures for enforcement action against noncomplying activity and

[46] *See* Letter Dated April 18, 2008 to Ms. Paula Higashi, Executive Director, Commission on State Mandates from Elizabeth Miller Jennings, Staff Counsel IV, Office of Chief Counsel, State Water Resources Control Board (Exhibit D to Item 3 on Agenda for the July 31, 2009 Commission Hearing). These documents are in the Commission's record for these proceedings.

[47] *See* Letter dated June 5, 2009 from Dorothy Rice, Executive Director, State Water Resources Control Board and Memorandum to Ms. Higashi from Ms. Jennings, Dated June 5, 2009, entitled "Commission on State Mandates – Response to Draft Staff Analysis re: *Municipal Storm Water and Urban Runoff Discharges* 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21. (Exhibit M to Item 3 on Agenda for the July 31, 2009 Commission Hearing.) These documents are in the Commission's record for these proceedings.

appropriate training for program staff.[48] The 1996 permit language, unlike the language in Part VI.D.8 of the 2012 Permit, contains no specification as to how inspections are to be carried out.

Similarly, the "minimum recommended requirements" and BMPs set forth in the 1996 Permit are barebones (mainly set forth in the Water Boards comments at page 109), with none of the specificity in the language of Part VI.D.8 of the 2012 Permit. Thus, even were it to be concluded that the 2012 development construction provisions were a descendant of the 1996 Permit provisions, those requirements are now much more extensive and detailed, and therefore would still be a new program and/or higher level of service. *See* SD County SOD at 53-54.[49]

1. *Construction Site Electronic Inventory/Tracking System Requirements*

Part VI.D.8.g(i) of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits (or any other municipal authorization to move soil and/or construct or destruct that involves land disturbance).

Part VI.D.8.g.ii of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to complete an inventory of development projects, which must be continuously updated as new sites are permitted and completed. This inventory/tracking system must contain, among other items, contact information for the project, basic site information, the proximity of all water bodies, significant threats to water quality status, current construction phase where feasible, required inspection frequency, start and anticipated completion dates, whether the project has submitted a Notice of Intent to be covered under the General Construction Activities Stormwater Permit ("GCASP") and whether it has obtain GCASP coverage, the date the ESCP was approved and post-construction structural BMPs subject to operation and maintenance requirements.

a. *The Construction Site Inventory and Tracking Requirements Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend (WB Comments at 110) that the construction site inventory and tracking requirements in the 2012 Permit stem from requirements in the 2001 Permit, requirements which were only to use an "effective system to track grading permits issued by each Permittee."[50] The 2001 Permit encouraged, but did not require the use of a database or GIS system.[51]

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[48] LARWQCB Order No. 96-054, Part 2.III.B.3.a (2001 AR at R0028699).

[49] The Water Boards also contend that Claimants did not address the Commission's finding that the Claimants had fee authority to conduct inspections of commercial, industrial and construction sites. WB Comments at 108. This is not correct; the Commission's finding is discussed in both Section 5 Narrative Statements. *See* Cities Narrative Statement at 35; County-District Narrative Statement at 38. The Claimants' disagreement with the reasoning of the Commission, an argument which has not been resolved by the courts, also is discussed in the Narrative Statements. *Id.* at 33, 36. [49] Those same arguments apply to the comparable requirements in the 2012 Permit.

[50] 2001 Permit, Part 4.E.3.c.

[51] *Ibid.*

It is plain that the far more detailed requirements of the 2012 Permit constitute a new source or higher level of service. Electronic tracking is required not only of grading permits, but also encroachment permits, demolition permits, building permits, and construction permits issued by the permittees. Moreover, the inventory must contain specific (and updated) information, none of which was required by the 2001 Permit. The requirements of 2012 Permit Part VI.D.8.g are a new program and/or require a higher level of service. *See* SD County SOD at 53-54.

b. *The Inventory and Tracking Requirements are Not Necessary to Implement Federal Law*

The Water Boards contend that federal NPDES permit application regulations require the construction site inventory and tracking requirements in the 2012 Permit. WB Comments at 110-111. In fact, neither of these regulations[52] requires the "scope and detail" of the 2012 Permit requirements. *Dept. of Finance, supra,* 1 Cal. 5th at 771. The first cited regulation requires only a description of procedures for identifying priorities for inspecting sites and enforcing control measures and the second requires only that permittees have a plan "to develop, implement and enforce controls to reduce the discharge of pollutants from [MS4s] which receive discharges from areas of new development and significant redevelopment," though discharges from MS4s containing construction site runoff are addressed in a different regulation.[53]

Under the test in *Dept. of Finance II,* neither of these regulations explicitly or expressly require the detailed provisions in the 2012 Permit. 18 Cal.App.5th at 683. As also discussed above, the Permit Improvement Guide, also cited by the Water Boards (WB Comment at 110) is not a source of federal authority.

Moreover, in the Fact Sheet for the 2012 Permit, the LARWQCB cited as legal authority the provisions in 40 CFR § 122.34(b)(4).[54] This regulation, however, and others set forth in 40 CFR § 122.30-122.37 are intended to cover only so-called "small MS4s," not the Phase I MS4s such as those governed by the 2012 Permit, and whose regulatory requirements are set forth in 40 CFR Part 122.26, as previously discussed.

c. *No Other Mandate Exceptions Apply*

The Water Boards, citing a comment by one permittee and statements in annual reports filed by others, claim that the additional cost to meet the requirements of 2012 Permit Part VI.D.8.g are "*de minimis."* WB Comments at 111. No evidence as to these alleged minimal costs is adduced by the Water Boards, however, and Claimants have already declared that the costs of implement the construction site provisions of the 2012 Permit are considerably more than "de minimis." *See* Cities Narrative Statement; County-District Narrative Statement at 35; Cities Declarations at ¶ 13(j); County Declaration at ¶ 13(i).

[52] 40 CFR § 122.26(d)(2)(iv)(D)(3) and 40 CFR § 122.26(d)(2)(iv)(A)(2).

[53] 40 CFR § 122.26(d)(2)(iv)(A)(2).

[54] 2012 Permit Fact Sheet at F-72-73.

And, if the Water Boards are arguing that because one or more permittees may have undertaken activities which were voluntary under the 2001 Permit but are obligatory under the 2012 Permit, the Government Code, again, provides that such voluntary activities are subject to a subvention of state funds if they were subsequently mandated by the state: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the o0perative date of the mandate." Govt. Code § 17565.

2. *Construction Plan Review and Approval Procedures Requirements*

Part VI.D.8.h of the 2012 Permit requires the non-District permittees, including Claimants, to develop and implement review procedures for construction plan documents, including preparation and submittal of an ESCP meeting multiple minimum requirements, verification of GCASP or other permit coverage and other items. In addition, Claimants must develop and implement a checklist to conduct and document review of each ESCP.

a. *The Plan Review and Approval Requirements Are a New Program and/or Represent a Higher Level of Service*

The Water Boards contend (WB Comments at 112) that Part 4.E.2.a of the 2001 Permit is "analogous to, and the basis for, the requirement of Part VI.D.8.h of the 2012 Permit," and therefore Part VI.D.8.h is not a new program or higher level of service. The requirements of the 2001 Permit, however, do not support that argument. The 2001 Permit only required that, in addition to certain minimum BMPs, permittees were to require developers to prepare a local Storm Water Pollution Prevention Plan ("SWPPP") for approval prior to issuance of a grading permit for construction projects of one acre or greater. The plan review requirements of the 2012 Permit are far more complex, requiring the development of plan review procedures, the minimum requirements of the ESCP, verification of developer permit coverage and development and implementation of a checklist to conduct and document review of each ESCP.

In view of the far greater complexity, and additional requirements in the 2012 Permit, the requirements of Part VI.D.8.h are a new program or higher level of service. These requirements represent a significant expansion of the plan review requirements in the 2001 Permit. *See* SD County SOD at 53-54.

b. *The Plan Review and Approval Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the requirements of Part VI.D.8.h of the 2012 Permit are required by federal law, citing general federal NPDES permit application regulations requiring that permittees have "procedures of site planning" and "procedures for identifying priorities for inspecting sites and enforcing control measures." WB Comments at 112 (citing 40 CFR § 122.26(d)(2)(iv)(D)(1) and (3)).[55]

[55] As discussed in Section II.F.1.b above, the LARWQCB did not cite this regulation as legal authority in the 2012 Permit Fact Sheet.

This general regulatory language does not contain the "scope and detail" of the 2012 Permit requirements, *Dept. of Finance*, 1 Cal. 5th at 771, nor do the regulations "explicitly" or "expressly" require the detailed provisions in the 2012 Permit. *Dept. of Finance II*, 18 Cal.App.5th at 683. These regulations do not mandate these specific activities. Similarly, as discussed earlier, the Permit Improvement Guide provisions cited by the Water Boards (WB Comments at 112-13) do not provide federal authority for the provisions in the 2012 Permit, or any MS4 permit.

The Water Boards contend that the Boise and Albuquerque permits contain the ESCP requirements at issue in the 2012 Permit. WB Comments at 113. This is not the case. Neither the Albuquerque nor Boise permit contains as prescriptive an ESCP review and approval procedure as in the 2012 Permit. Ashby Decl. at ¶ 13. Also, neither the Albuquerque nor Boise permit explicitly requires the development of a construction project inventory with specific fields. Exhibit 1 to Ashby Decl.

3. *BMP Technical Standards Requirements*

Part VI.D.8.i(i) of the 2012 Permit requires the non-District permittees, including Claimants, to implement technical standards for the selection, implementation and maintenance of construction site BMPs within their jurisdictions.

Part VI.D.8.i(ii) requires that such construction BMPs must be tailored by permittees, including Claimants, to the risks posed by the project, as well as be in minimum conformance with standards in Permit Table 15; the use of BMPs meeting the requirements of Permit Tables 14 and 16 for constructions sites of one or more acres or for paving projects; provision of detailed installation designs and cut sheets for use in ESCPs; and, provision of maintenance expectations for each BMP or category of BMPs.

Part VI.D.8.i(iv) requires that permittees make technical standards "readily available" to the development community and that such standards must be "clearly referenced" within each permittee's stormwater or development services website, ordinance, permit approval process and/or ESCP review forms.

Part VI.D.8.i(v) requires local BMP technical standards to cover all items set forth in Tables 13, 14, 15 and 16 of the Permit.

a. *The BMP Technical Standards Requirements are New Programs and/or Require a Higher Level of Service*

The Water Boards argue that these provisions of the 2012 Permit are not a new program or higher level of service because provisions in Part 4.E.1 of the 2001 Permit "are the basis" for the BMP Technical Standards requirements in the 2012 Permit. WB Comments at 113. Those earlier permit requirements, however, consist merely of general admonitions to retain sediments and construction related materials, wastes, spills or resides on site, contain non-stormwater runoff on site and control erosion from slopes or channels "by implementing an effective combination of BMPs." There is no requirement in the 2001 Permit to tailor the BMPs to the particular risks posed by a project, no requirement to consider the quality of the receiving water into which discharges

may flow, no requirement for the specific BMP types identified in the tables in the 2012 Permit and no requirement for "maintenance expectations" for BMPs.

The requirements of Part VI.D.8.i of the 2012 Permit represent a new program and/or a requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The BMP Technical Standards Requirements are Not Necessary to Implement Federal Law*

The Water Boards cite two general NPDES permit application regulations in arguing that 2012 Permit Part VI.D.8.i is "necessary" to meet federal requirements. WB Comments at 113-14. These regulations, like other NPDES permit application regulations, are general, requiring only a "description of requirements for nonstructural and structural best management practices" and a "description of appropriate educational and training measures for construction site operators." 40 CFR § 122.26(d)(2)(iv)(D)(2); (4). Neither of these regulations requires the "scope and detail" of the provisions in Part VI.D.8.i nor expressly or explicitly require those provisions. As such, there is no federal requirement for the measures contained in 2012 Permit Part VI.D.8.i. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683. And, as noted above, the LARWQCB itself did not cite those federal regulations in the 2012 Permit Fact Sheet as legal authority for Part VI.D.8.

The Water Boards contend (WB Comments at 114) that the Boise Permit requires that permittees have manuals describing construction stormwater management controls and specifications, and including acceptable control practices, selection and sizing criteria, illustrations, design examples and recommended operation and maintenance practices. As set forth in Exhibit 1 to the Ashby Declaration, however, the Boise permit requires that the technical guidance address the installation and maintenance of BMPs that may be implemented, but does not require risk assessments, detailed design sheets, or specify the types of BMPs to include within the manuals.

c. *The BMP Technical Standards Requirements are a Program*

The Water Boards (WB Comments at 114) argue that because there are requirements in the Caltrans MS4 permit to describe how BMPs are to be developed, constructed and maintained, the requirements in Part VI.D.8.i of the 2012 Permit are "not unique to local government." As discussed elsewhere, the requirement to develop BMP technical standards for BMPs for construction projects within its jurisdiction is a governmental program associated with the development of municipal areas. As such, they are "programs that carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards speculate that because Part VI.D.8.i.(iii) allows use of BMPs from a handbook, the costs associated with the implementation of Part VI.D.8.i "is *de minimis*." WB Comments at 114. Again, there is no proof to support that assertion and the Claimants have set

forth far more than "de minimis" costs for the implementation of Part VI.D.8. *See* Cities Narrative Statement at 27; County-District Narrative Statement at 35; Cities Declarations at ¶ 13(j); County Declaration at ¶ 13(i).

4. *Construction Site Inspection Requirements*

Part VI.D.8.j of the 2012 Permit requires the non-Flood Control District permittees, including Claimants, to inspect all construction sites of one acre or greater in size on the frequencies set forth in the Permit, which requires inspections prior to land disturbance activities, during active construction and at the conclusion of the project and as a condition to approve and/or issuing a Certificate of Occupancy. The frequency of inspections is also set in Table 17 of the Permit.

As part of their inspection obligations, Claimants must develop, implement and revise as necessary standard operating procedures that identify the inspection procedures to be followed by each permittee. Additionally, during inspections, Claimants must verify "active coverage" under the GCASP for specified projects; review the ESCP; inspect the site to determine whether all BMPs have been selected, installed, implemented and maintained; assess the appropriateness of planned and installed BMPs, and their effectiveness; visually observe and record non-stormwater discharge, potential illicit discharges and connections and potential discharge of pollutants in stormwater runoff; develop a written or electronic inspection report generated from a field inspection checklist; and, track the number of inspections for the site to ensure that it meets the minimum requirements of Permit Table 17.

a. *The Inspection Provisions Represent a New Program and/or a Higher Level of Service*

The Water Boards argue that 2012 Permit Part VI.D.E.j "essentially sets forth the same requirement" as Part 4.E.2.b of the 2001 Permit and Attachment U-4 to that permit (the Monitoring and Reporting Program). WB Comments at 115. In the prior test claim, the Commission found that Part 4.E.2.b of the 2001 Permit is a state mandate. Los Angeles County SOD at 46-47. If 2012 Permit Part VI.D.E.j sets forth the same requirements, then this part remains a state mandate. In fact, the requirements in the 2012 Permit are now even more specific and complex.

Part 4.E.2 of the 2001 Permit required that for construction sites of one acre or greater, developers had to prepare and submit a Local SWPPP for approval prior to being granted a grading permit, inspect such sites at least once during the wet season, and prior to issuing the site a grading permit, require proof that the site had filed for coverage under the GCASP. Attachment U-4 required permittees to report on the number of number of inspections and outcomes.

While the 2001 Permit required only one inspection during the wet season, the 2012 Permit requires inspections at least monthly for most construction sites and during wet weather events and at least once bi-weekly for construction sites that discharge to a tributary listed as an impaired waterbody for sediment or turbidity or which are determined to be a "significant threat" to water quality. Additionally, permittees are required to inspect prior to land disturbance, during construction and prior to issuing a Certificate of Occupancy. None of these requirements is contained in the 2001 Permit.

Similarly, the 2001 Permit did not require permittees to develop, implement and revise as necessary standard operating procedures for inspection procedures; review the applicable ESCP (which was not required under the 2001 Permit); determine whether all BMPs were selected, installed, implemented and maintained according to the ESCP; did not require an assessment of the appropriateness of planned and installed BMPs and their effectiveness; require that Claimants make visual observations and keep records of non-stormwater water discharges, potential illicit discharges and connections and potential discharge of stormwater runoff; or require Claimants to develop a written or electronic inspection report generated from an inspection checklist used in the field.

These new requirements constitute a new program and/or higher level of service, as the Commission previously has found. Los Angeles County SOD at 46-47; *see* SD County SOD at 53-54.

b. *The Inspection Provisions are Not Necessary to Implement Federal Law*

In arguing that the requirements of Part VI.D.E.j of the 2012 Permit are "necessary to meet federal requirements," the Water Boards cite the general federal NPDES permit application regulations. WB Comments at 115-16. Neither of the cited regulations, however, provides explicitly or expressly for the specific requirements in the Permit, nor the scope and detail of those requirements. The first regulation cited, 40 CFR § 122.26(d)(2)(iv)(D)(3), provides that the permit application must include a "description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality." Nothing in that regulation requires the detailed prescriptions of Part VI.D.8.j. The second set of regulations cited, subsections of 40 CFR § 122.26(d)(2)(i), relate solely to the legal authority required of permittees, and does not require the provisions in the 2012 Permit at issue.[56]

For the reasons discussed above, citation to the Permit Improvement Guide is inapposite, since the Guide does not serve as a font of federal authority for MS4 permit requirements.

The Water Boards also argue that "[p]rovisions for the inspection of construction sites" are included in the Boise and Albuquerque permits. WB Comments at 116. However, as set forth in Exhibit 1 to the Ashby Declaration, the Albuquerque permit's construction site inspection requirements are similar but less prescriptive than those in the 2012 Permit while the Boise permit, while it also requires inspections of construction sites, does not require the development of inspection procedures.

With respect to the 2001 Permit, the Commission found that the inspections provisions, based on these same regulations, were state mandates. Los Angeles County SOD at 46-47. The same rule applies here.

c. *The Inspection Provisions are a "Program"*

[56] Again, as noted above, the LARWQCB cited neither regulation as authority for this provision in the Fact Sheet of the 2012 Permit, but to provisions in 40 CFR Part 122.34, which expressly do not apply to Phase I MS4 permits such as the 2012 Permit.

The inspection provisions in 2012 Permit Part VI.D.E.j constitute a "program" for purposes of subvention under article XIII B, section 6 of the California Constitution. The Water Boards argue (WB Comments at 116) that there are construction requirements in the Caltrans MS4 permit and that private parties enrolled under the CGASP are required to conduct inspections. Neither of these facts means that the construction site inspection requirements in the 2012 Permit, which are different from those in the Caltrans and GCASP permits, is not a governmental function. The inspection requirements are specifically tied to the permittees' municipal function of overseeing land uses and development within municipal borders. In fact, final inspection requirements are made a condition for issuance by the permittees of a Certificate of Occupancy. 2012 Permit Part VI.D.8.j(2)(c). As such, the requirements "carry out the governmental function of providing services to the public" and thus constitute a "program." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

Again, the Commission found that the inspection provisions in the 2001 Permit were a new program or higher level of service within the meaning of article XIII B, section 6. Los Angeles County SOD at 46-47. The same analysis and rule applies here.

5. *Permittee Staff Training Requirements*

Part VI.D.8.l.i and ii of the 2012 Permit requires non-District permittees, including Claimants, to ensure training for "all staff whose primary job duties are related to implementing the construction storm water program," including plan reviewers and permitting staff with regard to the "technical review of local erosion and sediment control ordinance, local BMP technical standards, ESCP requirements, and the key objectives of the State Water Board QSD program." Permittees are further required to ensure that erosion sediment control/storm water inspectors are knowledgeable in inspection procedures consistent with various standards, as well as on local BMP technical standards and ESCP requirements. Additionally, if outside parties conduct inspections or review plans, each permittee, including Claimants, is required to ensure that such staff are trained under the same requirements.

a. *The Staff Training Requirements are a New Program and/or Require A Higher Level of Service*

The Water Boards contend (WB Comments at 117) that Part 4.E.5 of the 2001 Permit were the "basis" for the training requirements in the 2012 Permit and therefore Parts VI.D.8.l.i and ii of the 2012 Permit are not a new program or higher level of service. Again, however, the Commission has already found that Part 4.E.5 of the 2001 Permit is a state mandate. Los Angeles County SOD at 47-48. If Parts VI.D.8.l.i and ii are a continuation of those requirements, then Parts VI.D.8.l.i and ii remain a state mandate.

In fact, Parts VI.D.8.l.i and ii impose additional training requirements on claimants. Whereas the 2001 Permit required permittees to train employees regarding requirements of the stormwater management program, the 2012 Permit also requires training of employees with regard to the "technical review of local erosion and sediment control ordinance, local BMP technical standards, ESCP requirements, and the key objectives of the State Water Board QSD program;" that inspectors be knowledgeable in inspection procedures consistent with the QSD program or to

designate a staff person trained in the objectives of the QSD program or the Qualified SWPPP Practitioner program; and that each inspector be knowledgeable regarding local BMP technical standards and ESCP requirements. Finally, the 2001 Permit did not require that if outside parties conducted inspections or review plans, each permittee was required to ensure that such staff was trained under the same requirements.

As the Commission has found, such an expansion of requirements constitutes a new program or requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Staff Training Requirements are Not Necessary to Implement Federal Law*

The Water Boards (WB Comments at 117) again cite the NPDES permit application regulations in 40 CFR § 122.26(d)(2)(iv)(D),[57] which contain general requirements relating to municipalities having procedures to identify priorities for site inspections, arguing that an "important element of such procedures is training for the individuals tasked with implementing the program." *Id.* The federal NPDES regulations, however, contain no requirements for the training of staff that are contained in Part VI.D.8.l of the 2012 Permit. The regulations contain no explicit or express requirement for such training. Under *Dept. of Finance II*, they do not constitute federal authority for the provisions in the 2012 Permit. 18 Cal.App.5th at 683. *See also* Los Angeles County SOD at 43-46.

No federal authority is provided in the Permit Improvement Guide, as previously discussed. The Water Boards also assert that the requirements are federally required because they can be found in the Boise permit. In fact, as set forth in Exhibit 1 to the Ashby Declaration, the Boise permit's training requirements apply only to "key staff" and not to the requirement that all staff, public and private, involved in the construction program, be trained, the requirement found in the 2012 Permit.

c. *The Staff Training Requirements Constitute a "Program"*

The Water Boards repeat their argument that because there are training elements in the Caltrans MS4 permit and the GCASP, the staff training requirements in the 2012 Permit are "not unique to local government." WB Comments at 117-18. Again, however, the Commission has already found this type of training to be a state mandate. Los Angeles County SOD at 47-48. That holding applies here.

Moreover, the staff training requirements in the 2012 Permit assure that the public receives the benefits of these pollution reduction programs. As such this training provides a service to the public and, as such, is a "program" within the meaning of article XIII B, section 6 of the California Constitution. *San Diego Unified School Dist., supra*, 33 Cal. 4th at 874.

G. *Public Agency Requirements*

[57] As noted above, the LARWQCB did not cite these regulations as authority for Part VI.D.8 in the 2012 Permit Fact Sheet.

Part VI.D.9 and, with respect to the Flood Control District only, Part VI.D.4 of the 2012 Permit contains numerous separate requirements relating to the operation of Claimants' and the other copermittees public agency facilities. All of these requirements are new requirements or represent a higher level of service, are not necessary to implement federal law and are not subject to other exceptions from a subvention of funds.

1. *Public Facility Inventory Requirements*

Parts VI.D.4.c.iii and VI.D.9.c require the Flood Control District and the other permittees to maintain an "updated inventory" of all permittee-owned or operated facilities that are potential sources of stormwater pollution, including 24 separate categories of non-District permittee facilities and eight separate categories of District facilities that are required to be in the inventory. The inventory must include the name and address of the facility, contact information, a narrative description of activities performed and potential pollution sources, and coverage under any individual or general NPDES permits or waivers. The inventory must be updated at least once during the five-year term of the Permit with information collected through field activities or other means. The District must also maintain a map of its inventoried facilities.

a. *These Requirements Are a New Program and/or Are Higher Levels of Service*

The Water Boards argue (WB Comments at 119-20) that the inventory requirements are not new because the 2001 Permit included a requirement to inventory a smaller subset of privately owned commercial and industrial facilities and that the requirement in the 2012 Permit to "develop an inventory of public facilities" is "necessary in order to ensure that other provisions of the permit are implemented, and to enable the Permittee to report its stormwater control activities at these facilities in its annual report." But neither this argument, nor the argument that the 2001 Permit "clearly included both public and private [commercial and industrial] facilities" (WB Comments at 119) demonstrate that the 2001 Permit included a public facilities inventory requirement. It did not: the facilities that are included in the 2012 Permit's inventory list were not present in the 2001 Permit. The requirements at issue in the 2012 Permit were new.

Moreover, even were the requirements an expansion of similar but less specific requirements in the 2001 Permit, this still would represent a new program and/or higher level of service. *See* SD County SOD at 53-54.

b. *These Requirements Are Not Necessary to Implement Federal Law*

As they have argued earlier, the Water Boards cite the general federal permit applications regulations contained at 40 CFR § 122.26(d)(2)(iv) in support of their argument that these inventory requirements are a federal mandate. WB Comments at 120. As set forth above, the test as to whether a federal regulation imposes a federal mandate is whether the regulation "'expressly' or 'explicitly' [requires] the condition imposed in the permit." *Dept. of Finance II,* 18 Cal.App.5th at 683. Nowhere in the text of 40 CFR § 122.26(d)(2)(iv) is there any "explicit" or "express" requirement for the inventory of public facilities required in the 2012 Permit.

The Permit Improvement Guide, cited again by the Water Boards as authority for the proposition that the inventory provisions are "necessary to meet federal requirements," provides no such support because the Guide is not binding on Claimants, and cannot therefore represent any font of federal authority. *See* discussion in Section II.C.1.c, above.

Finally, with respect to the Massachusetts General MS4 permit, cited by the Water Boards as evidence that the inventory provisions "is necessary to meet federal requirements," the Massachusetts permit is a "Phase II" MS4 permit, applicable to smaller MS4s systems under a regulatory scheme entirely separate from that applicable to the 2012 Permit. The Massachusetts permit cannot provide evidence of federal authority for the Water Boards' argument.

c. *Other Mandate Exceptions Do Not Apply*

The Water Boards argue (WB Comments at 121) that based on various assumed facts not supported by any reference to the record, "the costs to implement these provisions is *de minimis* and therefore not entitled to subvention." While the specific costs of the inventory provisions are not broken out (and are not required to be broken out) in the Section 5 Narrative Statements, the total increased costs identified by the Claimants for the public agency requirements were, for the County, $35,000 in FY 2012-13 and $82,000 in FY 2013-14 and, for the District, $17,000 and $27,000.[58] These costs certainly are not de minimis.

The Water Boards further contend (WB Comments at 121) that at a meeting held on April 25, 2012, the District "presented its written proposal" for requirements in Part IV.D of the 2012 Permit, and that the LARWQCB "accepted the LACFCD written proposal in large part." To the contrary, the "written proposal" was simply a markup by the District of provisions in the draft 2012 Permit that it felt were not applicable to an agency which does not have the same land use jurisdiction as the County or the city permittees. [59] The markup were comments on the LARWQCB draft permit.

The provision of comments on a draft permit (some of which were not accepted, as the Water Boards acknowledge) does not constitute the voluntary agreement to permit terms. Were it to do so, there would be no incentive for permittees to comment, which is a right established by the CWA regulations.[60] It would also be counterproductive from a policy standpoint. As comments often are aimed at drawing the attention of the regional board to draft permit provisions which are impracticable or inordinately costly, such comments can reduce the scope of any subsequent test claim seeking a subvention of state funds under article XIIIB, section 6.

2. *Retrofitting Requirements*

Part VI.D.9.d of the 2012 Permit contains various requirements relating to the retrofitting of areas of existing development. Part VI.D.9.d.i requires permittees to develop an inventory of "retrofitting opportunities" in existing development. Part VI.D.9.d.ii requires them to screen existing areas of development "to identify candidate areas for retrofitting using watershed models

[58] County-District Narrative Statement at 21.

[59] RB-AR3065-84.

[60] 40 CFR § 124.12 (attached in Section 7 Rebuttal Documents at Tab 2).

or other screening level tools." They must then evaluate and rank areas of existing development to prioritize retrofitting candidates. Part VI.D.9.d.iv requires permittees to consider the results of the evaluation by giving "highly feasible" projects a "high priority" to implement source control and treatment control BMPs in the permittee's Storm Water Management Plan ("SWMP") and considering high priority retrofit projects as candidates for off-site mitigation for new development and redevelopment projects. Finally, Part VI.D.9.d.v requires permittees to cooperate with private landowners to "encourage site specific retrofitting projects." The permittees must consider demonstration retrofit projects, retrofits on public lands and easements, education and outreach, subsidies for retrofit projects, requiring retrofit projects as enforcement, mitigation or ordinance compliance, public and private partnerships, fees for existing discharges to the MS4 and reduction of such fees for retrofit implementation.

a. *These Requirements are a New Program and/or Require a Higher Level of Service*

The Water Boards argue that the requirements in Part VI.D.9.d are not new programs or a higher level of service. The Water Boards base this argument on the requirements in the 2001 Permit to have new and redevelopment projects maximize "the percentage of pervious surfaces to allow percolation of storm water into the ground," the requirement in the 2001 Permit's Storm Water Quality Management Program ("SQMP") that permittees comply with the general stormwater program requirements of 40 CFR § 122.26(d)(2), and the requirement that the SQMP be implemented to reduce the discharges of pollutants in stormwater to the MEP. WB Comments at 122.

First, as the Water Boards concede, nothing in the 2001 Permit placed these requirements on existing development; in the 2001 Permit "these provisions were limited to new development and redevelopment projects . . ." WB Comments at 122. The Water Boards do not argue that these requirements were explicitly or expressly required by the regulation. Thus as the Water Boards concede this extension was new.

Second, even were the 2001 Permit requirements related to the retrofitting requirements in the 2012 Permit, under the Commission's own holding in the San Diego County Statement of Decision, the addition of the numerous and expanded requirements in the 2012 Permit rendered them a new program or one requiring a higher level of service. *See* SD County SOD at 53-54 (even though previous MS4 permit required adoption of Model SUSMP and local SUSMPs, requirement in succeeding permit to submit a Model SUSMP with specific Low Impact Development BMP requirements constituted a new program or higher level of service).

b. *These Requirements are Not Necessary to Implement Federal Law*

Nothing in the Water Boards' argument about the alleged federal law necessity of the retrofitting requirements (WB Comments at 122-23) bears scrutiny under *Dept. of Finance* and *Dept. of Finance II.* First, the language in the Code of Federal Regulations cited by the Water Boards, that the NPDES permit application set forth a management program with a "comprehensive planning process" and a "description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas" (WB Comments at 122)

certainly does not expressly or explicitly require the retrofitting requirements in Part VI.D.9.d of the 2012 Permit. *Dept. of Finance II,* 18 Cal.App.5th at 683.

Second, the fact that much of the jurisdiction covered by the 2012 Permit may be built-out, (WB Comments at 122) does not support inclusion of the specific requirements set forth in the 2012 Permit. Again, the Water Boards do not point to any statute or regulation that expressly or explicitly imposes this requirement. And, again, the Water Boards' citation to the Permit Improvement Guide (*Id.* at 122-23) provides no source of federal authority, as that is guidance, and not to be used for enforcement purposes.

The Water Boards again cite requirements in the Massachusetts General Permit (WB Comments at 123) in support of their federal necessity argument. As discussed above, this Phase II permit does is not relevant to the requirements for Phase I permits such as the 2012 Permit.

c. *No Other Mandate Exceptions Apply*

The Water Boards make speculative arguments about whether the costs of these requirements are "de minimus." Again, while the specific costs of the inventory provisions are not broken out (and are not required to be broken out) in the Section 5 Narrative Statements, the total increased costs identified by the Claimants for the public agency requirements were, for the County $35,000 in FY 2012-13 and $82,000 in FY 2013-14 and, for the District, $17,000 and $27,000.[61] These costs certainly are not de minimis. And, arguments not supported

3. *Integrated Pest Management Program Requirements*

Parts VI.D.4.c(vi) (applicable to the District) and VI.D.9.g(ii) (applicable to all other permittees) of the 2012 Permit requires the permittees, including Claimants, to implement an Integrated Pest Management ("IPM") program, including restrictions on the use of pesticides, restricting treatments only to remove the target organism, selection of pest controls that minimize risks to human health, "beneficial non-target organisms" and the environment, partnering with other agencies and organizations to "encourage" the use of IPM and adopt and "verifiably implement" policies, procedures and/or ordinances requiring the minimization of pesticide use and encouraging the use of IPM techniques for public agency facilities and activities. Additionally, permittees in such policies must commit and schedule to reduce the use of pesticides that cause impairments of surface waters by preparing and updating annually an inventory of pesticides, quantify pesticide use by staff and contractors and demonstrate implementation of IPM alternatives where feasible to reduce pesticide use.

a. *These Requirements are a New Program and/or Require a Higher Level of Service*

The Water Boards (WB Comments at 124-125) argue that the IPM requirements do not constitute a new program or higher level of service because they "simply reflect[] the prevailing approach to pesticide management." The Water Boards also cite to "pesticide-related"

[61] County-District Narrative Statement at 21.

requirements in the 2001 Permit and argue that the 2012 Permit IPM requirements "ground the permit in the well-established IPM approach to pest control." *Id.* at 124.

A comparison of the 2001 Permit with the 2012 Permit, however, shows that the 2012 Permit requirements were not in the 2001 Permit. The 2001 Permit did not require permittees to implement an IPM program or IPM techniques. The IPM requirements in the 2012 Permit are new requirements and/or requirements for a higher level of service.

b. *These Requirements are Not Necessary to Implement Federal Law*

The Water Boards argue that the federal regulations require permittees to have, as part of their management program, a program to reduce to the maximum extent practicable pollutants "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." WB Comments at 125, quoting 40 C.F.R. 122.26(d)(2)(iv)(A)(6). The Water Boards also cite to an example permit in the Permit Improvement Guide which includes IPM requirements. WB Comments at 125-26.

40 C.F.R. 122.26(d)(2)(iv)(A)(6), however, does not expressly or explicitly require the requirements set forth in Parts VI.D.4.c(vi) and VI.D.9.g(ii) of the 2012 Permit. As such it is not a ground for finding that it mandates these permit requirements. *Dept. of Finance II*, 18 Cal.App.5th at 683. For the reasons discussed above, to the Permit Improvement Guide also carries no weight as a basis for finding a federal mandate. The IPM requirements in the 2012 Permit were not required by federal law.

c. *The IPM Requirements Are a "Program"*

The Water Boards argue that the IPM requirements in the 2012 Permit are not "unique to local government" because IPM elements are in an MS4 permit applicable to Caltrans and because a federal law authorized federal agencies to promote IPM techniques. WB Comments at 126. It is unclear what the Water Boards are contending. The IPM requirements in the 2012 Permit apply to a variety of local municipal activities, including landscape, park and recreational facilities management.[62] As such, they are "programs that carry out the governmental function of providing services to the public." *San Diego Unified School Dist. supra*, 33 Cal. 4th at 874. Thus, this fact alone qualifies the IPM requirements as "programs," and thus eligible for a subvention of funds under article XIII B, section 6 of the California Constitution.

Additionally, the IPM requirements are unique to an essential governmental function, the maintenance of these public facilities. The fact that a Caltrans permit may have some similar IPM requirements does not render the IPM requirements in the 2012 Permit as not uniquely governmental. The Water Boards' citation to the Food Quality Protection Act of 1996 is

[62] 2012 Permit, Part VI.D.9.g.ii.

completely inapposite, as it does not prove that the 2012 Permit IPM requirements apply "generally to all residents and entities in the state." *San Diego Unified, supra,* 33 Cal. 4th at 874.

d. *No Other Mandate Exceptions Apply*

The Water Boards again contend (WB Comments at 126) that the Flood Control District "proposed to the Los Angeles Water Board its own set of permit provisions." The Water Boards refer to the same April 25, 2012 proposal discussed in Section II.G.1.c above. The Water Boards contend that "the LACFCD proposed that it implement these requirements and the Board accepted the LAFCD's proposal." WB Comments at 127.

Again, the record does not support this assertion. The District's "proposal" was simply comments on a draft of the 2012 Permit. And in fact, the LARWQCB accepted only some of those comments, as reflected on RB-AR3071-73. This does not constitute voluntary agreement to permit requirements that might constitute an exception to a mandated cost.

4. *Trash Excluder Requirements*

Part VI.D.9.h.vii of the 2012 Permit requires Claimants, in areas not subject to a Trash TMDL, to install trash excluders, or equivalent devices, on or in catch basins or outfalls, except where such installation would cause flooding. Claimants may also employ alternative or enhanced BMPs that "provide substantially equivalent removal of trash." If alternative means are employed, the permittee must demonstrate that such BMPs "provide equivalent trash removal performance as excluders."

a. *The Trash Excluder Requirements are a New Program or Higher Level of Service*

The Water Boards contend (WB Comments at 127) that the trash excluder requirements in the 2012 Permit are merely an "elaboration" of the requirement in the 2001 Permit that permittees implement "the most effective combination of BMPs for storm water/urban runoff pollution control."

The absence of any discussion of trash excluders or equivalent technology in the 2001 Permit disproves this argument. Moreover, as previously discussed, this argument also ignores the test set forth by the Commission in the San Diego County Statement of Decision that "elaboration" (here, a completely new provision) on an existing permit provision still can constitute a new program or requirement for a higher level of service. SD County SOD at 53-54.

b. *The Trash Excluder Requirements are Not Necessary to Implement Federal Law*

In support of their argument that federal law necessitates the trash excluder requirements, the Water Boards argue (WB Comments at 127-28) that the general NPDES permit application regulations "identify the need to develop, implement, and enforce controls to reduce the discharge of pollutants from MS4s." The Water Boards further cite regulatory language requiring MS4 permittee management programs include "maintenance activities and a maintenance schedule for

structural controls to reduce pollutants (including floatables) in discharges from MS4s" and that trash excluder provisions in the 2012 Permit are "consistent with these regulations."

The Water Boards cite no federal statute or regulatory language that expressly or explicitly requires the trash excluder requirements in the 2012 Permit. Absent such authority, there is no support for the Water Boards' argument. *Dept. of Finance II*, 18 Cal.App.5th at 683.[63]

c. *The Trash Excluder Requirements are a "Program"*

The Water Boards assert that since trash capture devices are required in a Caltrans permit under a statewide water quality policy concerning trash, the trash excluder requirement in the 2012 Permit "is not unique to local government." WB Comments at 128. Again, the test for whether the requirements represent part of a "program" for which a subvention of funds is required is, in relevant part, whether the requirements are "programs that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874.

As discussed in Section I.E.1 above, MS4 operators, such as Claimants, are required to operate MS4s to protect their residents' life and property from flooding. This is a governmental function of providing services to the public. The trash excluder requirements themselves provide services to the public in collecting trash and minimizing its impact. As such, these trash excluder requirements are a program under article XIII B, section 6.

d. *No Other Mandate Exceptions Apply*

The Water Boards assert that permittees, including Claimants, have "significant flexibility" to choose structural controls and/or non-structural BMPs that are not trash excluders to satisfy the trash excluder requirements of the 2012 Permit. The Water Boards do not, however, explain how this constitutes an exception to the requirement for a subvention of funds. The trash excluder requirements are requirements, and there are increased costs associated with their satisfaction. *See* Cities Narrative Statement at 30; County-District Narrative Statement at 21.

5. *Pesticide Training Requirements*

Parts VI.D.4.c.x.(2) (applicable to the District) and VI.D.9.k(ii) (applying to all other permittees) require Claimants to train all employees and contractors who use or have the potential to use pesticides or fertilizers. This training shall address the potential for pesticide-related surface water toxicity; the proper use, handling, and disposal of pesticides; least toxic methods of pest prevention and control, including IPM; and the reduction of pesticide use.

a. *The Pesticide Training Requirements Are a New Program and/or Higher Level of Service*

[63] The Water Boards also cite (WB Comments at 128) a U.S. EPA publication on "Trash and Debris Management." This document does not even appear to constitute a guidance document, but only a fact sheet. In any event, it does not provide federal authority for the trash excluder requirements in the 2012 Permit.

The Water Boards assert that the 2001 Permit contained requirements for permittees to implement landscaping protocols and to ensure proper application of pesticides, and the requirement for the training of employees and contractors contained in the 2012 Permit merely "clarifies expectations under the 2001 Permit." On this basis, the Water Boards argue that the new training requirements do not constitute a new program or higher level of service. WB Comments at 129.

As discussed earlier, however, this assertion does not pass muster under governing authority. First, training in pesticide use handling and disposal, IPM techniques and reduction in pesticide use were new to the 2012 Permit and not part of the requirements under the former permit. Second, under the Commission's decision in the San Diego County test claim, even were the pesticide training requirements considered to be additive to the pesticide requirements set forth in the 2001 Permit, they still would be considered to be a new program and/or require a higher level of service. SD County SOD at 53-54.

b. *The Pesticide Training Requirements Are Not Required to Implement Federal Law*

The Water Boards, citing general NPDES permit application regulatory language which does not explicitly require training in pesticide issues, argue that the training requirements in the 2012 Permit are required by federal law, because"[t]raining programs for the application of pesticides are necessary to comply with these regulations." WB Comments at 129.

Applying the tests set forth by the Supreme Court and the Court of Appeal in *Dept. of Finance* and *Dept. of Finance II*, nothing in the federal regulations cited by the Water Boards expressly or explicitly requires the specific training requirements in the 2012 Permit. As such, they are not federally required.

Nor do the Water Boards explain how the regulations require these as opposed to other training requirements or how the regulations can be met solely through these requirements. The Water Boards do not cite to any evidence in the record in support of their contention.

The Water Boards also cite language in regulations covering smaller "Phase II" MS4s, which are not applicable to the Phase I MS4s that are subject of the 2012 Permit. WB Comments at 130. Even were this regulatory language to apply to Claimants, the language does not expressly or explicitly require the pesticide training requirements in the 2012 Permit. Finally, the Water Boards cite the Permit Improvement Guide as authority. WB Comments at 130. For the reasons previously discussed, the Guide does not set forth binding federal requirements.

c. *The Pesticide Training Requirements are a Program*

The Water Boards again argue that the pesticide training requirements in the 2012 Permit are "not unique to local government" because a Caltrans permit contains similar, but much less specific, pesticide training requirements. WB Comments at 130.

The requirement to train municipal employees and contractors in the correct use of pesticides while engaged in applying these pesticides to municipal facilities such as parks and

recreation areas, however, constitutes part of programs "that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. As such, the pesticide training requirements in the 2012 Permit represent a mandated "program" for which a subvention of funds under article XIII B, section 6 of the California Constitution is required.

d. *No Other Mandate Exceptions Apply*

The Water Boards (WB Comments at 131) assert that, with regard to 2012 Permit Part VI.D.4.c.x.(2), "the LACFCD proposed that it implement these requirements and the Board accepted the LACFCD proposal." As discussed in Section II.G.1.c above, however, the LACFCD presented a markup of a draft of the 2012 Permit *prepared by the LARWQCB.* This is evident from the Administrative Record.[64] That record shows also that the LARWQCB expressly did not incorporate some of the District's comments. The District was not making a "proposal." It was providing comments (a right granted to all permittees, and non-permittees) on draft permit language. There was no voluntary provision of permit language, only edits in existing draft language, many of which were not accepted.

H. *Illicit Connections and Illicit Discharges Elimination Program Requirements*

Part VI.D.4.d.v (with respect to the Flood Control District) and Part VI.D.10.d (with respect to the County and city permittees) of the 2012 Permit requires Claimants to revise signage adjacent to open channels, to develop and maintain written procedures to document how complaint calls are received, documented and tracked and to maintain documentation of complaint calls. Part VI.D.4.d.vi for the District and Part VI.D.10.e for the County and city permittees require specific requirements for spill response plans.

The Water Boards first argue that since Claimants can and have prepared a WMP or EWMP that would incorporate illicit connection and discharge detection program control measures in a customized watershed-specific fashion, the choice to implement Parts VI.D.4.d and VI.D.10 rather than alternatives (as allowed by the Permit), was a "choice" to implement those provisions and thus not a mandate. WB Comments at 132.

This argument, however, ignores the fact that the permittees must still meet the requirements of VI.D.4.d.v and vi and Part VI.D.10.d and e. Permittees entering into a WMP or EWMP must assess these requirements and incorporate or customize them to meet these part's requirements. 2012 Permit Part VI.C.5.b.iv. These requirements are therefore still mandates.

The Water Boards also again argue that because the District "proposed" certain changes in language in the draft 2012 Permit, which were in part accepted by the LARWQCB, this means that the District is not entitled to a subvention of funds. WB Comments at 132-33. As previously discussed, the District was making comments on a draft of the 2012 Permit.[65] These comments, along with a number of other comments, were aimed at making the permit language fit the factual

[64] *See* RB-AR3076-77.

[65] *See* RB-AR3082-83.

circumstances of the District's operations. That does not make the comments a voluntary assumption of permit responsibilities. Under the Water Boards' argument, any test claimant which commented on a permit (the right of any party regarding a proposed NPDES permit[66]) and had that comment accepted would waive any right to seek funding for the permit requirements. That is not the law.

1. *Signage for Open Channel Requirements*

2012 Permit Part VI.D.4.d.v.(2) requires the District to "include information regarding public reporting of illicit discharges or improper disposal on the signage adjacent to open channels," as required in Permit Part VI.D.9.h.vi.(4). Part VI.D.10.d.iii of the 2012 Permit requires non-District permittees to "ensure that signage adjacent to open channels . . . include information regarding dumping prohibitions and public reporting of illicit discharges."[67]

a. *The Public Reporting Signage Provisions Are a New Program and/or Require a Higher Level of Service*

The Water Boards contend that the requirements for signage concerning public reporting of spills was not a new program and/or a requirement for a higher level of service because, under the 2001 Permit, permittees were required to post signs discouraging illegal dumping pursuant to 2001 Permit Part 4.B.1.(a). WB Comments at 133. The 2001 Permit, however, did not require that the signs require information concerning public reporting of illicit discharges or improper disposal.

The 2012 Permit requires new signs with the new required information. If a permittee did not comply, it could not simply assert that the signs were in compliance with the prior permit. This is, therefore, a new mandate. Alternatively, to the extent that this new signage is considered an expansion of the 2001 signage program, the Commission has held that an expansion of an existing program constitutes a new program or requirement for a higher level of service. SD County SOD at 53-54.

b. *The Public Reporting Signage Provisions Are Not Required to Implement Federal Law*

The Water Boards cite two NPDES MS4 permit application regulations and the afore-mentioned Permit Improvement Guide in support of their argument that the public reporting signage requirements are required to implement federal law. WB Comments at 133-34. As discussed previously, the Permit Improvement Guide is guidance, not federal requirements. The two regulations, 40 CFR § 122.26(d)(2)(iv)(B)(5) and (6), provide:

[66] Pursuant to 40 CFR § 124.12(c), "[a]ny person may submit oral or written statements and data concerning the draft permit." This requirement applies to state programs pursuant to 40 CFR § 123.25.

[67] Permit Part VI.D.10.d.iii states that the signage is as referenced in "Part F.8.h.vi." There is no such part in the 2012 Permit. It is presumed that this reference should have been to Part VI.D.9.h.vi.(4), which is referenced by the Water Boards in their comments. WB Comments at 133.

> (5) 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 [MS4s];
>
> (6) A description of . . . public information activities . . . to facilitate the proper management and disposal of used oil and toxic materials . . . .

Id.

The plain language of these regulations reveals that neither explicitly nor expressly requires the particular signage requirements set forth in Parts VI.D.4.d.v.(2) or VI.D.10.d.iii, nor the scope and depth of those requirements. Thus, federal law does not mandate them. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

Additionally, 2012 Permit Parts VI.D.4.d.v.(2) and VI.D.10.d.iii mandate how Claimants are to comply with the federal regulations. In doing so, the LARWQCB usurped Claimants discretion given to them under the regulations and directed the specific manner in which Claimants were to comply. By doing so, the LARWQCB imposed a state mandate. *Long Beach Unified School District,* 225 Cal.App.3d at 173.

c. *No Other Mandate Exceptions Apply*

The Water Boards argue that since signage is required regarding illegal dumping under other provisions in the 2012 Permit, the requirements of Parts VI.D.4.d.v.(2) and VI.D.10.d.iii are "essentially equivalent" and thus, additional costs to comply are "*de minimus*" and not entitled to subvention. WB Comments at 134. The Water Boards cite to no evidence in the record to support this argument.

2. *Written Procedures for Complaint Call Responses*

Part VI.D.4.d.v.(3) of the 2012 Permit requires the District to develop and maintain written procedures that document how complaint calls are received, documented and tracked "to ensure that all complaints are adequately addressed." Such procedures must be "evaluated to determine whether changes or updates are needed to ensure that the procedures adequately document the methods employed by the LACFCD."

Part VI.D.10.d.iv of the 2012 Permit requires the non-District permittees to develop and maintain written procedures that document how complaint calls are received, documented and tracked "to ensure that all complaints are adequately addressed." Such procedures must be "evaluated to determine whether changes or updates are needed to ensure that the procedures adequately document the methods employed by the Permittee."

a. *The Complaint Call Procedures Requirements Are a New Program or Require a Higher Level of Service*

The Water Boards contend that the requirements for procedures regarding complaint calls were "consistent" with the 2001 Permit Part 4.G's requirements for documenting, tracking and reporting illicit connection/illicit discharge ("IC/ID") events. WB Comments at 135.

Again, however, the 2001 Permit did not contain any of the specific requirements set forth above regarding how permittees were to develop and maintain written procedures for the handling

of complaint calls, or for their evaluation. The requirements in the 2012 permit were completely new, and thus constitute a new program and/or a requirement for a higher level of service.

b. *The Complaint Call Procedures Requirements Were Not Necessary to Implement Federal Law*

The Water Boards argue that because Parts VI.D.4.d.v.(3) and VI.D.10.d.iv are "consistent" with the Permit Improvement Guide and the Boise Permit, this "demonstrates these provisions are required to implement federal law." WB Comments at 136.

As previously discussed, the Permit Improvement Guide cannot, by its own terms, be used to compel any permit condition choices by permittees. The Boise permit contains only general requirements to coordinate the response to spills, including documentation, tracking and reporting. Nothing in that permit duplicates the specific provisions at issue in the 2012 Permit. *See* Ashby Decl. at ¶ 15 (spill response plan requirements not as prescriptive as those in 2012 Permit.) Moreover, the provisions in the Boise permit were a product of EPA's discretion afforded under the CWA to determine, in the circumstances of the facts surrounding that permit, what would meet the MEP standard. As a discretionary act, the contents of a federal permit do not constitute a federal mandate.

3. *Maintaining Documentation of Complaint Call Requirements*

Part VI.D.4.d.v.(4) of the 2012 Permit requires the District to maintain documentation of complaint calls and internet submissions and to record the location of the reported spill or illicit discharge and the action undertaken in response, including referrals to other agencies. Part VI.D.10.d.v requires the non-District permittees to maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action undertaken in response.

a. *The Documentation Requirements are a New Program and/or a Requirement for a Higher Level of Service*

The Water Boards (WB Comments at 136-37) argue that these provisions of the 2012 Permit are not new programs because they are allegedly consistent with requirements in 2001 Permit Part 4.G, including Part 4.G.1(b), which required that permittees map illicit connections and discharges to their MS4s.

The requirements in the 2012 Permit, however, are broader, and require documentation of the content of all complaint calls as well as actions taken to address IC/ID complaints, including referrals to other agencies. Because these are new requirements, they represent a new program and/or requirement for a higher level of service.

b. *The Documentation Requirements are Not Necessary to Implement Federal Law*

The Water Boards cite CWA Section 402(a)(2) as authority for the documentation requirements in the 2012 Permit. WB Comments at 137. The general language of the statute, however, requiring that any NPDES permit include conditions "on data and information collection, reporting, and such other requirements," is not an explicit or express mandate for the documentation requirements in the 2012 Permit nor a mandate for the scope and detail of the permit requirements. *Dept. of Finance II*, 18 Cal.App.5th at 683; *Dept. of Finance*, 1 Cal. 5th at 771.

The Water Boards also cite the Boise permit, which contains a requirement that permittees must maintain a record documenting complaints and responses to illicit discharges. WB Comments at 137. This recording requirement is less detailed than in the 2012 Permit and in any event were imposed as a matter of discretion by EPA. Significantly, similar requirements were not found in other EPA-issued permits, again supporting the fact that the documentation requirements were not a federal mandate, but merely a requirement imposed at the discretion of EPA.

4. *Illicit Discharge and Spill Response Plan Requirements*

Part VI.D.4.d.vi.(1) of the 2012 Permit requires, in pertinent part, that the District implement an "ID and spill response plan" for all sewage and other spills that may discharge into its MS4, which, at a minimum, must (a) require coordination with spill response teams "throughout all appropriate departments, programs and agencies so that maximum water quality protection is provided;" (b) respond to IDs and spills within four hours of become aware of the ID or spill, or if on private property, within two hours of gaining legal access to the property and (c) report spills that may endanger health or the environment to appropriate public health agencies and the Office of Emergency Services ("OES").

Permit Part VI.D.10.e.i requires, in pertinent part, that non-District permittees implement a "spill response plan" for all sewage and other spills that may discharge into its MS4. The spill response plan must identify agencies responsible for spill response and cleanup, phone numbers and e-mail addresses for contacts and shall further address coordination with spill response teams "throughout all appropriate departments, programs and agencies so that maximum water quality protection is provided."

Permit Part VI.D.10.e.i.(3) and (4) requires the non-District permittees to respond to spills for containment within four hours of becoming aware of the spill, or if on private property, within two hours of gaining legal access to the property and reporting of spills that may endanger health or the environment to appropriate public health agencies and the OES. This requires the permittees to assemble and have available sufficient staff and equipment to meet these requirements.

a. *The Spill Response Plan Requirements are a New Program and/or a Requirement for a Higher Level of Service*

The Water Boards contend that the spill response plan requirements in the 2012 Permit are not a new requirement, because the 2001 Permit required a response plan for overflows of sanitary sewers in permittees' jurisdiction, an implementation plan for dealing with IC/ID and a requirement that permittees respond within one business day of discovery or a report of a suspected illicit discharge, with activities to abate, contain, and cleanup such discharges. WB Comments at 138-39.

Again, however, the requirements of the 2012 Permit are more complex and far-ranging. Those requirements include intra-permittee coordination among all responsible departments, identification of agencies responsible for spill response, including contact information, response to spills (not just from sanitary sewers) with containment within 4 hours of becoming aware, or within 2 hours of gaining legal access to private property, and requirements for reporting spills of all types (not just from sanitary sewers) that pose a threat to health or the environment.

Whereas the 2001 Permit had more limited spill response requirements, the broader and more comprehensive requirements set forth in the 2012 Permit constitute a new program and/or requirement for a higher level of service. *See* SD County SOD at 53-54.

b. *The Spill Response Plan Requirements are Not Necessary to Implement Federal Law*

The Water Boards cite the general requirement in the CWA that permittees must "effectively prohibit non-stormwater discharges" into their MS4s. WB Comments at 139. This general requirement, however, does not require the "scope and detail" of the 2012 Permit requirements, nor does it explicitly or expressly mandate those requirements. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683. The Water Boards also cite the Permit Improvement Guide but, for the reasons already discussed, this document provides no support for the proposition that the 2012 Permit requirements were mandated by federal law.

Finally, the Water Boards cite 40 CFR § 122.26(d)(2)(iv)(B)(4), one of the general NPDES MS4 permit application regulations, as additional authority for their argument that federal law mandates the spill response plan requirements. This regulation, which requires MS4 permits to include a "description of procedures to prevent, contain, and respond to spills that may discharge into the [MS4]," again does not contain the scope and detail of the 2012 Permit requirements or explicitly or expressly mandate the permit requirements. The regulation does not constitute a federal mandate for those requirements. *Dept. of Finance,* 1 Cal. 5th at 771; *Dept. of Finance II,* 18 Cal.App.5th at 683.

c. *The Spill Response Plan Requirements Constitute a "Program"*

Citing the Caltrans permit, the Water Boards again argue that the spill response plan requirements are not "unique to local government," and therefore do not constitute a "program" under article XIII B, section 6, of the California Constitution. As previously discussed, the activities set forth in the spill response plan requirements are those of governmental agencies "that carry out the governmental function of providing services to the public." *San Diego Unified School Dist., supra,* 33 Cal. 4th at 874. As such, the spill response plan requirements in the 2012 Permit represent a mandated "program" for which a subvention of funds under article XIII B, section 6 of the California Constitution is required.

The Water Boards also argue that the reporting of illicit discharges and spills to public health agencies is "consistent" with Water Code §§ 13271 and 13272, which are applicable to persons who discharge hazardous substances or sewage or oil or petroleum products to waters of the state. The difference is that in the case of the 2012 Permit, the reporting obligation applies to permittees not with respect to their own discharges, but when the discharger is a third party. In this way, permittees are being treated differently than other dischargers.

REBUTTAL TO COMMENTS OF WATER BOARDS AND DEPARTMENT OF FINANCE

IV. CLAIMANTS LACK FEE AUTHORITY TO FUND THE MANDATES IMPOSED BY THE 2012 PERMIT

Test claimants are entitled to reimbursement for a mandated program or increased level of service unless they have the authority to levy service charges, fees or assessments sufficient to pay for the program or service. Govt. Code § 17556(d). Because the fee authority is an exception to payment, like the exception for federal mandates set forth in Govt. Code § 17556(c), the State bears the burden of proving that the Test Claimants have this authority, and not otherwise.[68] As the Supreme Court stated with respect to the federal mandate exception, "the State must explain why" the Test Claimants can assess service charges, fees or assessments to pay for the mandates set forth above. *Dept. of Finance,* 1 Cal. 5th at 769.

The Water Boards and the DOF have not met this burden. The Water Boards' chief contention is that Claimants can levy fees to pay for the programs at issue in these Test Claims. WB Comments at 36-38. DOF's chief contention, also raised by the Water Boards, is that the fact that Claimants must seek voter approval pursuant to Proposition 218, articles XIII C and D of the California Constitution, to assess a fee or tax does not mean that they do not have authority to do so within the meaning of Govt. Code § 17556(d). DOF Comments at 1-2; WB Comments at 39.

Neither of these contentions meets the State's burden of explaining why Claimants can assess charges, fees or assessments to fund the mandates in this Test Claim. First, under article XIII C of the California Constitution, when providing services or conferring benefits, Claimants cannot assess a fee that covers more than the reasonable cost of providing the benefit, privilege, service or product. Additionally, the manner in which those costs are allocated to a payor must bear a fair and reasonable relationship to the payor's burdens or benefits received from the governmental activity. In this regard, when assessing a fee, Claimants bear the burden of proving by a preponderance of the evidence that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. Cal. Const., article XIII C § 1(e). Otherwise the fee would be considered a tax subject to the requirements of article XIII C of the California Constitution. Cal. Const., article XIII C § 1(e). *See Jacks v. City of Santa Barbara* (2017) 3 Cal. 5th 248, 261.

The mandates at issue in this Test Claim are not the types of programs for which the Claimants can assess a fee. Implementation of TMDL requirements, evaluation and control of non-stormwater discharges, public information programs, investigation of illicit connections and discharges, are all programs intended to improve the overall water quality in the Los Angeles basin, which benefits all persons within the jurisdiction. It is not possible to identify benefits that any

[68] The Water Boards argue that "Claimants must establish that they are required to use tax monies to pay for implementation of the contested provisions." WB Comments at 35. This was done in the Section 6 Declarations submitted in support of the Test Claims. *See* County Declaration at ¶ 16; District Declaration at ¶ 12.

individual resident, business or property owner within the jurisdiction would be receiving that is distinct from benefits that all other persons within the jurisdiction are receiving.

Likewise, 2012 Permit requirements that apply to Claimants' own activities as municipal governments address requirements imposed on Claimants themselves. Again, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements.

Similarly, Claimants would have difficulty assessing a fee for inspection of industrial or construction sites, at least to the extent those sites hold general industrial or general construction stormwater permits for which the State Board already assesses a fee to pay for inspections and where the state has not itself inspected the facilities. This issue is relevant to the mandate in the 2001 Permit for inspection of industrial and commercial facilities. The State assesses a fee for these inspections, pursuant to Water Code § 13260(d)(2)(B).

Second, any assessment would be considered to be a "special tax," and, as such, could not be imposed without a vote of the electorate. Under the Constitution, a tax is defined to be "any levy, charge, or exaction of any kind imposed by a local government . . . ." Cal. Const., article XIII C, § 1(e). A "special tax" is defined to be "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." *Id.*, article XIII C § 1(d). Under the Constitution, "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Cal. Const., article XIII C § 2(d).

Article XIII C, section 1(e), sets forth certain charges that are excepted from the definition of a tax. Those exceptions are:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Cal. Const., article XIII C § 1(e).

None of these exceptions applies here. As discussed above, any fee or assessment to pay for implementation of TMDL requirements, evaluation and control of non-stormwater discharges, public information programs, or investigation of illicit connections and discharges would be a fee or assessment to pay for the costs of a general program, not one directed towards a specific benefit, privilege, service or product. As for the other mandates, such as discharges from commercial, industrial or construction sites, the State is already regulating or has the authority to regulate those activities.

Article XIII D of the California Constitution also restricts the Claimants' ability to assess property-related fees. Under article XIII D, section 3(a), no tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership, unless it is for "property-related services"[69] or certain other exceptions, except upon a two-thirds vote of the electorate. Under article XIII D, section 6(c), except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed unless approved by a majority vote of property owners of the property subject to the fee or charge or by two-thirds vote of the electorate residing the affected area. In *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354,[70] the Court of Appeal held that a general stormwater fee is a property-related fee that is not excepted as a charge for water or sewer services, but instead is a property-related fee subject to the two-thirds electoral vote requirement. *Id.* at 1354-55, 1357-59.

The Water Boards cite a newly adopted statute, Senate Bill 231, which took effect on January 1, 2018, and which amended the definition of "sewer" in Govt. Code § 53750 as support for their argument that Claimants have authority under article XIII D to impose a property-related fee (WB Comments at 37). This legislation seeks to legislatively clarify the meaning the article XIII D of the Constitution and overrule *Howard Jarvis Taxpayers Assn.* Its constitutionality has not yet been tested. Significantly, however, even if upheld by the courts, it would not affect any amounts spent by Claimants and the other permittees under the 2012 Permit during the period up to January 1, 2018.

Accordingly, the Claimants do not have the authority to levy fees or assessments to pay for the mandates that are the subject of this Test Claim. Such fees or assessments can be levied only upon the vote of the electorate.

The DOF and the Water Boards contend that even though Cal. Const. articles XIII C and D require Claimants to submit a fee to the electorate for approval, this does not mean that Claimants lack authority to assess a fee. This contention also lacks merit. Indeed, the Commission has already considered and rejected this contention. In the San Diego County test claim, DOF and the Water Boards made the same contention that they make here, that municipalities have authority

[69] "Property-related services" means "a public service having a direct relationship to property ownership." Article XIII D, § 2(h).

[70] Attached in Section 7 Rebuttal Documents, Tab 1.

to levy service charges, fees or assessments within the meaning of Govt. Code § 17556(d), even though they lack such authority under articles XIII C and D unless the charges, fees or assessments are submitted to the electorate and approved by a two-thirds vote. The Commission held:

> 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.' . . . 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 "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 taxing and spending limitations that articles XIII A and XIII B impose."

SD County SOD at 106 (emphasis in original; citation omitted).

In reaching this result, the Commission rejected the Water Boards' contention, also made here, that *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, in which the court held that economic impracticability is not a bar to levying charges or fees within the meaning of section 17556, was applicable. The Commission held:

> 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.

SD County SOD at 107 (emphasis added).[71]

[71] As a result, the Commission found the following state mandates in the San Diego County stormwater permit to be reimbursable: (1) street sweeping; (2) street sweeping reporting; (3) conveyance system cleaning; (4) conveyance system cleaning reporting; (5) educational programs; (6) watershed activities and collaboration in the Watershed Urban Runoff Management Program; (7) the Regional Urban Runoff Management Program; (8) program effectiveness assessment; (9) long-term effectiveness assessment; and (10) permittee collaboration requirements. *Id.* at 1-2.

The Commission reached the same conclusion in that test claim with respect to property-related fees under article XIII D of the Constitution. To the extent that any fees imposed for the programs at issue here would be considered property-related fees, rather than a special tax, the fee would still be subject to voter approval or approval by a majority of property owners under article XIII D, section 6(c). *See Howard Jarvis Taxpayers Assn., supra,* 98 Cal.App.4th at 1354. As the Commission found in the San Diego County Test Claim, this requirement also means that Claimants lack authority to impose fees for property-related services. SD County SOD at 106-07.

The Commission reiterated this principle in *In Re Test Claim on Water Code Division 6, Part 2.5 [Sections 10608 through 10608.41] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4,* Test Claim Nos. 10-TC-12 and 12-TC-01 (December 5, 2014).[72] In these test claims, certain water suppliers sought reimbursement for new activities imposed on urban and agricultural water suppliers. With respect to the application of article XIII D, the Commission found that the water suppliers had fee authority, in that their fees were for water services within the meaning of article XIII D, section 6(e), and therefore the fee was subject only to a majority protest, not a vote of the electorate or property owners. *Id.* at 78. In doing so, the Commission noted that the San Diego County Stormwater Test Claim was distinguishable and that, with respect to in the mandates in that test claim, "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)." Test Claim Nos. 10-TC-12 and 12-TC-01, Decision at 77.

For these same reasons, Assembly Bills 2554 and 1180[73] (WB Comments at 37-38) also do not give Claimants authority to assess a fee or charge within the meaning of Government Code § 17556(d). These two bills, which authorize the Los Angeles County Flood Control District to levy a tax or fee in accordance with article XIII D or articles XIII C or D, respectively, of the Constitution, still require a vote of the people. See Los Angeles County Flood Control Act, Section 2, paragraph 8a.[74] Because there is no authority absent voter approval, these bills do not, therefore, provide authority to assess a fee or charge. SD County SOD at 107. Additionally, the two bills do not provide authority to the other Claimants.

The Water Boards also cite to Health and Safety Code § 5471 and Public Resources Code § 40059(a). Neither of these statutes provide authority either. Health and Safety Code § 5471 applies to sanitation and sewer districts. It does not apply to Claimants. Public Resources Code § 40059(a) was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board, to ensure that local trash collection agreements would not be affected by the IWMB legislation. In *Waste Resource Technologies v. Department of Public Health* (1994) 23 Cal.App.4th 299[75] the court held that the statute reflected Legislature's intent to allow for local regulation of waste collection. *Id*. at 308-09 (validating city's exclusive refuse contract). The statute does not give local agencies authority to impose fees for stormwater control.

[72] Attached in Section 7 Rebuttal Documents, Tab 4.

[73] Attached in Section 7 Rebuttal Documents, Tab 3.

[74] Attached in Section 7 Rebuttal Documents, Tab 3.

[75] Attached in Section 7 Rebuttal Documents, Tab 1.

The Water Boards and DOF nevertheless contend that Claimants have the ability to submit fees to the voters for approval, and that under *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, this ability by itself meets the requirements of Govt. Code § 17556(d). (WB comments at 39; DOF comments at 1).

Clovis is not applicable. In *Clovis* the school district was authorized to collect health fees but voluntarily chose not to do so. 188 Cal.App.4th at 810. In those circumstances, the Court of Appeal held that the Controller's office properly offset the authorized fees, whether the school district collected them or not, because the district had the authority to assess those fees. *Id*. at 812. Here, Claimants have not been authorized to collect fees or taxes; they currently have no such power as such authority resides directly with the electorate, pursuant to Prop 218, for any stormwater related pollution control charge. Therefore this is not a circumstance in which Claimants can assess fees but have voluntarily chosen not to do so. Indeed, if one accepted this argument, article XIII B, section 6 would be written out of the Constitution because the argument could always be made that a city or county could submit a tax or fee to the electorate. If that ability was all that was required to meet Government Code § 17556(d), a city or county could never obtain a subvention of funds. Such a result would be contrary to the people of California's intent in adopting article XIII B, section 6.[76]

The Water Boards and DOF have not met their burden of showing that Claimants have the authority to levy service charges, fees or assessments sufficient to pay for the mandated programs at issue here. Govt. Code § 17556(d) does not apply.

V. CONCLUSION

For the foregoing reasons, each of the mandates at issue in these Test Claims are state mandates for which Claimants are entitled to reimbursement. Claimants respectfully request that the Commission find that Claimants are entitled to a subvention of funds for each mandate in accordance with article XIII B, section 6, of the California Constitution.

[76] The Water Boards reference the decision made by some jurisdictions to impose local stormwater fees and attach excerpts from stormwater fee ordinances adopted by the Cities of Alameda and Palo Alto. WB Comments at 18 and Attachments 8 and 9. Neither of the excerpts supports the Water Boards' argument. First, the excerpt of the Alameda ordinance only refers to inspections. A local agency can recover reasonable fees for the cost of inspections related to stormwater compliance, provided that the fee is in accord with the requirements of the California Constitution. Second, the Palo Alto stormwater fee ordinance was passed by the voters in 2005 in compliance with the requirements of the California Constitution, not simply imposed by the city council. *See* Exhibit G to Burhenn Declaration, an excerpt from a Question and Answer document prepared by the City describing the background of its stormwater fee ordinance. Claimants request that the Commission take administrative notice of this document pursuant to Evidence Code § 452(b) as a legislative enactment issued by a public entity in the United States.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge and belief.

Dated: January 29, 2019

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and Los Angeles County Flood Control District

ATTACHMENTS IN SUPPORT OF REBUTTAL COMMENTS OF LOS ANGELES COUNTY LOCAL AGENCY TEST CLAIMANTS TO COMMENTS OF STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, AND DEPARTMENT OF FINANCE CONCERNING CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, ORDER NO. R4-2012-0175, 13-TC-01 and 13-TC-02

ATTACHMENT 1: DECLARATION OF DAVID W. BURHENN AND EXHIBITS A-D THERETO

ATTACHMENT 2: DECLARATION OF KAREN ASHBY AND EXHIBITS 1-6 THERETO

ATTACHMENT 1

DECLARATION OF DAVID W. BURHENN ON BEHALF OF JOINT TEST CLAIMANTS IN SUPPORT OF REBUTTAL COMMENTS

I, DAVID W. BURHENN, hereby declare and state as follows:

1. I am a partner in the firm of Burhenn & Gest LLP and am assisting my partner, Howard Gest, in representation of the Los Angeles County Local Agency Test Claimants, California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, 13-TC-01 and 13-TC-02. As such, I have personal knowledge of the matters set forth in this Declaration and could, if called upon, testify competently thereto.

2. Exhibit A to this Declaration is a true and correct copy of an excerpt of a municipal stormwater permit issued by the California Regional Water Quality Control Board, Central Valley Region ("CVRWQCB") to the City of Modesto on or about May 12, 2008. On January 23, 2019, I downloaded that excerpt from the CVWRQCB website at the following address:
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/stanislaus/r5-2008-0092.pdf

3. Exhibit B to this Declaration is a true and correct copy of an excerpt of a municipal stormwater permit Fact Sheet issued by the California Regional Water Quality Control Board, San Francisco Bay Region ("SFBRWQCB") to permittees in the San Francisco Bay area on or about October 14, 2009. On January 23, 2019, I downloaded that excerpt from the SFBRWQCB website at the following address:
http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/Municipal/R2-2009-0074.pdf

4. I have reviewed the permit issued by the SFBRWQCB to the San Francisco Bay permittees and determined that revisions to the permit dated November 28, 2011 did not include revisions to those provisions in the Fact Sheet included in Exhibit B.

5. Exhibit C to this Declaration is a true and correct copy of an excerpt from the 2010-11 Individual Annual Report Form, Attachment U-4, of the City of Los Angeles. On January 24, 2019, I downloaded this document from the following address:

https://ladpw.org/wmd/npdesrsa/annualreport/2011/Appendix%20G%20-%20Los%20Angeles%20River%20WMA/LAX/Annual%20Report.pdf

6. Exhibit D to this Declaration is a true and correct copy of a memorandum issued by the Associate Attorney General to Heads of Civil Litigating Components, United States Attorneys, entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" and dated January 25, 2018. On January 23, 2019, I downloaded this document from the website of the U.S. Department of Justice at the following address:

http://www.justice.gov/file/1028756/download

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 25, 2019 at Los Angeles, California.

David W. Burhenn

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER R5-2011-0005

NPDES NO. CAS0084077

WASTE DISCHARGE REQUIREMENTS FOR STOCKTON PORT DISTRICT FACILITY-WIDE STORM WATER DISCHARGES FROM MUNICIPAL SEPARATE STORM SEWER SYSTEM AND NON-STORM WATER DISCHARGES FROM THE PORT OF STOCKTON SAN JOAQUIN COUNTY

The California Regional Water Quality Control Board, Central Valley Region, ("Central Valley Water Board") finds that:

1. The Stockton Port District (the "Permittee") is a special district that owns and operates the Port of Stockton and its storm sewer system. The Port of Stockton (the "Port") is located within the City of Stockton, which is the largest city in San Joaquin County, with a population of about 287,000. In 1997, the Central Valley Water Board issued a municipal storm sewer system ("MS4") permit to the Permittee that regulated the Port as a medium MS4 under federal storm water regulations (40 C.F.R. § 122.26(b)(7).). The portion of the storm sewer system operated by the City of Stockton is separately regulated under different waste discharge requirements (Order R5-2007-0173).

2. Prior to issuance of this Order, the Permittee was covered under the State Water Board's General Industrial Permit, and then by an NPDES area-wide MS4 permit; Order 97-042 (NPDES No. CAS0084077), issued by the Central Valley Water Board in 1997 and Order R5-2004-0136 (NPDES No. CAS0084077), adopted on 15 October 2004.

3. The Port of Stockton is physically divided into a West Complex (formerly Rough & Ready Island) and an East Complex. The 640-acre East Complex is older and more developed than the West Complex, which was a former Naval facility acquired from the United States Navy in September 2003. The West Complex is being converted and developed for full-scale shipping and manufacturing operations, which will include maritime, industrial, and commercial uses.

4. The 1,460-acre West Complex is surrounded by water: The Stockton Deep Water Ship Channel ("DWSC") on the north, Burns Cutoff on the south and west, and the San Joaquin River to the east. Since the site was formerly the U. S. Naval Station, it was previously zoned for institutional uses. However, the Permittee is pursuing a change of land use designation in order to accommodate maritime, industrial and commercial land uses. The project will include the redevelopment of marine terminals on the existing 500 acres in the northern portion of the island and the development of a commercial and industrial park on the undeveloped 500 acres southern portion of the island.

municipal, or industrial activities. Any person discharging waste or proposing to discharge waste that could affect the quality of the waters of the state must file a ROWD (California Water Code (CWC) § 13260(a)(1).). Any person operating an injection well must file a ROWD. (CWC § 13260(a)(3).). The Regional Water Board shall prescribe requirements that implement the Basin Plan, take into consideration the beneficial uses to be protected and the water quality reasonably required for that purpose (CWC § 13263).

27. The Discharger's publicly-owned rock wells are Class 5 injection wells under the U.S. EPA's Underground Injection Control program. The U.S. EPA does not provide regulation of these wells beyond registration.

28. Due to the discharge of storm water to shallow groundwater through rock wells and the large number of these wells operated by the City of Modesto, this discharge represents a potential threat to groundwater quality. It is the intent of these requirements to quantify the magnitude of this threat, determine if historic discharge to groundwater has impacted groundwater and to minimize the discharge of pollutants to groundwater. Privately-owned rock wells (a.k.a. spin-out or backhole wells) within the Modesto urbanized area are not regulated as storm water discharges as part of this Order, because they are not part of the MS4 regulated by this Order. However, if the groundwater assessment determines that other rock wells (including individual rock wells, or rock well systems smaller than the Discharger's 11,000 wells) pose a threat to groundwater, such wells will be subject to requirements for the protection of shallow groundwater.

STATUTORY AND REGULATORY CONSIDERATIONS

29. The CWA authorizes the U.S. EPA to permit a state to serve as the NPDES permitting authority in lieu of the U.S. EPA. The State of California has in-lieu authority for an NPDES program. The Porter-Cologne Water Quality Control Act authorizes the State Water Resource Control Board (State Water Board), through the Regional Water Boards, to regulate and control the discharge of pollutants into waters of the State. The State Water Board entered into a Memorandum of Agreement with the U.S. EPA, on September 22, 1989, to administer the NPDES Program governing discharges to waters of the United States.

30. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense*

Council, Inc. v. U.S. E.P.A. (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (*cf. Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Order to implement total maximum daily loads (TMDLs) are federal mandates. The federal Clean Water Act requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once the U.S. Environmental Protection Agency or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. § 122.44(d)(1)(vii)(B).)]

Second, the local agency Discharger's obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges or waste discharge requirements for discharges to underground injection wells. With a few inapplicable exceptions, the Clean Water Act regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Wat. Code, §§ 13260, 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].). As noted above, private dischargers to underground injection wells who cause similar threats to groundwater would be subject to similar regulation.

The Clean Water Act and the Porter-Cologne Water Quality Control Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Except for municipal separate storm sewer systems, the Clean Water Act requires point source dischargers, including discharges of storm water associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1165 [noting that industrial storm water discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Order does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Order, therefore, regulates the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

EXHIBIT B

California Regional Water Quality Control Board
San Francisco Bay Region
Municipal Regional Stormwater NPDES Permit

Order R2-2009-0074
NPDES Permit No. CAS612008
October 14, 2009

inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer."

40 CFR 122.26(d)(2)(iv) – Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) requires "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. [...] Proposed programs may impose controls on a system wide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. [...] Proposed management programs shall describe priorities for implementing controls."

40 CFR 122.26(d)(2)(iv)(A -D) – Federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(A - D) 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. Control of illicit discharges is also required.

CWC 13377 – CWC section 13377 requires that "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the CWA, 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 anymore stringent effluent standards or limitation necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

Order No. R2-2009-0074 is an essential mechanism for achieving the water quality objectives that have been established for protecting the beneficial uses of the water resources in the San Francisco Bay Region. Federal NPDES regulation 40 CFR 122.44(d)(1) requires MS4 permits to include any requirements necessary to "achieve water quality standards established under CWA section 303, including State narrative criteria for water quality." The term "water quality standards" in this context refers to a water body's beneficial uses and the water quality objectives necessary to protect those beneficial uses, as established in the Basin Plan.

State Mandates

This Permit does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Permit implements federally mandated requirements under CWA section 402, subdivision (p)(3)(B). (33 U.S.C. § 1342(p)(3)(B).) This includes federal requirements to effectively prohibit non-stormwater discharges, to reduce the discharge of pollutants to the maximum extent practicable, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Federal cases have held that these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (Natural Resources Defense Council, Inc. v. USEPA

(9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.) The authority exercised under this Permit is not reserved state authority under the CWA's savings clause (cf. Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627-628 [relying on 33 U.S.C. § 1370, which allows a state to develop requirements that are not less stringent than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for MS4. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389; Building Industry Association of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 882-883.)

Likewise, the provisions of this Permit to implement total maximum daily loads (TMDLs) are federal mandates. The CWA requires TMDLs to be developed for waterbodies that do not meet federal water quality standards. (33 U.S.C. § 1313(d).) Once USEPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable WLA. (40 CFR 122.44(d)(1)(vii)(B).)

Second, the local agencies' (Permittees') obligations under this Permit are similar to, and in many respects less stringent than, the obligations of nongovernmental dischargers who are issued NPDES permits for stormwater discharges. With a few inapplicable exceptions, the CWA regulates the discharge of pollutants from point sources (33 U.S.C. § 1342) and the Porter-Cologne regulates the discharge of waste (Water Code, section 13263), both without regard to the source of the pollutant or waste. As a result, the costs incurred by local agencies to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and nongovernmental dischargers. (See County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The CWA and the Porter-Cologne Water Quality Control Act largely regulate stormwater with an even hand, but to the extent that there is any relaxation of this evenhanded regulation, it is in favor of the local agencies. Except for MS4s, the CWA requires point source dischargers, including discharges of stormwater associated with industrial or construction activity, to comply strictly with water quality standards. (33 U.S.C. § 1311(b)(1)(C), Defenders of Wildlife v. Browner (1999) 191 F.3d 1159, 1164-1165 [noting that industrial stormwater discharges must strictly comply with water quality standards].) As discussed in prior State Water Board decisions, this Permit does not require strict compliance with water quality standards. (SWRCB Order No. WQ 2001-15, p. 7.) The Permit, therefore, regulates the discharge of waste in municipal stormwater more leniently than the discharge of waste from nongovernmental sources.

Third, the Permittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Permit. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Permittees can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising

EXHIBIT C

Los Angeles County Municipal Storm Water Permit (Order 01-182)
Individual Annual Report Form
Attachment U-4

This form summarizes the requirements in Order No. 01-182. Each Permittee must complete this form in its entirety, except for those requirements applicable only to the Principal Permittee. Only report activities that were performed during the previous fiscal year. Upon completion, this form shall be submitted to the Principal Permittee, by the date specified by the Principal Permittee, for inclusion in the unified Annual Storm Water Program Report. Attachments should be included where necessary to provide sufficient information on program implementation.

The goals of this Report are to: 1) concisely document implementation of the Storm Water Quality Management Program (SQMP) during the past fiscal year; 2) evaluate program results for continuous improvement; 3) to determine compliance with Order 01-182; and 4) to share this information with other Permittees, municipal decision makers, and the public.

!	YOU MUST FILL OUT ALL THE INFORMATION REQUESTED *Do not leave any of the sections blank.*
N/A	If the question does not apply to your municipality, please indicate N/A in the space provided and provide a brief explanation
U	If the information requested is currently unavailable, please indicate U in the space provided and give a brief explanation.

This Report Form consists of the following sections:

IV. Special Provisions (Part 4)

A. Public Information and Participation (Part 4.B)

In addition to answering the following questions, attach a summary of all storm water education activities that your agency conducted or participated in last year.

1. No Dumping Message

a) How many storm drain inlets does your agency own? *43,466*

b) How many storm drain inlets were marked with a no dumping message in the last fiscal year? *0*

c) What is the total number of storm drain inlets that are legibly marked with a no dumping message? *42,945*

If this number is less than the number in question 1.b, describe why all inlets have not been marked, the process used to implement this requirement, and the expected completion date.

A small number of catch basins are not accessible to the public and do not need to be labeled and an even smaller number were recently located and will be labeled soon.

d) How many public access points to creeks, channels, and other water bodies within your jurisdiction have been posted with no dumping signage in the past year? *7*

Describe your agency's status of implementing this requirement by the date required in Order No. 01-182.

The City has posted "No Trespassing/No Dumping" signs on all access points into creeks and channels that have been fenced or gated.

Los Angeles County Municipal Storm Water Permit (Order 01-182)
Individual Annual Report Form
Attachment U-4

2. Reporting Hotline

a) Has your agency established its own hotline for reporting and for general storm water management information? Yes ☒ No ☐

b) If so, what is the number? *(800) 974-9794*

c) Is this information listed in the government pages of the telephone book? Yes ☒ No ☐

d) If no, is your agency coordinated with the countywide hotline? *Not Applicable* Yes ☐ No ☐

e) Do you keep record of the number of calls received and how they were responded to? Yes ☒ No ☐

f) How many calls were received in the last fiscal year?

1,649 calls were received reporting illicit discharges, abandoned wastes etc.

246 calls were received requesting public education information.

g) Describe the process used to respond to hotline calls.

Staff receives messages from the public education voice mail box daily. Calls coming from the public information voice mail box are responded to within 24 hours of receipt.

Since 2006-07, the task of receiving Stormwater Hotline calls has been handled by the BOS' Call Center. The Call Center staff is trained by WPD staff members annually, and a copy of the "Illicit Connection / Illicit Discharge Elimination Program Manual" which contains the protocol for addressing Hotline Call Investigations, is available for review at the Call Center and the offices of WPD.

Hotline Calls are monitored daily by the Senior Environmental Compliance Inspector. When an emergency situation occurs, the Call Center staff refers the incident to the Senior on Duty to speed up the response time.

h) Have you provided the Principal Permittee with your current reporting contact information? Yes ☒ No ☐

i) Have you compiled a list of the general public reporting contacts for all Permittees and posted it on the www.888CleanLA.com web site *(Principal Permittee only)?* Yes ☐ No ☐

If not, when is this scheduled to occur? *Not Applicable*

Los Angeles County Municipal Storm Water Permit (Order 01-182)
Individual Annual Report Form
Attachment U-4

3. Outreach and Education

a) Describe the strategy developed to provide outreach and bilingual materials to target ethnic communities. Include an explanation of why each community was chosen as a target, how program effectiveness will be determined, and status of implementation. *(Principal Permittee only)*

Not applicable.

b) Did the Principal Permittee organize quarterly Public Outreach Strategy meetings that you were aware of? Yes ☒ No ☐

How many Public Outreach Strategy meetings did your agency participate in last year? *4*

Explain why your agency did not attend any or all of the organized meetings.

City staff attended all quarterly NPDES Permit Public Information / Public Participation update meetings coordinated by the County of Los Angeles.

Identify specific improvements to your storm water education program as a result of these meetings:

These meetings facilitated a sharing of outreach ideas and resources with other municipal agencies and environmental organizations.

List suggestions to increase the usefulness of quarterly meetings:

Continue to invite a different co-permittee to make presentations about their own public outreach programs during each meeting.

If quarterly Public Outreach Strategy meetings were not organized, explain why not and when this requirement will be implemented *(Principal Permittee only)*.

Not applicable.

c) Approximately how many impressions were made last year on the general public about storm water quality via print, local TV, local radio, or other media? *5,000,000*

d) Describe efforts your agency made to educate local schools on storm water pollution.

The City of Los Angeles outreach efforts to local schools included the following:

- *Presented educational assemblies and classrooms presentations to 10,464 elementary students in 32 schools.*
- *Distributed educational materials to teachers through the (800) 974-9794 Stormwater Hotline.*
- *Organized and coordinated the 18th Annual Kids Ocean Day on June 2 – a beach clean-up event for more than 5,000 elementary students at Dockweiler Beach.*

For more detailed information regarding the City of Los Angeles Stormwater Public Education Program, please see the 2010-11 NPDES Permit Public Education Annual Report.

e) Did you provide all schools within each school district in Los Angeles County with materials necessary to educate a minimum of 50 percent of all school children (K-12) every 2 years on storm water pollution *(Principal Permittee only)*? Yes ☐ No ☐

If not, explain why.

Not applicable.

f) Describe the strategy developed to measure the effectiveness of in-school educational programs, including assessing students' knowledge of storm water pollution problems and solutions before and after educational efforts *(Principal Permittee only).*

Not applicable.

For Permit Years 2-5, attach an assessment of the effectiveness of in-school storm water education programs.

g) What is the behavioral change target that was developed based on sociological data and other studies *(Principal Permittee only)?*

Not applicable.

If no target has been developed, explain why and describe the status of developing a target.

Not applicable.

What is the status of meeting the target by the end of Year 5?

Not applicable.

4. Pollutant-Specific Outreach

a) Attach a description of each watershed-specific outreach program that your agency developed *(Principal Permittee only)*. All pollutants listed in Table 1 (Section B.1.d.) must be included.

b) Did your agency cooperate with the Principal Permittee to develop specific outreach programs to target pollutants in your area? Yes ☒ No ☐

c) Did your agency help distribute pollutant-specific materials in your city? Yes ☒ No ☐

d) Describe how your agency has made outreach material available to the general public, schools, community groups, contractors and developers, etc…

Outreach materials are made available through public counters, educational presentations, community events, mailings, a speaker's bureau, community-based organizations, environmental groups, neighborhood councils, home improvement stores, gardening centers, automotive stores, pet stores, veterinarian offices, the City of Los Angeles' Stormwater Hotline (800-974-9794), and the City's website (LAStormwater.org).

For more detailed information regarding the City of Los Angeles Stormwater Public Education Program, please see the 2010-11 NPDES Permit Public Education Annual Report.

5. Businesses Program

a) Briefly describe the Corporate Outreach Program that has been developed to target gas stations and restaurant chains *(Principal Permittee only).*

Not applicable.

b) How many corporate managers did your agency *(Principal Permittee only)* reach last year? *Not Applicable*

c) What is the total number of corporations to be reached through this program *(Principal Permittee only)*? *Not Applicable*

d) Is your agency meeting the requirement of reaching all gas station and restaurant corporations once every two years *(Principal Permittee only)*? Yes ☐ No ☐

If not, describe measures that will be taken to fully implement this requirement.

Not applicable.

e) Has your agency developed and/or implemented a Business Assistance Program? Yes ☒ No ☐

If so, briefly describe your agency's program, including the number of businesses assisted, the type of assistance, and an assessment of the program's effectiveness.

The City of Los Angeles implements a Business Assistance Program, which includes information and guidance on permits and regulations, listings of service providers and publications and workshops on business related topics.

6. Did you encourage local radio stations and newspapers to use public service announcements? Yes ☒ No ☐

How many media outlets were contacted? *27*

Which newspapers or radio stations ran them?

The City of Los Angeles Stormwater Program received print, radio, television and online coverage for its various programs and projects, including Proposition O-funded capital improvement projects, Kids Ocean Day and Green Streets projects.

For more detailed information regarding the City of Los Angeles Stormwater Public Education Program, please see the 2010-11 NPDES Permit Public Education Annual Report.

Who was the audience?

The primary audiences were the residents and business owners of Los Angeles and program stakeholders.

7. Did you supplement the County's media purchase by funding additional media buys? Yes ☒ No ☐
   Estimated dollar value/in-kind contribution: *$100,000*
   Type of media purchased: *Print*
   Frequency of the buys: *Twice Annually*
   Did another agency help with the purchase? Yes ☐ No ☒

8. Did you work with local business, the County, or other Permittees to place non-traditional advertising? Yes ☒ No ☐
   If so, describe the type of advertising.

The City of Los Angeles partnered with home improvement stores, pet stores, gardening centers and automotive stores to place point-of-purchase advertising materials (posters and tip cards).

For more detailed information regarding the City of Los Angeles Stormwater Public Education Program, please see the 2010-11 NPDES Permit Public Education Annual Report.

9. Did you establish local community partnerships to distribute educational storm water pollution prevention material? Yes ☒ No ☐
   Describe the materials that were distributed:

The City of Los Angeles distributed pamphlets, posters, dog poop bags, canvas bags, tip cards, FAQ sheets, coloring books and children's stickers to community partners.

For more detailed information regarding the City of Los Angeles Stormwater Public Education Program, please see the 2010-11 NPDES Permit Public Education Annual Report.

Los Angeles County Municipal Storm Water Permit (Order 01-182)
Individual Annual Report Form
Attachment U-4

Who were the key partners? *Please see below*
Who was the audience (businesses, schools, etc.)?

The key partners were community-based organizations, businesses, schools, neighborhood councils, individual residents and environmental groups.

10. Did you participate in or publicize workshops or community events to discuss storm water pollution? Yes ☒ No ☐
    How many events did you attend? *57*

11. Does your agency have a website that provides storm water pollution prevention information? Yes ☒ No ☐
    If so, what is the address? *www.LAStormwater.org*

12. Has awareness increased in your community regarding storm water pollution? Yes ☒ No ☐
    Do you feel that behaviors have changed? Yes ☒ No ☐
    Explain the basis for your answers. Include a description of any evaluation methods that are used to determine the effectiveness of your agency's outreach.

Awareness of stormwater pollution issues and positive behavior change continues to increase throughout the City of Los Angeles. The program continues to increase community awareness through its many programs. Several are worth a special mention:

- *The program continues to experience a substantial number of hits to LAStormwater.org. Web site hits in 2010-11 numbered 3,954,173.*
- *Since its inception in 2008, the LA Stormwater e-newsletter has attracted 6,572 subscribers and experienced a substantial increase this year from 3,797 in 2009-10. The sign-ups are obtained as a way of keeping interested stakeholders and residents involved in the program beyond an initial interaction at an event, school, clean-up.*
- *Booth in a Box continues to be a successful part of the City's Stormwater Public Education Program. Initiated in 2009 as a response to the City's fiscal challenges which necessitated staff's inability to attend local community events to distribute educational materials, the Booth in a Box program utilizes community volunteers to distribute stormwater public education materials to event participants. Through this program, the Stormwater Public Education Program attended 57 events this year.*

The City's social media program, which includes a Facebook page, the Team Effort blog and a You Tube channel continues to grow in its popularity. The program currently has 1,059 Facebook friends and the program placed 92 educational posts on the Team Effort blog this year with the Facebook page experiencing 10,463 views and the blog experiencing 21,592 views. The elements of the City's social media program provide an interactive component to the program, which adds value in stakeholder relations.

The City's pilot Rainwater Harvesting program experienced a great deal of success and media coverage and demonstrated that residents want to get involved to solve the stormwater pollution problem. More than 2,000 homeowners applied for 800 slots to receive free installed rain barrels. This pilot program received a significant amount of media coverage – more than 50 media outlets ran stories on the pilot program - and has begun a movement here in Los Angeles. Residents want to do their part to reduce the amount of contaminated rainwater flowing to our regional waterways.

13. How would you modify the storm water public education program to improve it on the City or County level?

Increase funding to the City of Los Angeles Stormwater Public Education Program. In order to address the ongoing fiscal challenges faced by the City of Los Angeles, substantial funding cuts to the City's Stormwater Public Education Program in 2010-11 continued to negatively impact the program's effectiveness in the community. It is anticipated that these funding cuts will continue in 2011-12. This will only increase the difficulty in getting the stormwater pollution abatement message out to the audiences who need to hear it and change polluting behaviors.

EXHIBIT D

U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

January 25, 2018

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

CC: REGULATORY REFORM TASK FORCE

FROM: THE ASSOCIATE ATTORNEY GENERAL

SUBJECT: Limiting Use of Agency Guidance Documents
In Affirmative Civil Enforcement Cases

On November 16, 2017, the Attorney General issued a memorandum ("Guidance Policy") prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. Under the Guidance Policy, the Department may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments), or to create binding standards by which the Department will determine compliance with existing statutory or regulatory requirements.

The Guidance Policy also prohibits the Department from using its guidance documents to coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation. And when the Department issues a guidance document setting out voluntary standards, the Guidance Policy requires a clear statement that noncompliance will not in itself result in any enforcement action.

The principles from the Guidance Policy are relevant to more than just the Department's own publication of guidance documents. These principles also should guide Department litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement ("ACE").[1]

[1] As used in this memorandum, "guidance document" means any agency statement of general applicability and future effect, whether styled as "guidance" or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, documents informing the public of agency enforcement priorities or factors considered in exercising prosecutorial discretion, or internal directives, memoranda, or training materials for agency personnel. For more information, see "Memorandum for All Components: Prohibition of Improper Guidance Documents," from Attorney General Jefferson B. Sessions III, November 16, 2017. "Affirmative civil enforcement" refers to the Department's filing of civil lawsuits on behalf of the United States to

Guidance documents cannot create binding requirements that do not already exist by statute or regulation.

Accordingly, effective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.

The Department may continue to use agency guidance documents for proper purposes in such cases. For instance, some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate.

However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.

This memorandum applies only to future ACE actions brought by the Department, as well as (wherever practicable) those matters pending as of the date of this memorandum. This memorandum is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws. For example, this memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.

ATTACHMENT 2

In Support of Joint Test Claims of Los Angeles County Local Agencies and the Los Angeles County Flood Control District Concerning Los Angeles RWQCB
Order No. R4-2012-0175

(Joint Test Claims for the Los Angeles County Flood Control District and the Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier)

Prepared by:
Karen Ashby
Larry Walker Associates, Inc.
1480 Drew Avenue, Suite 100
Davis, CA 95618-4889

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DECLARATION OF KAREN ASHBY

I, Karen Ashby, hereby declare:

1. I am a Vice President at Larry Walker Associates, Inc., an environmental engineering and consulting firm that specializes in, amongst other matters, water quality management. In my capacity as a Vice President I serve as a Project Manager for stormwater and watershed management projects.

2. I have a Bachelor of Science (BS) from the University of California at Irvine and am certified as a Professional in Storm Water Quality (CPSWQ) from Envirocert International, Inc. I have been an active member of the California Stormwater Quality Association (CASQA) since 1999 as well as a Board of Director, Vice Chair and Chair of the Association. I have over 25 years of experience in stormwater quality matters, including but not limited to, providing regulatory assistance; facilitating stakeholder groups; developing and implementing stormwater management programs and Total Maximum Daily Loads (TMDLs); developing and conducting training modules; evaluating and reporting on stormwater program effectiveness; and preparing various technical reports on stormwater management issues. Prior to joining Larry Walker Associates, I managed the area-wide municipal stormwater program for the County of Orange.

3. I have personal knowledge of the matters set forth herein and, if called to testify, could and would testify competently thereto.

4. I was requested to perform a survey of Phase I National Pollutant Discharge Elimination System (NPDES) municipal separate storm sewer system (MS4) permits issued by the United States Environmental Protection Agency (EPA). I was further asked to review those permits to determine if they included the requirements that are the subject of the Test Claims filed with the Commission on State Mandates by cities located within the County of Los Angeles, the County of Los Angeles, and the Los Angeles County Flood Control District.

5. EPA currently issues Phase I NPDES MS4 permits in four jurisdictions: Idaho, Massachusetts, New Mexico and Washington, D.C. I reviewed five currently effective Phase I

permits issued to municipalities in those jurisdictions, Boise/Garden City Area (Boise), Boston, Worcester, Albuquerque, and Washington, D.C.

6. EPA issued the currently effective Albuquerque permit in 2014 and the currently effective Boise permit in 2012. EPA issued the currently effective Washington, D.C. permit ("D.C. permit") in 2011 and modified this permit in 2012. The Boston and Worcester permits are older, EPA having issued the Boston permit in 1999 and the Worcester permit in 1998.

7. I reviewed these five EPA-issued permits to determine if they included the provisions that are the subject of the test claim filed by cities located in the County of Los Angeles and the test claim filed by the County of Los Angeles and the Los Angeles County Flood Control District, concerning provisions in Los Angeles Regional Board Order No. R4-2012-0175, as amended by State Water Resources Control Board Order No. WQ 2015-0075 ("2012 Permit"). Attached as Exhibit 1 is a chart that summarizes my review. The Albuquerque, Boise, D.C., Boston, and Worcester permits are attached hereto as Exhibits 2, 3, 4, 5, and 6 respectively.

8. **Compliance with TMDL and Receiving Water Limitation Requirements.** 2012 Permit Provision VI.E.1.c requires the permittees to comply with applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the wasteload allocations established in the TMDLs set forth in those attachments, including implementation plans and schedules. 2012 Permit Part VI.B and Attachment E, Parts II.E.1 through 3 and Part V require permittees to collect and analyze water samples at TMDL "receiving water compliance points" and at stormwater and non-stormwater outfalls as designated in the TMDL monitoring plans.

Although the EPA-issued permits contain provisions directed at achieving water quality standards, they do not take the same approach or impose the same requirements as the 2012 Permit. The Boise, Boston and Worcester permits contain no TMDL requirements or other numeric effluent limits. They do not incorporate any TMDLs. The Albuquerque permit provides that permittees must develop a stormwater management program designed to reduce the discharge of pollutants to the maximum extent practicable, including BMPs consistent with the assumptions

and requirements of adopted TMDLs but, unlike the 2012 Permit, contains no numeric effluent limits. No TMDL specific monitoring is required. The D.C. permit requires development of a consolidated TMDL implementation plan and monitoring to assess whether wasteload allocations are being attained but contains no strict timetables and no numeric effluent limits.

9. **Requirements Related to Discharge Prohibitions for Non-Stormwater.** 2012 Permit Part III.A.1 prohibits certain non-stormwater discharges through the municipal separate storm sewer system (MS4) to receiving waters. Parts III.A.2 and VI.D.9.f require permittees to assure that appropriate BMPs are employed for discharges from essential non-emergency firefighting activities and, with regard to unpermitted discharges by drinking water supplier, to work with those suppliers on the conditions of their discharges. Part III.A.4.a requires permittees to develop and implement procedures to require non-stormwater discharges to fulfill certain requirements. Part III.4.b requires permittees to develop and implement procedures to minimize the discharge of landscape irrigation water into the MS4. Part III.A.4.c requires permittees to evaluate monitoring and other associated data to determine if any authorized or conditionally exempt non-stormwater discharges are sources of pollutants that may be causing or contributing to an exceedance of a receiving water limitation or water quality-based effluent limitation. Part III.A.4.d requires that, if this data shows that the non-stormwater discharges are such a source of pollutants, permittees are required to take further action to determine whether the discharge is causing or contributing to exceedances of receiving water limitations, report those findings to the Regional Board and to take steps to effectively prohibit condition require diversion or require treatment of the discharge.

The EPA-issued permits do not contain these provisions.

10. **Public Information and Participation Program.** 2012 Permit Part VI.D.5 requires permittees to undertake specific activities part of a Public Information and Participation Program. Part VI.D.5.a requires permittees to measurably increase the knowledge of target audiences. Part VI.D.5.b requires permittees to participate in or implement a public information and participation program. Part VI.D.5.c requires permittees to provide a means for public

reporting of clogged catch basin inlets and illicit discharges, identify staff or departments serving as contact persons, and organize and provide public outreach events and activities. Part VI.D.5.d requires permittees to conduct stormwater pollution prevention public service announcements and advertising campaigns, public information materials, maintain websites, and educate and involve different communities.

Many of the public information activities or elements of the public information program required by the 2012 Permit are not either not specifically required by the EPA-issued permits or are not as extensive or prescriptive.

11. **Inventory and Inspection of Industrial and Commercial Sources.** 2012 Permit Part VI.D.6 requires permittees to track various "critical" industrial and commercial sources, including the development and maintenance of an electronic database and inspections. Part VI.D.6.b requires the permittees to track nurseries and nursery centers, as well as the sites required by the prior permit. Part VI.D.6.d requires that commercial facilities, including nurseries and nursery centers, be inspected twice during the term of the permit, evaluated to determine if they are implementing effective BMPs and require implementation of additional BMPs where stormwater is charged to a significant ecological area, waterbody subject to a TMDL or a listed impaired waterbody. Part VI.D.6.e requires permittees to inspect industrial facilities, confirm that the facilities either have a waste discharge identification number or have applied for and received a no exposure notification, and are effectively implementing BMPs.

The Boston and Worcester permits only require an industrial and commercial inspection program for municipal landfills, hazardous waste treatment, storage and disposal and recovery facilities, facilities that are subject to EPCRA Title III, Section 313, and other industrial and commercial discharges that the permittees determines is contributing to a substantial pollutant loading to the MS4 however they do not require the development of a database. The Albuquerque permit requires an inspection program but does not include the number and type of industrial and commercial facilities as required by the 2012 Permit. Nurseries and nursery centers are not specifically included. The Boise permit similarly requires development of an

industrial/commercial inspection program, but not as extensive as required by the 2012 Permit. Although agricultural sources are referenced, the Boise permit does not specifically inquire the inclusion of nurseries or nursery centers. No inspection is required to determine the possession of a waste discharge identification number or no exposure notification. The D.C. permit contains an inventory and inspection program, but not as extensive as that required by the 2012 Permit. The D.C. permit dos not include nurseries or nursery centers and does not require implementation of additional BMPs due to proximity to a significant ecological area or TMDL impaired waterbody. The permittees are not required to confirm possession of a waste discharge identification number or no exposure certification.

12. **Post-Construction BMPs.** 2012 Permit Part VI.D.7.d(iv) requires the permittees to implement a tracking, inspection and enforcement program for new and redevelopment post-construction BMPs. Part VI.D.7.d (iv)(1)(a) and Attachment E, Part X require the permittees to implement a GIS or other electronic system for tracking projects that are required to contain post-construction BMPs. Part VI.D.7.d (iv)(1)(b) requires the permittees to inspect all development sites upon completion of construction to ensure proper installation of post-construction BMPs, including low impact development measures and structural BMPs, treatment BMPs and hydromodification control BMPs. Part VI.D.7.d(iv)(1)(c) requires the permittees to develop a post-construction BMP maintenance inspection checklist and inspect at an interval of at least once every two years permittee-operated post-construction BMPs.

Neither the Albuquerque, Boston nor Worcester permits require such provisions. The Boise and D.C. permits require the creation of post-construction BMP databases and inspections but are not as prescriptive.

13. **Construction Site Requirements.** 2012 Permit Part VI.D.8 requires the permittees to inspect construction sites of one acre or more, create a construction site inventory and electronic tracking system, develop and implement technical standards construction BMPs, require erosion and sediment control plans and review those plans, require BMPs tailored to the

risks posed by the projects, and train their employees with respect to construction site requirements.

The Boston and Worcester permits do not contain these requirements. The Albuquerque, Boise, and D.C. permits contain a construction site program, but are not as prescriptive. For example, they do not include the requirement of an electronic database and the inspection and erosion and sediment control review and approval procedures are not as prescriptive.

14. **Public Agency Requirements.** 2012 Permit Part VI.D.9 requires the permittees to undertake several tasks with respect to their properties and operations. Part VI.D.9.c requires the permittees to maintain an updated inventory of all permittee-owned or operated facilities that are potential sources of stormwater pollution including twenty-four separate categories of facilities that are required to be included. Part VI.D.9.d(i) requires the permittees to develop an inventory of "retrofitting opportunities" in existing development. Part VI.D.9.d(iv) requires permittees to consider the results of that evaluation and give "highly feasible" projects a "high priority" for implementation of source and treatment control. Part VI.D.9.d(v) requires the permittees to cooperate with private landowners to encourage site specific retrofitting projects. Part VI.D.9.g(ii) requires the permittees to implement integrated pest management programs. Part VI.D.9.h(vii) requires the permittees, in areas no subject to a trash TMDL, to install trash excluders or equivalent devices, except where such installation would cause flooding. Part VI.D.9.k(ii) requires permittees to train all employees and contractors who use or have the potential to use pesticides or fertilizers.

No EPA-issued permit contains all of these requirements. The Boston and Worcester permits do not contain any of these requirements. The Albuquerque permit contains the requirement to inventory and evaluate retrofitting opportunities and require the pesticide applicators be properly trained but does not include any of the other provisions. The Boise permit requires the creation of an updated inventory of permittee-owned or operated facilities that are potential sources of pollutants and the development of an inventory of retrofitting opportunities but contains none of the other requirements. The D.C. permit requires the development and

evaluation of retrofitting opportunities and integrated pest management program but does not contain any of the other requirements.

15. **Illicit Connection and Discharge Program.** 2012 Permit Part VI.D.10.d requires the permittees to have signage adjacent to open channels, to develop and maintain written procedures to document how complaint calls are received, documented and tracked, and to maintain documentation of complaint calls. Part VI.D.10.d(iii) requires permittees to ensure that signage adjacent to open channels includes information regarding dumping prohibitions and public reporting of illicit discharges. Part VI.D.10.d(iv) requires the permittees to develop and maintain written procedures that document how complaint calls are received, documented and tracked. Part VI.D.10.d(v) requires permittees to maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action undertaken in response. Part VI.D.10.e(i) requires that the permittees implement a spill response plan for all sewage and other spills that may discharge into the MS4. Part VI.D.10e(i)(1) requires that the spill response plan must identify the agency is responsible for response and clean-up, phone numbers and email addresses for contacts and further address coordination with spill response teams. Parts VI.D.10.e(i)(3) and (4) require permittees to respond to spills within four hours of becoming aware of the spill, or if on private property, within two hours of gaining legal access to the property and to report the spills to the appropriate public agencies and the Office of Emergency Services.

The EPA-issued permits require spill response programs but are not as prescriptive as the 2012 Permit. The Boston and Worcester permits require the permittees to develop and implement a spill response plan and to coordinate with other municipal, state and federal agencies, but do not contain any of the other 2012 Permit provisions. The Albuquerque and D.C. permits require spill response programs, including coordination with other agencies. They do not require a response within four hours or include the signage requirement. The Boise permit includes the requirement of a spill response plan, but is not as prescriptive as the 2012 Permit, and also does not include the signage requirement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th day of November 2018 at Davis, California, California.

Karen Ashby

Karen Ashby

EXHIBIT 1

Summary of USEPA Permit Requirements

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City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV.A	**TMDL Requirements** a. Part VI.E.1.c and Attachments L through R - Comply with water quality based effluent limits (WQBELs) and/or receiving water limitations (RWLs), consistent with WLAs	Permittees' SWMP shall include controls targeting pollutants identified in TMDLs.	Pages 8, 15-20 of Part I Page 1 of Part II Page 1 of Part VI Page 4 of Part VII Appendix B	**Permittee must develop a Stormwater Management Program designed to reduce the discharge of pollutants to the maximum extent practicable, to protect water quality and satisfy applicable surface water quality standards. SWMP shall incorporate BMPs consitent with the assumptions and requirements of adopted TMDLs (Appendix B of the Permit).** **- No numeric effluent limits**
	b. Attachment K - Sets forth the applicable TMDLs	No	Page 6 of Part I Appendix B - B.1	**Permit does not specify which Permittees are responsible parties pursuant to the TMDLs, however there are TMDL-based requirements that must be met in order to obtain coverage under the permit.**
	c. Attachments L through Q - Sets forth requirements of the applicable TMDLs and its WLAs	Similar provisions	Appendix B	**Permit incorporates the applicable TMDL with the corresponding WLAs.**
	d. Parts VI.B and VI.C - Comply with Monitoring and Reporting Program or coordinate with an approved Watershed Management Program (consistent with Parts II.A and II.E of Attachment E)	No	Pages 16-17 of Part I Page 1 of Part III	**Permit requires the development of a monitoring and assessment program that includes wet weather monitoring, dry weather discharge screening, floatable monitoring, and industrial and high risk runoff monitoring. TMDL specific monitoring is not required.**
	e. Attachment E and Part VI.E.2.a - Monitoring must occur consistent with the TMDL and at the TMDL compliance points - May meet the requirements through participation in a WMP or EWMP	No	See response to d.	-
	Requirements Related to Discharge Prohibitions for Non-Stormwater Part III.A.1 - Prohibit certain non-stormwater discharges "through the MS4 to receiving waters"	No	Page 39 of Part I	**Requirement to effectively prohibit non-stormwater discharges into the MS4.**
	Parts III.A.2 and VI.D.9.f - Assure appropriate BMPs are employed for discharges from essential non-emergency firefighting activities - With regard to unpermitted discharges, work with drinking water suppliers on the conditions of their discharges	Similar provisions for non-emergency fire fighting activities, but not for drinking water suppliers	Pages 7 and 40 of Part I	**Permit includes general reference to non-emergency fire fighting activities (training) and excludes this category from the authorized non-stormwater discharges. Does not require assurance of appropriate BMPs for non-emergency firefighting activities. Does not require coordination with water suppliers.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. B	Part III.A.4.a - Develop and implement procedures to require non-stormwater dischargers to fulfill requirements in Part III.A.4. a(i-vi)	No	--	**--**
	Part III.A.4.b - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs - Work with local water purveyors (water use efficiency, use of drought tolerant native vegetation, less toxic pesticide controls) - Develop and implement a coordinated outreach and education program (minimize discharge of irrgation water)	No	Page 7 of Part I	**Landscape irrigation, irrigation water, and lawn watering are authorized non-stormwater discharges. Control measures are only required if these categories of discharges are found to be significant sources of pollutants.**
	Part III.A.4.c - Evaluate monitoring data collected and any other associated data or information to determine if any authorized or conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance	No	Page 7 of Part I	**- Permittee must document why the categories of discharges are not expected to be significant contributors of pollutants to the MS4. However, there is not a requirement to evaluate monitoring data to determine if the discharge categories are a significant source.**
	Part III.A.4.d - If non-stormwater discharges are a source of pollutants - --determine if the discharge is causing or contributing to an exceedance --report findings to the Regional Water Board -- take steps to prohibit, condition, require diversion or treatment of the discharge	No	Pages 7 and 40 of Part I	**General requirement to address the categories of non-stormwater discharges only if they are identified as significant contributors. No requirement to impose conditions on non-stormwater discharges, or to require diversion or treatment.**
	Public Information Program Requirements Part VI.D.5.a - "measurably increase" the knowledge of target audiences (about MS4s, adverse impacts of stormwater pollution, potential solutions) - "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" - involve and engage a diverse group of participants	Similar provisions, but not as prescriptive	Pages 45 and 48 of Part I	**Permit requires outreach to non-English speaking residents, but does not require measurable increases of changes/outcomes as a result of the implementation of the public education program.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. C (IV. E)	Part VI.D.5.b - Implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually	Similar provisions	Pages 10, 24, and 44 of Part I	**Permit allows the permittee the option of implementing the public education program in cooperation with other municipal agencies or individually.**
	Part VI.D.5.c - provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and general information (via phone) - identify staff or departments serving as contact persons - organize public outreach events and activities (education seminars, clean-ups, and stenciling)	No	Pages 40 and 45 of Part I	**Permit only requires public reporting for illicit connections/discharges.**
	Part VI.D.5.d - conduct stormwater pollution prevention public service announcements and advertising campaigns - provide public education materials (vehicles, HHW, construction, pesticides and fertilizers, IPM, green waste, animal waste - provide activity specific materials (automotive parts, home improvement, lumber yards, hardware stores, landscaping, gardening, pet/feed stores - maintain the website - provide schools with materials - educate and involve ethinic communities	Similar provisions, but not as prescriptive	Page 45 of Part I	**The Permit requires a comprehensive outreach effort that encompasses a wide range of mechanisms and approaches, however it does not prescribe the specific requirements. The Permit also requires outreach and the development of materials for non-English speaking residents.**
IV. D	**Inventory and Inspections of Industrial/Commercial Sources** Part VI.D.6 - Develop and implement an industrial/commercial source program	Similar provisions, but number and type of industrial and commercial facilities covered by program are more limited.	Pages 37-38 of Part I	**Permit requires an industrial/commercial program that includes inspections, control measures, and monitoring. However, the program has an industrial focus.**
	Part VI.D.6.b - Tracking of nurseries and nursery centers and corresponding information (NAICS codes, exposure of materials, receiving water, proximity of facility to 303(d) listed receiving water, filing of NEC - Conduct field work as needed to obtain this information - Update inventory annually	No	Pages 37-38 of Part I	**The Permit requires a "list" of the facilities, but does not specify how to develop or how often to update the list. Does not explictly include nurseries and nursery centers.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
(IV. F)	Part VI.D.6.d - Inspect commercial facilities, RGOs, nurseries and nursery centers twice during the permit term - Evaluate if effective source control BMPs are being implemented - Require implementation of additional BMPs when stormwater is discharged to a significant ecological area (TMDL, 303(d) list)	No	-	-
	Part VI.D.6.e - Inspect industrial facilties (Phase I facilities and Specified facilities) - Confirm WDID or NEC and require additional BMPs when stormwater is discharged to a water body subject to TMDLs or 303(d) list	No	Page 38 of Part I	**Inspections are required, however the Permit does not require confirmation of WDID or NECs or additional BMPs based on proximity to an impaired waterbody**
IV. E **(IV. G)**	**Requirements Relating to Post-Construction BMPs** Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X - Implement GIS or other system for tracking post-construction projects - Include project ID, acreage, BMP type and locations, date of acceptance and maintenance agreements, inspection dates and results	No	-	-
	Part VI.D.7.d(iv)(1)(b) - Inspect all development sites upon completion to ensure proper installation of BMPs	No	Pages 28-29 of Part I	**Permittees should consider tracking and inspection of post construction BMPs, but not required.**
	Part VI.D.7.d(iv)(1)(c) - Develop post construction BMP maintenance checklist - Inspect at least every 2 years	No	Pages 28-29 of Part I	**Permittees should consider tracking and inspection of post construction BMPs, but not required.**
	Construction Site Requirements Part VI.D.8.g(i) - Develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. F (IV. H)	Part VI.D.8.g(ii) - Complete an inventory of projects (and continually update) - Include contact information, site information, proximity of waterbodies, significant threats to water quality, construction phase, inspection frequency, start and completion dates, NOI, date of ESCP approval, O&M requirements	No	Page 25 of Part I	**Permit does not explicitly require the development of a construction project inventory with specific fields.**
	Part VI.D.8.h - Develop and implement review procedures for construction plan documents - Prep and submittal of ESCP, verification of CGP coverage - Develop and implement a checklist to conduct and document review of the ESCP	No	Page 25 of Part I	**Permit does not explicitly require the submittal and review of erosion and sediment control plans.**
	Part VI.D.8.i(i) - Develop and implement technical standards for selection, implementation and maintenance of construction BMPs	No	Page 26 of Part I	**Permit does not require the development of technical standards.**
	Part VI.D.8.i(ii) - Construction BMPs must address risks posed by project and conform with Permit Table 15 - BMPs for paving projects must meet Permit Tables 14 and 16 - Provide installation designs and cut sheets for ESCPs - Provide maintenance expectations for each BMP or category of BMPs	No	-	-
	Part VI.D.8.i(iv) - Make technical standards "readily available" to development community - Standards must be "clearly referenced" within the webiste, ordinance, and permit approval process, and/or ESCP review form	No	-	-
	Part VI.D.8.i(v) - Local BMP technical standards must cover all items in Permit Tables 13-16	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
	Part VI.D.8.j - Inspect all construction sites one acre or greater - prior to land disturbance, during active construction, at conclusion of project - prior to Certificate of Occupancy - Develop SOPs for inspections - During inspection - confirm coverage for CGP, review the ESCP, review BMPs, observe non-stormwater discharges - Develop a written report	Similar provisions, not as prescriptive	Page 25-26 of Part I	**Permit requires annual inspections of construction sites, inspection procedures, and reports.**
	Part VI.D.8.l(i-ii) - Training for all staff (public and private) whose primary duties are related to the construction program (plan reviewers, permitting staff, inspectors, third party)	Similar provisions	Page 25 of Part I	**Permit requires training for the key staff in the construction program.**
IV. G (IV.C)	**Public Agency Requirements** Part VI.D.9.c & VI.D.4.c(iii) - Maintain an updated inventory of permittee-owned or operated facilities that are potential sources of pollution (24 categories) - Include name, address, contact information, description activities performed, potential sources, other permits - Minimum update every 5 years	No	-	**-**
	Part VI.D.9.d(i) - Develop an inventory of retrofitting opportunities	Similar provisions	Pages 31 and 36 of Part I	**Permit requires the development of an inventory and evaluation of retrofit opportunities.**
	Part VI.D.9.d(ii) - Screen existing areas of development to identify areas for retrofitting used watershed models or other tools - Evalute and rank identified opportunities	Similar provisions for evaluation and ranking	Page 31 of Part I	**Permit requires evaluation and prioritization of retrofitting opportunities, but does not require the use of a model or other tool for the prioritization process.**
	Part VI.D.9.d(iv) - Consider results of evaluation - give highly feasible projects a high priority to implement controls - Consider high priority retrofit projects for off-site mitigation for new development projects	Similar provisions for flood control and SWMP priorities	Page 36 of Part I	**Permit uses the results of the evaluation of retrofitting opportunities for flood control devices and the SWMP.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
(IV.C)	Part VI.D.9.d(v) - Cooperate with private land owners to encourage site specific retrofitting projects. - Consider demonstration retrofit projects, projects on public lands, education and outreach, subsidies, requiring retrofit projects as enforcement, mitigation, public and private partnerships, reduction of fees.	No	-	-
	Part VI.D.9.g(ii) and VI.D.4.c(vi) - Implement and demonstrate implementation of an IPM program - Including restrictions on use of pesticides, target organisms, human health, beneficial non-target organisms, partnering with other agencies - Prepare and update and inventory of pesticides and quantify the use	No	-	-
	Part VI.D.9.h(vii) - Where no Trash TMDL - install trash excluders on or in catch basins or outfalls (except where it would cause flooding)	No	Page 36 of Part I	-
	Part VI.D.9.k(ii) and VI.D.4.c(x)(2) - Train all employees and contractors who use or have the potential to use pesticides or fertilizers - Specifies topics to address	Similar provisions, not as stringent	Page 29 of Part I	**Permit requires that pesticide applicators be properly trained.**
	Illicit Connection and Discharge Program Part VI.D.10.d(iii) and VI.D.4.d(v)(2) - Ensure that signage adjacent to open channels…include information regarding dumping prohibitions and public reporting of illicit discharges	No	-	-
	Part VI.D.10.d(iv) VI.D.4.d(v)(3) - Develop and maintain written procedures to document how complaints are received, documented, and tracked - Evaluate and update as needed	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Albuquerque, NM	MS4-Phase I (Watershed based permit)	NMR04A000	2014	Albuquerque MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. H (IV.D)	Part VI.D.10.d(v) and VI.D.4.d(v)(4) - Maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action udnertaken in response.	No	Page 40 of Part I	-
	Part VI.D.10.e(i) - Implement a spill response plan for all sewage and other spills that may discharge into the MS4	Similar provisions, not as prescriptive	Page 41 of Part I	**Permit requires the development and implementation of a spill response program.**
	Part VI.D.10.e(i)(1) - Spill response plan must identify agencies responsible for spill response and cleanup, phone numbers, and email addresses - Address coordination with spill response teams	Similar provisions, not as prescriptive	Page 41 of Part I	**Permit requires the development and implementation of a spill response program that is coordinated with other agencies.**
	Part VI.D.10.e(i)(3-4) and VI.D.4.d(vi)(1) - Respond to spills for containment within 4 hours of becoming aware of the spill - on private property within 2 hours of gaining legal access - Report spills that endanger health or the environment to public health agencies and OES	Similar provisions, not as prescriptive	Pages 40-41 of Part I	**Permit requires response time within 48 hours and protection of public health and the environment.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV.A	**TMDL Requirements** a. Part VI.E.1.c and Attachments L through R - Comply with water quality based effluent limits (WQBELs) and/or receiving water limitations (RWLs), consistent with WLAs	No	Pages 33 and 64 of 66	**- No numeric effluent limits.** **- No TMDLs - 303(d) consituents are treated as "pollutants of concern".**
	b. Attachment K - Sets forth the applicable TMDLs	No	---	**Permit does not incorporate TMDLs.**
	c. Attachments L through Q - Sets forth requirements of the applicable TMDLs and its WLAs	No	---	**Permit does not incorporate TMDLs.**
	d. Parts VI.B and VI.C - Comply with Monitoring and Reporting Program or coordinate with an approved Watershed Management Program (consistent with Parts II.A and II.E of Attachment E)	No	---	**Permit does not incorporate TMDLs.**
	e. Attachment E and Part VI.E.2.a - Monitoring must occur consistent with the TMDL and at the TMDL compliance points - May meet the requirements through participation in a WMP or EWMP	No	---	**Permit does not incorporate TMDLs.**
	Requirements Related to Discharge Prohibitions for Non-Stormwater Part III.A.1 - Prohibit certain non-stormwater discharges "through the MS4 to receiving waters"	No	Pages 26-27 of 66	**Requirement to effectively prohibit non-stormwater discharges into the MS4.**
	Parts III.A.2 and VI.D.9.f - Assure appropriate BMPs are employed for discharges from essential non-emergency firefighting activities - With regard to unpermitted discharges, work with drinking water suppliers on the conditions of their discharges	No	Page 4 of 66	**Permit includes general reference to emergency fire fighting activities as an authorized non-stormwater discharge. Does not require assurance of appropriate BMPs for non-emergency firefighting activities. Does not require coordination with water suppliers.**

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Boise/Garden City, ID	Medium MS4	IDS-027561	2012	Boise MS4

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IV. B	Part III.A.4.a - Develop and implement procedures to require non-stormwater dischargers to fulfill requirements in Part III.A.4. a(i-vi)	No	--	--
	Part III.A.4.b - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs - Work with local water purveyors (water use efficiency, use of drought tolerant native vegetation, less toxic pesticide controls) - Develop and implement a coordinated outreach and education program (minimize discharge of irrgation water)	No	Page 4 of 66	**Landscape irrigation, irrigation water, and lawn watering are authorized non-stormwater discharges. Control measures are only required if these categories of discharges are found to be significant sources of pollutants.**
	Part III.A.4.c - Evaluate monitoring data collected and any other associated data or information to determine if any authorized or conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance	No	Page 4 of 66	**No requirement to evaluate the authorized non-stormwater discharges.**
	Part III.A.4.d - If non-stormwater discharges are a source of pollutants - --determine if the discharge is causing or contributing to an exceedance --report findings to the Regional Water Board -- take steps to prohibit, condition, require diversion or treatment of the discharge	No	Page 4 of 66	**General requirement to eliminate illicit connections and discharges. No requirement to impose conditions on non-stormwater discharges, or to require diversion or treatment.**
	Public Information Program Requirements Part VI.D.5.a - "measurably increase" the knowledge of target audiences (about MS4s, adverse impacts of stormwater pollution, potential solutions) - "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" - involve and engage a diverse group of participants	Similar provisions but not as prescriptive	Pages 30-31 of 66	**Permit requires that the public education program be developed to support changes in awareness and behavior change, but does not specifically require measurable change. Permit does not require outreach to non-English speaking residents.**

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IV. C (IV. E)	Part VI.D.5.b - Implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually	Similar provisions	Pages 7 and 30 of 66	**Permit allows the permittee the option of implementing the public education program in cooperation with other municipal agencies or individually.**
	Part VI.D.5.c - provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and general information (via phone) - identify staff or departments serving as contact persons - organize public outreach events and activities (education seminars, clean-ups, and stenciling)	Similar provisions for reporting of illicit connections and discharges as well as a stormwater website	Pages 32-33 of 66	**Permit requires the establishment of a website that provide a mechanism for reporting of illicit connections and discharges as well as key contacts for the agency.**
	Part VI.D.5.d - conduct stormwater pollution prevention public service announcements and advertising campaigns - provide public education materials (vehicles, HHW, construction, pesticides and fertilizers, IPM, green waste, animal waste - provide activity specific materials (automotive parts, home improvement, lumber yards, hardware stores, landscaping, gardening, pet/feed stores - maintain the website - provide schools with materials - educate and involve ethinic communities	Similar provisions, but not as prescriptive	Pages 30-33 of 66	**The Permit requires a comprehensive outreach effort that encompasses a wide range of mechanisms and approaches, however it does not prescribe the specific requirements.**
IV. D	**Inventory and Inspections of Industrial/Commercial Sources** Part VI.D.6 - Develop and implement an industrial/commercial source program	Similar provisions	Pages 21-22 of 66	**Permit requires an industrial/commercial program that includes inventory, inspections, control measures, and monitoring.**
	Part VI.D.6.b - Tracking of nurseries and nursery centers and corresponding information (NAICS codes, exposure of materials, receiving water, proximity of facility to 303(d) listed receiving water, filing of NEC - Conduct field work as needed to obtain this information - Update inventory annually	Similar provisions	Pages 20-21 of 66	**Permit requires an inventory that is updated annually (does not specify how). The permit includes urban agriculture activities, but does not specify the inclusion of nurseries or nursery centers.**

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(IV. F)	Part VI.D.6.d - Inspect commercial facilities, RGOs, nurseries and nursery centers twice during the permit term - Evaluate if effective source control BMPs are being implemented - Require implementation of additional BMPs when stormwater is discharged to a significant ecological area (TMDL, 303(d) list)	No	Pages 20-21 of 66	**Permit requires inspections, but does not include specificity on what facilities, how often, and when additional BMPs are necessary.**
	Part VI.D.6.e - Inspect industrial facilties (Phase I facilities and Specified facilities) - Confirm WDID or NEC and require additional BMPs when stormwater is discharged to a water body subject to TMDLs or 303(d) list	No	Page 20 of 66	**Inspections are required, but number and scope of facilites are more limited and the Permit does not require confirmation of WDID or NECs or additional BMPs based on proximity to an impaired waterbody**
IV. E (IV. G)	**Requirements Relating to Post-Construction BMPs** Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X - Implement GIS or other system for tracking post-construction projects - Include project ID, acreage, BMP type and locations, date of acceptance and maintenance agreements, inspection dates and results	Similar provisions	Page 18 of 66	**Permit requires database tracking of all new public and private sector permanent storm water controls.**
	Part VI.D.7.d(iv)(1)(b) - Inspect all development sites upon completion to ensure proper installation of BMPs	Similar provisions	Pages 18-19 of 66	**Permit requires inspection of permanent storm water management controls.**
	Part VI.D.7.d(iv)(1)(c) - Develop post construction BMP maintenance checklist - Inspect at least every 2 years	Similar provisions	Pages 15 and 18-19 of 66	**Permit requires the development of inspection checklists and annual inspections for high priority locations.**
	Construction Site Requirements Part VI.D.8.g(i) - Develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits	No	-	-

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IV. F (IV. H)	Part VI.D.8.g(ii) - Complete an inventory of projects (and continually update) - Include contact information, site information, proximity of waterbodies, significant threats to water quality, construction phase, inspection frequency, start and completion dates, NOI, date of ESCP approval, O&M requirements	No	Page 10 of 66	**Permit does not explicitly require the development of a construction project inventory with specific fields.**
	Part VI.D.8.h - Develop and implement review procedures for construction plan documents - Prep and submittal of ESCP, verification of CGP coverage - Develop and implement a checklist to conduct and document review of the ESCP	Similar provisions, not as prescriptive	Page 9 of 66	**Permit requires the review of ESCPs, confirmation of coverage under the CGP, and development of a checklist.**
	Part VI.D.8.i(i) - Develop and implement technical standards for selection, implementation and maintenance of construction BMPs	Similar provisions	Page 9 of 66	**Permit requires the review of ESCPs, confirmation of coverage under the CGP, and development of a checklist.**
	Part VI.D.8.i(ii) - Construction BMPs must address risks posed by project and conform with Permit Table 15 - BMPs for paving projects must meet Permit Tables 14 and 16 - Provide installation designs and cut sheets for ESCPs - Provide maintenance expectations for each BMP or category of BMPs	No	Page 9 of 66	**Permit only requires that the technical guidance address the installation and maintenance of the BMPs that may be implemented, it does not require risk assessments, detailed design sheets, or specify the types of BMPs to include within the manuals.**
	Part VI.D.8.i(iv) - Make technical standards "readily available" to development community - Standards must be "clearly referenced" within the webiste, ordinance, and permit approval process, and/or ESCP review form	Similar provisions, not as prescriptive	Page 32 of 66	**Permit generally requires education and outreach as well as the use of the website to disseminate information and documents.**
	Part VI.D.8.i(v) - Local BMP technical standards must cover all items in Permit Tables 13-16	No	Page 9 of 66	**Permit requires that the technical guidance include requirements for the installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls, but does not specify the types of BMPs to include within the manuals.**

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	Part VI.D.8.j - Inspect all construction sites one acre or greater - prior to land disturbance, during active construction, at conclusion of project - prior to Certificate of Occupancy - Develop SOPs for inspections - During inspection - confirm coverage for CGP, review the ESCP, review BMPs, observe non-stormwater discharges - Develop a written report	Similar provisions, not as prescriptive	Pages 9-10 of 66	**Permit requires inspections of construction sites (frequency determined by Permittee), review of specific items, and written reports, but does not require the development of inspection procedures.**
	Part VI.D.8.l(i-ii) - Training for all staff (public and private) whose primary duties are related to the construction program (plan reviewers, permitting staff, inspectors, third party)	Similar provisions	Pages 12-13 of 66	**Permit requires training for the key staff in the construction program.**
IV. G (IV.C)	**Public Agency Requirements** Part VI.D.9.c & VI.D.4.c(iii) - Maintain an updated inventory of permittee-owned or operated facilities that are potential sources of pollution (24 categories) - Include name, address, contact information, description activities performed, potential sources, other permits - Minimum update every 5 years	Similar provisions, not as stringent	Pages 21-23 and 25 of 66	**Permit requires an inventory of all Permittee-owned material storage facilities and maintenace yards.**
	Part VI.D.9.d(i) - Develop an inventory of retrofitting opportunities	Similar provisions	Page 25 of 66	**Permit an evaluation of retrofitting opportunities and development of a list of opportunities.**
	Part VI.D.9.d(ii) - Screen existing areas of development to identify areas for retrofitting used watershed models or other tools - Evalute and rank identified opportunities	No	-	-
	Part VI.D.9.d(iv) - Consider results of evaluation - give highly feasible projects a high priority to implement controls - Consider high priority retrofit projects for off-site mitigation for new development projects	No	-	**Permit only requires an evaluation of retrofitting opportunities for existing stormwater control devices.**

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(IV.C)	Part VI.D.9.d(v) - Cooperate with private land owners to encourage site specific retrofitting projects. - Consider demonstration retrofit projects, projects on public lands, education and outreach, subsidies, requiring retrofit projects as enforcement, mitigation, public and private partnerships, reduction of fees.	No	-	-
	Part VI.D.9.g(ii) and VI.D.4.c(vi) - Implement and demonstrate implementation of an IPM program - Including restrictions on use of pesticides, target organisms, human health, beneficial non-target organisms, partnering with other agencies - Prepare and update and inventory of pesticides and quantify the use	No	-	-
	Part VI.D.9.h(vii) - Where no Trash TMDL - install trash excluders on or in catch basins or outfalls (except where it would cause flooding)	No	-	-
	Part VI.D.9.k(ii) and VI.D.4.c(x)(2) - Train all employees and contractors who use or have the potential to use pesticides or fertilizers - Specifies topics to address	No	-	-
	Illicit Connection and Discharge Program Part VI.D.10.d(iii) and VI.D.4.d(v)(2) - Ensure that signage adjacent to open channels…include information regarding dumping prohibitions and public reporting of illicit discharges	No	-	-
	Part VI.D.10.d(iv) VI.D.4.d(v)(3) - Develop and maintain written procedures to document how complaints are received, documented, and tracked - Evaluate and update as needed	Similar provisions	Page 27 of 66	**Permit includes specific requirements for the management of the complaint/reporting hotline. No specific requirement to evaluate and updae procedures.**

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IV. H (IV.D)	Part VI.D.10.d(v) and VI.D.4.d(v)(4) - Maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action udnertaken in response.	Similar provisions	Pages 27 and 47 of 66	**The Permit requires tracking of public complaints for mapping and annual reporting purposes.**
	Part VI.D.10.e(i) - Implement a spill response plan for all sewage and other spills that may discharge into the MS4	Similar provisions, but not as prescriptive	Page 29 of 66	**Permit requires the development and implementation of a spill response program.**
	Part VI.D.10.e(i)(1) - Spill response plan must identify agencies responsible for spill response and cleanup, phone numbers, and email addresses - Address coordination with spill response teams	Similar provisions, but not as stringent	Page 29 of 66	**Permit requires the development and implementation of a spill response program that is coordinated with other agencies.**
	Part VI.D.10.e(i)(3-4) and VI.D.4.d(vi)(1) - Respond to spills for containment within 4 hours of becoming aware of the spill - on private property within 2 hours of gaining legal access - Report spills that endanger health or the environment to public health agencies and OES	Similar provisions, but not as stringent	Pages 50-51 of 66	**Permit does not require specific response times**

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IV.A	**TMDL Requirements** a. Part VI.E.1.c and Attachments L through R - Comply with water quality based effluent limits (WQBELs) and/or receiving water limitations (RWLs), consistent with WLAs	No. Requires development of consolidated TMDL Implementation Plan, but no strict time table. No numeric effluent limitations.	Pages 6, 29-32 Fact Sheet Page 14	**Compliance with the performance standards and provisions of the permit constitute adequate progress towards compliance with TMDL waste load allocations (no numeric limitations).**
	b. Attachment K - Sets forth the applicable TMDLs	Similar provisions	Pages 29-32	**Since this Permit is issued to one Permittee, they are a responsible party to the TMDLs in the Permit.**
	c. Attachments L through Q - Sets forth requirements of the applicable TMDLs and its WLAs	No. Permit requires development of consolidated TMDL Implementation Plan, but no numeric WLAs or strict time table. Compliance with permit's performance standards and provisions constitutues adequate progress towards ocmpliance with TMDL WLAs.	Pages 29-32	**Permit incorporates the applicable TMDL with the corresponding WLA planning and implementation requirements.**
	d. Parts VI.B and VI.C - Comply with Monitoring and Reporting Program or coordinate with an approved Watershed Management Program (consistent with Parts II.A and II.E of Attachment E)	Similar provisions	Pages 31 and 33	**Permit requires the development of a monitoring and assessment program that includes monitoring, as necessary, for WLA tracking and to determine if WLAs are being attained.**
	e. Attachment E and Part VI.E.2.a - Monitoring must occur consistent with the TMDL and at the TMDL compliance points - May meet the requirements through participation in a WMP or EWMP	No	-	**TMDL-based monioring and compliance points are not specifically referenced wtihin the permit.** (also see d. above)
	Requirements Related to Discharge Prohibitions for Non-Stormwater Part III.A.1 - Prohibit certain non-stormwater discharges "through the MS4 to receiving waters"	No	Pages 5-6	**Requirement to effectively prohibit non-stormwater discharges into the MS4.**
	Parts III.A.2 and VI.D.9.f - Assure appropriate BMPs are employed for discharges from essential non-emergency firefighting activities - With regard to unpermitted discharges, work with drinking water suppliers on the conditions of their discharges	No	--	--

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IV. B	Part III.A.4.a - Develop and implement procedures to require non-stormwater dischargers to fulfill requirements in Part III.A.4.a(i-vi)	No	--	--
	Part III.A.4.b - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs - Work with local water purveyors (water use efficiency, use of drought tolerant native vegetation, less toxic pesticide controls) - Develop and implement a coordinated outreach and education program (minimize discharge of irrgation water)	No	Page 5	**Landscape irrigation, irrigation water, and lawn watering are authorized non-stormwater discharges. Control measures are only required if these categories of discharges are found to be significant sources of pollutants.**
	Part III.A.4.c - Evaluate monitoring data collected and any other associated data or information to determine if any authorized or conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance	No	Page 5	**No requirement to evaluate the authorized non-stormwater discharges.**
	Part III.A.4.d - If non-stormwater discharges are a source of pollutants - --determine if the discharge is causing or contributing to an exceedance --report findings to the Regional Water Board -- take steps to prohibit, condition, require diversion or treatment of the discharge	No	Page 5	**General requirement to eliminate illicit connections and discharges as soon as possible. No requirement to evaluate exempt non-stormwater discharges to determine if discharge is a source of pollutant that is causing exceedance of applicable water quality based effluent limitations or receiving water limitations and if so take action against discharge.**
	Public Information Program Requirements Part VI.D.5.a - "measurably increase" the knowledge of target audiences (about MS4s, adverse impacts of stormwater pollution, potential solutions) - "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" - involve and engage a diverse group of participants	Similar provisions for awareness and behavior change	Pages 27-28	**Permit requires that the public education program be developed to support changes in awareness and behavior change, but is not as detailed or prescriptive. Permit does not specifically require measurable change. Permit does not require outreach to non-English speaking residents.**

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IV. C (IV. E)	Part VI.D.5.b - Implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually	Similar provisions	Pages 27 and 29	**Permit allows the permittee the option of implementing the public education program in cooperation with other municipal agencies or individually.**
	Part VI.D.5.c - provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and general information (via phone) - identify staff or departments serving as contact persons - organize public outreach events and activities (education seminars, clean-ups, and stenciling)	No similar public reporting provision. Does provide for public participation events	Page 29	**Permit requires facilitation of public participation events.**
	Part VI.D.5.d - conduct stormwater pollution prevention public service announcements and advertising campaigns - provide public education materials (vehicles, HHW, construction, pesticides and fertilizers, IPM, green waste, animal waste - provide activity specific materials (automotive parts, home improvement, lumber yards, hardware stores, landscaping, gardening, pet/feed stores - maintain the website - provide schools with materials - educate and involve ethinic communities	Similar provisions, but not as prescriptive	Pages 27-28	**The Permit requires a comprehensive outreach effort that encompasses a wide range of mechanisms and approaches, however it does not prescribe the specific requirements. The Permit does not specifically require outreach for non-English speaking residents.**
IV. D	**Inventory and Inspections of Industrial/Commercial Sources** Part VI.D.6 - Develop and implement an industrial/commercial source program	Similar provisions. Inspection requirements not as extensive.	Pages 22-24	**Permit requires an industrial/commercial program that includes inspections, control measures, and monitoring.**
	Part VI.D.6.b - Tracking of nurseries and nursery centers and corresponding information (NAICS codes, exposure of materials, receiving water, proximity of facility to 303(d) listed receiving water, filing of NEC - Conduct field work as needed to obtain this information - Update inventory annually	Similar provisions	Pages 22-23	**Permit requires an inventory that is updated annually through a variety of mechanisms including field activities, however it does not require the inclusion of nurseries or nursery centers.**

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(IV. F)	Part VI.D.6.d - Inspect commercial facilities, RGOs, nurseries and nursery centers twice during the permit term - Evaluate if effective source control BMPs are being implemented - Require implementation of additional BMPs when stormwater is discharged to a significant ecological area (TMDL, 303(d) list)	Similar provisions, not as prescriptive	Pages 22-23	**Permit requires inspections of commercial facilities including automotive service and critical sources, but not specifically nurseries. Permit does not require implementation of additional BMPs due to proximity of an impaired waterbody.**
	Part VI.D.6.e - Inspect industrial facilties (Phase I facilities and Specified facilities) - Confirm WDID or NEC and require additional BMPs when stormwater is discharged to a water body subject to TMDLs or 303(d) list	Similar provisions for inspection	Page 24	**Inspections are required, however the Permit does not require confirmation of WDID or NECs or additional BMPs based on proximity to an impaired waterbody**
IV. E (IV. G)	**Requirements Relating to Post-Construction BMPs** Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X - Implement GIS or other system for tracking post-construction projects - Include project ID, acreage, BMP type and locations, date of acceptance and maintenance agreements, inspection dates and results	Similar provisions, but not as prescriptive	Pages 12 and 15 Pages 25-26 of Fact Sheet	**Permit requires development of a verification and tracking systems, but does not prescribe what information should be tracked.**
	Part VI.D.7.d(iv)(1)(b) - Inspect all development sites upon completion to ensure proper installation of BMPs	Similar provisions	Page 12	**Permit requires a formal process for site plan reviews and post-construction verification process (including inspections).**
	Part VI.D.7.d(iv)(1)(c) - Develop post construction BMP maintenance checklist - Inspect at least every 2 years	No	Page 15	**Permit does not require the development of a checklist and does not prescribe the frequency of O&M inspections.**
	Construction Site Requirements Part VI.D.8.g(i) - Develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits	No	-	-

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IV. F (IV. H)	Part VI.D.8.g(ii) - Complete an inventory of projects (and continually update) - Include contact information, site information, proximity of waterbodies, significant threats to water quality, construction phase, inspection frequency, start and completion dates, NOI, date of ESCP approval, O&M requirements	No	-	-
	Part VI.D.8.h - Develop and implement review procedures for construction plan documents - Prep and submittal of ESCP, verification of CGP coverage - Develop and implement a checklist to conduct and document review of the ESCP	Similar provisions, not as prescriptive	Page 24	**Permit requires the review of ESCPs and confirmation of coverage under the CGP, however, it does not include the development of a checklist.**
	Part VI.D.8.i(i) - Develop and implement technical standards for selection, implementation and maintenance of construction BMPs	Similar provisions	Pages 25 and 28	**Permit requires provision of guidance manuals and technical publications.**
	Part VI.D.8.i(ii) - Construction BMPs must address risks posed by project and conform with Permit Table 15 - BMPs for paving projects must meet Permit Tables 14 and 16 - Provide installation designs and cut sheets for ESCPs - Provide maintenance expectations for each BMP or category of BMPs	No	-	-
	Part VI.D.8.i(iv) - Make technical standards "readily available" to development community - Standards must be "clearly referenced" within the webiste, ordinance, and permit approval process, and/or ESCP review form	Similar provisions, not as prescriptive	Pages 27-29	**Permit generally requires education and outreach as well as the use of the website to disseminate information and documents.**
	Part VI.D.8.i(v) - Local BMP technical standards must cover all items in Permit Tables 13-16	No	-	-

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	Part VI.D.8.j - Inspect all construction sites one acre or greater - prior to land disturbance, during active construction, at conclusion of project - prior to Certificate of Occupancy - Develop SOPs for inspections - During inspection - confirm coverage for CGP, review the ESCP, review BMPs, observe non-stormwater discharges - Develop a written report	Similar provisions, not as prescriptive	Page 24	**Permit requires inspections of construction sites and general record keeping, but does not require the development of inspection procedures and reports.**
	Part VI.D.8.l(i-ii) - Training for all staff (public and private) whose primary duties are related to the construction program (plan reviewers, permitting staff, inspectors, third party)	Similar provisions	Pages 21-22	**Permit requires training for the key staff in the construction program.**
	Public Agency Requirements Part VI.D.9.c & VI.D.4.c(iii) - Maintain an updated inventory of permittee-owned or operated facilities that are potential sources of pollution (24 categories) - Include name, address, contact information, description activities performed, potential sources, other permits - Minimum update every 5 years	No	-	**-**
	Part VI.D.9.d(i) - Develop an inventory of retrofitting opportunities	Similar provisions	Pages 13 and 27	**Permit requires the development of a retrofit program.**
	Part VI.D.9.d(ii) - Screen existing areas of development to identify areas for retrofitting used watershed models or other tools - Evalute and rank identified opportunities	No	-	-

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IV. G (IV.C)	Part VI.D.9.d(iv) - Consider results of evaluation - give highly feasible projects a high priority to implement controls - Consider high priority retrofit projects for off-site mitigation for new development projects	Similar provisions, not as prescriptive	Pages 13-14 of 20	**Permit requires the development of a retrofit program for existing discharges.**
	Part VI.D.9.d(v) - Cooperate with private land owners to encourage site specific retrofitting projects. - Consider demonstration retrofit projects, projects on public lands, education and outreach, subsidies, requiring retrofit projects as enforcement, mitigation, public and private partnerships, reduction of fees.	No	-	**-**
	Part VI.D.9.g(ii) and VI.D.4.c(vi) - Implement and demonstrate implementation of an IPM program - Including restrictions on use of pesticides, target organisms, human health, beneficial non-target organisms, partnering with other agencies - Prepare and update and inventory of pesticides and quantify the use	Similar provisions	Page 17	**Permit requires the implementation of an IPM program**
	Part VI.D.9.h(vii) - Where no Trash TMDL - install trash excluders on or in catch basins or outfalls (except where it would cause flooding)	No	-	**-**
	Part VI.D.9.k(ii) and VI.D.4.c(x)(2) - Train all employees and contractors who use or have the potential to use pesticides or fertilizers - Specifies topics to address	No	-	-
	Illicit Connection and Discharge Program Part VI.D.10.d(iii) and VI.D.4.d(v)(2) - Ensure that signage adjacent to open channels…include information regarding dumping prohibitions and public reporting of illicit discharges	No	-	**-**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
District of Columbia	MS4-Phase I	DC0000221, Modification #1	2011 (modified in 2012)	DC MS4

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. H (IV.D)	Part VI.D.10.d(iv) VI.D.4.d(v)(3) - Develop and maintain written procedures to document how complaints are received, documented, and tracked - Evaluate and update as needed	No	-	**-**
	Part VI.D.10.d(v) and VI.D.4.d(v)(4) - Maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action udnertaken in response.	No	-	**-**
	Part VI.D.10.e(i) - Implement a spill response plan for all sewage and other spills that may discharge into the MS4	Similar provisions	Pages 16 and 24	**Permit requires the development and implementation of a spill response program.**
	Part VI.D.10.e(i)(1) - Spill response plan must identify agencies responsible for spill response and cleanup, phone numbers, and email addresses - Address coordination with spill response teams	Similar provisions	Pages 16 and 24	**Permit requires the development and implementation of a spill response program that is coordinated with other agencies.**
	Part VI.D.10.e(i)(3-4) and VI.D.4.d(vi)(1) - Respond to spills for containment within 4 hours of becoming aware of the spill - on private property within 2 hours of gaining legal access - Report spills that endanger health or the environment to public health agencies and OES	Similar provisions, but not as prescriptive	Page 16	**Permit does not specify specific response times.**

1 - The numbering of the items from the narrative statements is driven by the narrative statement from Test Claim 13-TC-01, differences in numbering from Test Claim 13-TC-02 are noted in parantheses.

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV.A	**TMDL Requirements** a. Part VI.E.1.c and Attachments L through R - Comply with water quality based effluent limits (WQBELs) and/or receiving water limitations (RWLs), consistent with WLAs	No	Pages 3 and 13 of 20 Pages 2, 5, 7, and 10 of the Fact Sheet	-**Permittee required to develop a storm water program designed to reduce the discharge of pollutants to the maximum extent practicable.** **- Permit does not incorporate TMDLs.** **- No numeric effluent limits.**
	b. Attachment K - Sets forth the applicable TMDLs	No	---	**Permit does not incorporate TMDLs.**
	c. Attachments L through Q - Sets forth requirements of the applicable TMDLs and its WLAs	No	---	**Permit does not incorporate TMDLs.**
	d. Parts VI.B and VI.C - Comply with Monitoring and Reporting Program or coordinate with an approved Watershed Management Program (consistent with Parts II.A and II.E of Attachment E)	No	---	**Permit does not incorporate TMDLs.**
	e. Attachment E and Part VI.E.2.a - Monitoring must occur consistent with the TMDL and at the TMDL compliance points - May meet the requirements through participation in a WMP or EWMP	No	---	**Permit does not incorporate TMDLs.**
	Requirements Related to Discharge Prohibitions for Non-Stormwater Part III.A.1 - Prohibit certain non-stormwater discharges "through the MS4 to receiving waters"	No	Pages 2 and 6 of 20 Pages 2 and 5 of the Fact Sheet	**Requirement to effectively prohibit non-stormwater discharges to the MS4.**
	Parts III.A.2 and VI.D.9.f - Assure appropriate BMPs are employed for discharges from essential non-emergency firefighting activities - With regard to unpermitted discharges, work with drinking water suppliers on the conditions of their discharges	No	Page 7 of 20	**Permit includes general reference to emergency fire fighting activities as an authorized non-stormwater discharge. Does not require assurance of appropriate BMPs for non-emergency firefighting activities. Does not require coordination with water suppliers.**
	Part III.A.4.a - Develop and implement procedures to require non-stormwater dischargers to fulfill requirements in Part III.A.4.a(i-vi)	No	--	**--**

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Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. B	Part III.A.4.b - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs - Work with local water purveyors (water use efficiency, use of drought tolerant native vegetation, less toxic pesticide controls) - Develop and implement a coordinated outreach and education program (minimize discharge of irrgation water)	No	Pages 6-7 of 20	**Landscape irrigation, irrigation water, and lawn watering are authorized non-stormwater discharges. Control measures are only required if these categories of discharges are found to be significant sources of pollutants.**
	Part III.A.4.c - Evaluate monitoring data collected and any other associated data or information to determine if any authorized or conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance	No	-	**No requirement to evaluate the authorized non-stormwater discharges.**
	Part III.A.4.d - If non-stormwater discharges are a source of pollutants - --determine if the discharge is causing or contributing to an exceedance --report findings to the Regional Water Board -- take steps to prohibit, condition, require diversion or treatment of the discharge	No	Pages 6-7 of 20	**General requirement to eliminate illicit connections and discharges as soon as possible. No requirement to impose conditions on non-stormwater discharges, or to require diversion or treatment.**
	Public Information Program Requirements Part VI.D.5.a - "measurably increase" the knowledge of target audiences (about MS4s, adverse impacts of stormwater pollution, potential solutions) - "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" - involve and engage a diverse group of participants	No. Public information program not as prescriptive or extensive.	Pages 7, 9-10 of 20	**Permit requires outreach to non-English speaking residents, but does not require measurable increases of changes/outcomes as a result of the implementation of the public education program.**
	Part VI.D.5.b - Implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually	Similar provisions	Pages 3 and 9-10 of 20	**Permit allows the permittee the option of implementing the public education program in cooperation with other municipal agencies or individually.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. C (IV. E)	Part VI.D.5.c - provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and general information (via phone) - identify staff or departments serving as contact persons - organize public outreach events and activities (education seminars, clean-ups, and stenciling)	No	Page 9 of 20	**Permit requires the establishment and promotion of a hotline for reporting illicit connections and discharges. Otherwise not as prescriptive.**
	Part VI.D.5.d - conduct stormwater pollution prevention public service announcements and advertising campaigns - provide public education materials (vehicles, HHW, construction, pesticides and fertilizers, IPM, green waste, animal waste - provide activity specific materials (automotive parts, home improvement, lumber yards, hardware stores, landscaping, gardening, pet/feed stores - maintain the website - provide schools with materials - educate and involve ethinic communities	No	Pages 9-10 of 20	**The Permit requires a outreach effort limited to illicit discharge and disposal, automotive care, household hazardous waste, fertilizers and pesticides. The Permit also requires the development of materials for non-English speaking residents.**
IV. D	**Inventory and Inspections of Industrial/Commercial Sources** Part VI.D.6 - Develop and implement an industrial/commercial source program	No	Page 8 of 20	**Industrial and commercial inspection program limited to discharges from municipal landfills, hazardous waste treatment, storage and disposal and recovery facilities, facilities that are subject to EPCRA Title III, Section 313, and other industrial and commercial discharges that the permittees determines is contributing to a substantial pollutant loading to the MS4.**
	Part VI.D.6.b - Tracking of nurseries and nursery centers and corresponding information (NAICS codes, exposure of materials, receiving water, proximity of facility to 303(d) listed receiving water, filing of NEC - Conduct field work as needed to obtain this information - Update inventory annually	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
(IV. F)	Part VI.D.6.d - Inspect commercial facilities, RGOs, nurseries and nursery centers twice during the permit term - Evaluate if effective source control BMPs are being implemented - Require implementation of additional BMPs when stormwater is discharged to a significant ecological area (TMDL, 303(d) list)	No	-	-
	Part VI.D.6.e - Inspect industrial facilties (Phase I facilities and Specified facilities) - Confirm WDID or NEC and require additional BMPs when stormwater is discharged to a water body subject to TMDLs or 303(d) list	No	Page 8 of 20	**Industrial and commercial inspection program limited to discharges from municipal landfills, hazardous waste treatment, storage and disposal and recovery facilities, facilities that are subject to EPCRA Title III, Section 313, and other industrial and commercial discharges that the permittees determines is contributing to a substantial pollutant loading to the MS4. Permit also does not require confirmation of WDID or NECs or additional BMPs based on proximity to an impaired waterbody**
IV. E (IV. G)	**Requirements Relating to Post-Construction BMPs** Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X - Implement GIS or other system for tracking post-construction projects - Include project ID, acreage, BMP type and locations, date of acceptance and maintenance agreements, inspection dates and results	No	-	-
	Part VI.D.7.d(iv)(1)(b) - Inspect all development sites upon completion to ensure proper installation of BMPs	No	-	-
	Part VI.D.7.d(iv)(1)(c) - Develop post construction BMP maintenance checklist - Inspect at least every 2 years	No	-	-
	Construction Site Requirements Part VI.D.8.g(i) - Develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. F (IV. H)	Part VI.D.8.g(ii) - Complete an inventory of projects (and continually update) - Include contact information, site information, proximity of waterbodies, significant threats to water quality, construction phase, inspection frequency, start and completion dates, NOI, date of ESCP approval, O&M requirements	No	-	-
	Part VI.D.8.h - Develop and implement review procedures for construction plan documents - Prep and submittal of ESCP, verification of CGP coverage - Develop and implement a checklist to conduct and document review of the ESCP	No	Page 9 of 20	-
	Part VI.D.8.i(i) - Develop and implement technical standards for selection, implementation and maintenance of construction BMPs	No	-	-
	Part VI.D.8.i(ii) - Construction BMPs must address risks posed by project and conform with Permit Table 15 - BMPs for paving projects must meet Permit Tables 14 and 16 - Provide installation designs and cut sheets for ESCPs - Provide maintenance expectations for each BMP or category of BMPs	No	-	-
	Part VI.D.8.i(iv) - Make technical standards "readily available" to development community - Standards must be "clearly referenced" within the webiste, ordinance, and permit approval process, and/or ESCP review form	No	-	-
	Part VI.D.8.i(v) - Local BMP technical standards must cover all items in Permit Tables 13-16	No	-	-

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
	Part VI.D.8.j - Inspect all construction sites one acre or greater - prior to land disturbance, during active construction, at conclusion of project - prior to Certificate of Occupancy - Develop SOPs for inspections - During inspection - confirm coverage for CGP, review the ESCP, review BMPs, observe non-stormwater discharges - Develop a written report	No	-	-
	Part VI.D.8.l(i-ii) - Training for all staff (public and private) whose primary duties are related to the construction program (plan reviewers, permitting staff, inspectors, third party)	No	Page 9 of 20	**Permit requires the provision of assistance to appropriate municipal agencies in the development of education and training measures for construction site operators.**
IV. G (IV.C)	**Public Agency Requirements** Part VI.D.9.c & VI.D.4.c(iii) - Maintain an updated inventory of permittee-owned or operated facilities that are potential sources of pollution (24 categories) - Include name, address, contact information, description activities performed, potential sources, other permits - Minimum update every 5 years	No	-	-
	Part VI.D.9.d(i) - Develop an inventory of retrofitting opportunities	No	Page 6 of 20	**Permit only requires an evaluation of retrofitting opportunities for existing flood control devices, not all public right of ways or in coordination with TMDLs. Also permit does not require the development of an inventory.**
	Part VI.D.9.d(ii) - Screen existing areas of development to identify areas for retrofitting used watershed models or other tools - Evalute and rank identified opportunities	No	-	-
	Part VI.D.9.d(iv) - Consider results of evaluation - give highly feasible projects a high priority to implement controls - Consider high priority retrofit projects for off-site mitigation for new development projects	No	Page 6 of 20	**Permit only requires an evaluation of retrofitting opportunities for existing structural flood control devices.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
	Part VI.D.9.d(v) - Cooperate with private land owners to encourage site specific retrofitting projects. - Consider demonstration retrofit projects, projects on public lands, education and outreach, subsidies, requiring retrofit projects as enforcement, mitigation, public and private partnerships, reduction of fees.	No	-	-
	Part VI.D.9.g(ii) and VI.D.4.c(vi) - Implement and demonstrate implementation of an IPM program - Including restrictions on use of pesticides, target organisms, human health, beneficial non-target organisms, partnering with other agencies - Prepare and update and inventory of pesticides and quantify the use	No	-	-
	Part VI.D.9.h(vii) - Where no Trash TMDL - install trash excluders on or in catch basins or outfalls (except where it would cause flooding)	No	-	-
	Part VI.D.9.k(ii) and VI.D.4.c(x)(2) - Train all employees and contractors who use or have the potential to use pesticides or fertilizers - Specifies topics to address	No	-	-
	Illicit Connection and Discharge Program Part VI.D.10.d(iii) and VI.D.4.d(v)(2) - Ensure that signage adjacent to open channels…include information regarding dumping prohibitions and public reporting of illicit discharges	No	-	-
	Part VI.D.10.d(iv) VI.D.4.d(v)(3) - Develop and maintain written procedures to document how complaints are received, documented, and tracked - Evaluate and update as needed	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Boston, MA	MS4-Phase I	MAS010001	1999* [Still valid]	Boston MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. H (IV.D)	Part VI.D.10.d(v) and VI.D.4.d(v)(4) - Maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action udnertaken in response.	No	-	-
	Part VI.D.10.e(i) - Implement a spill response plan for all sewage and other spills that may discharge into the MS4	Similar provisions, not as prescriptive	Page 8 of 20	**Permit requires the development and implementation of a spill response program.**
	Part VI.D.10.e(i)(1) - Spill response plan must identify agencies responsible for spill response and cleanup, phone numbers, and email addresses - Address coordination with spill response teams	Similar provisions, not as prescriptive	Page 8 of 20	**Permit requires the development and implementation of a spill response program that is coordinated with federal state and municipal agencies.**
	Part VI.D.10.e(i)(3-4) and VI.D.4.d(vi)(1) - Respond to spills for containment within 4 hours of becoming aware of the spill - on private property within 2 hours of gaining legal access - Report spills that endanger health or the environment to public health agencies and OES	No	Page 4 of the Fact Sheet	-

1 - The numbering of the items from the narrative statements is driven by the narrative statement from Test Claim 13-TC-01, differences in numbering from Test Claim 13-TC-02 are noted in parantheses.

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV.A	**TMDL Requirements** a. Part VI.E.1.c and Attachments L through R - Comply with water quality based effluent limits (WQBELs) and/or receiving water limitations (RWLs), consistent with WLAs	No	Pages 3 and 15 of 21	-**Permittee required to develop a storm water program designed to reduce the discharge of pollutants to the maximum extent practicable.** **- Permit does not incorporate TMDLs.** **- No numeric effluent limits.**
	b. Attachment K - Sets forth the applicable TMDLs	No	---	**Permit does not incorporate TMDLs.**
	c. Attachments L through Q - Sets forth requirements of the applicable TMDLs and its WLAs	No	---	**Permit does not incorporate TMDLs.**
	d. Parts VI.B and VI.C - Comply with Monitoring and Reporting Program or coordinate with an approved Watershed Management Program (consistent with Parts II.A and II.E of Attachment E)	No	---	**Permit does not incorporate TMDLs.**
	e. Attachment E and Part VI.E.2.a - Monitoring must occur consistent with the TMDL and at the TMDL compliance points - May meet the requirements through participation in a WMP or EWMP	No	---	**Permit does not incorporate TMDLs.**
	Requirements Related to Discharge Prohibitions for Non-Stormwater Part III.A.1 - Prohibit certain non-stormwater discharges "through the MS4 to receiving waters"	No	Pages 2, 8-9 of 21	**Requirement to effectively prohibit non-stormwater discharges to the MS4.**
	Parts III.A.2 and VI.D.9.f - Assure appropriate BMPs are employed for discharges from essential non-emergency firefighting activities - With regard to unpermitted discharges, work with drinking water suppliers on the conditions of their discharges	No	Page 8 of 21	**Permit includes general reference to emergency fire fighting activities as an authorized non-stormwater discharge. Does not require assurance of appropriate BMPs for non-emergency firefighting activities. Does not require coordination with water suppliers.**
	Part III.A.4.a - Develop and implement procedures to require non-stormwater dischargers to fulfill requirements in Part III.A.4. a(i-vi)	No	--	**--**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. B	Part III.A.4.b - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs - Work with local water purveyors (water use efficiency, use of drought tolerant native vegetation, less toxic pesticide controls) - Develop and implement a coordinated outreach and education program (minimize discharge of irrgation water)	No	Page 8 of 21	**Landscape irrigation, irrigation water, and lawn watering are authorized non-stormwater discharges. Control measures are only required if these categories of discharges are found to be significant sources of pollutants.**
	Part III.A.4.c - Evaluate monitoring data collected and any other associated data or information to determine if any authorized or conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance	No	Page 8 of 21	**No requirement to evaluate the authorized non-stormwater discharges.**
	Part III.A.4.d - If non-stormwater discharges are a source of pollutants - --determine if the discharge is causing or contributing to an exceedance --report findings to the Regional Water Board -- take steps to prohibit, condition, require diversion or treatment of the discharge	No	Pages 8-9 of 21	**General requirement to eliminate illicit connections and discharges as soon as possible. No requirement to impose conditions on non-stormwater discharges, or to require diversion or treatment.**
	Public Information Program Requirements Part VI.D.5.a - "measurably increase" the knowledge of target audiences (about MS4s, adverse impacts of stormwater pollution, potential solutions) - "measurably change" waste disposal and stormwater pollution generation behavior by developing and encouraging implementation of "appropriate alternatives" - involve and engage a diverse group of participants	No	Pages 9, 11-12 of 21	**Permit requires outreach to non-English speaking residents, but does not require measurable increases of changes/outcomes as a result of the implementation of the public education program.**
	Part VI.D.5.b - Implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually	Similar provisions	Pages 3 and 11-12 of 21	**Permit allows the permittee the option of implementing the public education program in cooperation with other municipal agencies or individually.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. C (IV. E)	Part VI.D.5.c - provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels and general information (via phone) - identify staff or departments serving as contact persons - organize public outreach events and activities (education seminars, clean-ups, and stenciling)	No	Page 11 of 21	**Permit requires the establishment and promotion of a hotline for reporting illicit connections and discharges. Otherwise not as prescriptive.**
	Part VI.D.5.d - conduct stormwater pollution prevention public service announcements and advertising campaigns - provide public education materials (vehicles, HHW, construction, pesticides and fertilizers, IPM, green waste, animal waste - provide activity specific materials (automotive parts, home improvement, lumber yards, hardware stores, landscaping, gardening, pet/feed stores - maintain the website - provide schools with materials - educate and involve ethinic communities	No	Pages 11-12 of 21	**The Permit requires a outreach effort limited to illicit discharge and disposal, automotive care, household hazardous waste, fertilizers and pesticides. The Permit also requires the development of materials for non-English speaking residents.**
IV. D (IV. F)	**Inventory and Inspections of Industrial/Commercial Sources** Part VI.D.6 - Develop and implement an industrial/commercial source program	No	Page 9-10 of 21	**'Industrial and commercial inspection program limited to discharges from municipal landfills, hazardous waste treatment, storage and disposal and recovery facilities, facilities that are subject to EPCRA Title III, Section 313, and other industrial and commercial discharges that the permittees determines is contributing to a substantial pollutant loading to the MS4.**
	Part VI.D.6.b - Tracking of nurseries and nursery centers and corresponding information (NAICS codes, exposure of materials, receiving water, proximity of facility to 303(d) listed receiving water, filing of NEC - Conduct field work as needed to obtain this information - Update inventory annually	No	-	-
	Part VI.D.6.d - Inspect commercial facilities, RGOs, nurseries and nursery centers twice during the permit term - Evaluate if effective source control BMPs are being implemented - Require implementation of additional BMPs when stormwater is discharged to a significant ecological area (TMDL, 303(d) list)	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
	Part VI.D.6.e - Inspect industrial facilties (Phase I facilities and Specified facilities) - Confirm WDID or NEC and require additional BMPs when stormwater is discharged to a water body subject to TMDLs or 303(d) list	No	Page 10 of 21	**Industrial and commercial inspection program limited to discharges from municipal landfills, hazardous waste treatment, storage and disposal and recovery facilities, facilities that are subject to EPCRA Title III, Section 313, and other industrial and commercial discharges that the permittees determines is contributing to a substantial pollutant loading to the MS4. Also, the Permit does not require confirmation of WDID or NECs or additional BMPs based on proximity to an impaired waterbody.**
IV. E (IV. G)	**Requirements Relating to Post-Construction BMPs** Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X - Implement GIS or other system for tracking post-construction projects - Include project ID, acreage, BMP type and locations, date of acceptance and maintenance agreements, inspection dates and results	No	-	-
	Part VI.D.7.d(iv)(1)(b) - Inspect all development sites upon completion to ensure proper installation of BMPs	No	-	-
	Part VI.D.7.d(iv)(1)(c) - Develop post construction BMP maintenance checklist - Inspect at least every 2 years	No	-	-
	Construction Site Requirements Part VI.D.8.g(i) - Develop an electronic system to inventory grading, encroachment, demolition, building, or construction permits	No	-	-
	Part VI.D.8.g(ii) - Complete an inventory of projects (and continually update) - Include contact information, site information, proximity of waterbodies, significant threats to water quality, construction phase, inspection frequency, start and completion dates, NOI, date of ESCP approval, O&M requirements	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

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Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. F (IV. H)	Part VI.D.8.h - Develop and implement review procedures for construction plan documents - Prep and submittal of ESCP, verification of CGP coverage - Develop and implement a checklist to conduct and document review of the ESCP	No	-	-
	Part VI.D.8.i(i) - Develop and implement technical standards for selection, implementation and maintenance of construction BMPs	No	-	-
	Part VI.D.8.i(ii) - Construction BMPs must address risks posed by project and conform with Permit Table 15 - BMPs for paving projects must meet Permit Tables 14 and 16 - Provide installation designs and cut sheets for ESCPs - Provide maintenance expectations for each BMP or category of BMPs	No	-	-
	Part VI.D.8.i(iv) - Make technical standards "readily available" to development community - Standards must be "clearly referenced" within the webiste, ordinance, and permit approval process, and/or ESCP review form	No	-	-
	Part VI.D.8.i(v) - Local BMP technical standards must cover all items in Permit Tables 13-16	No	-	-
	Part VI.D.8.j - Inspect all construction sites one acre or greater - prior to land disturbance, during active construction, at conclusion of project - prior to Certificate of Occupancy - Develop SOPs for inspections - During inspection - confirm coverage for CGP, review the ESCP, review BMPs, observe non-stormwater discharges - Develop a written report	No	-	-
	Part VI.D.8.l(i-ii) - Training for all staff (public and private) whose primary duties are related to the construction program (plan reviewers, permitting staff, inspectors, third party)	No	Page 11 of 21	**Permit only requires development of appropriate education and training measures for construction site operators.**

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
IV. G (IV.C)	**Public Agency Requirements** Part VI.D.9.c & VI.D.4.c(iii) - Maintain an updated inventory of permittee-owned or operated facilities that are potential sources of pollution (24 categories) - Include name, address, contact information, description activities performed, potential sources, other permits - Minimum update every 5 years	No	-	-
	Part VI.D.9.d(i) - Develop an inventory of retrofitting opportunities	No	Page 7 of 21	**Permit only requires an evaluation of retrofitting opportunities for existing flood control devices, not all public right of ways or in coordination with TMDLs. Also permit only requires an evaluation of retrofitting opportunities, not the development of an inventory.**
	Part VI.D.9.d(ii) - Screen existing areas of development to identify areas for retrofitting used watershed models or other tools - Evalute and rank identified opportunities	No	-	-
	Part VI.D.9.d(iv) - Consider results of evaluation - give highly feasible projects a high priority to implement controls - Consider high priority retrofit projects for off-site mitigation for new development projects	No	Page 7 of 21	**Permit only requires an evaluation of retrofitting opportunities for existing structural flood control devices.**
	Part VI.D.9.d(v) - Cooperate with private land owners to encourage site specific retrofitting projects. - Consider demonstration retrofit projects, projects on public lands, education and outreach, subsidies, requiring retrofit projects as enforcement, mitigation, public and private partnerships, reduction of fees.	No	-	-
	Part VI.D.9.g(ii) and VI.D.4.c(vi) - Implement and demonstrate implementation of an IPM program - Including restrictions on use of pesticides, target organisms, human health, beneficial non-target organisms, partnering with other agencies - Prepare and update and inventory of pesticides and quantify the use	No	-	-

City - State	Permit Type	Permit Number	Year Issued	Internet Link
Worcester, MA	MS4-Phase I	MAS010002	1998* [Still valid]	Worcester MS4

* EPA currently developing a permit to replace the older one.

Item # in Narrative Statement[1]	Los Angeles Region Permit Mandated Activity Order No. R4-2012-0175	Does this EPA-Issued Permit have the Same Requirement as the Los Angeles Region Permit Issued to the Claimants?	Page Number	Description
	Part VI.D.9.h(vii) - Where no Trash TMDL - install trash excluders on or in catch basins or outfalls (except where it would cause flooding)	No	-	-
	Part VI.D.9.k(ii) and VI.D.4.c(x)(2) - Train all employees and contractors who use or have the potential to use pesticides or fertilizers - Specifies topics to address	No	-	-
IV. H (IV.D)	**Illicit Connection and Discharge Program** Part VI.D.10.d(iii) and VI.D.4.d(v)(2) - Ensure that signage adjacent to open channels…include information regarding dumping prohibitions and public reporting of illicit discharges	No	-	-
	Part VI.D.10.d(iv) VI.D.4.d(v)(3) - Develop and maintain written procedures to document how complaints are received, documented, and tracked - Evaluate and update as needed	No	-	-
	Part VI.D.10.d(v) and VI.D.4.d(v)(4) - Maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action udnertaken in response.	No	-	-
	Part VI.D.10.e(i) - Implement a spill response plan for all sewage and other spills that may discharge into the MS4	Similar provisions, not as prescriptive	Page 9 of 21	**Permit requires the development and implementation of a spill response program.**
	Part VI.D.10.e(i)(1) - Spill response plan must identify agencies responsible for spill response and cleanup, phone numbers, and email addresses - Address coordination with spill response teams	Similar provisions, not as prescriptive	Page 9 of 21	**Permit requires the development and implementation of a spill response program that is coordinated with other agencies.**
	Part VI.D.10.e(i)(3-4) and VI.D.4.d(vi)(1) - Respond to spills for containment within 4 hours of becoming aware of the spill - on private property within 2 hours of gaining legal access - Report spills that endanger health or the environment to public health agencies and OES	No	-	-

1 - The numbering of the items from the narrative statements is driven by the narrative statement from Test Claim 13-TC-01, differences in numbering from Test Claim 13-TC-02 are noted in parantheses.

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EXHIBIT 2

Albuquerque, NM – Middle Rio Grande Watershed Based MS4 Permit

(NPDES General Permit No. NMR04A000)

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Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

NPDES General Permit No. NMR04A000

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, as amended, (33 U.S.C. 1251 et. seq; the "Act"), except as provided in Part I.A.5 of this permit, operators of municipal separate storm sewer systems located in the area specified in Part I.A.1 are authorized to discharge pollutants to waters of the United States in accordance with the conditions and requirements set forth herein.

Only operators of municipal separate storm sewer systems in the general permit area who submit a Notice of Intent and a storm water management program document in accordance with Part I.A.6 of this permit are authorized to discharge storm water under this general permit.

This is a renewal NPDES permit issued for these portions of the small municipal separate storm sewer systems covered under the NPDES permit No NMR040000 and NMR04000I and the large municipal separate storm sewer systems covered under the NPDES permit No NMS000101.

This permit is issued on and shall become effective on the date of publication in the Federal Register. DEC 2 2 2014

This permit and the authorization to discharge shall expire at, midnight, December 19, 2019.

Signed by

William K. Honker, P.E.
Director
Water Quality Protection Division

Prepared by

Nelly Smith
Environmental Engineer
NPDES Permits and TMDLs Branch

MIDDLE RIO GRANDE WATERSHED BASED MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

Table of Contents

PART I. INDIVIDUAL PERMIT CONDITIONS

A. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1. **Permit Area.** This permit is available for MS4 operators within the Middle Rio Grande Sub-Watersheds described in Appendix A. This permit may authorize stormwater discharges to waters of the United States from MS4s within the Middle Rio Grande Watershed provided the MS4:

   a. Is located fully or partially within the corporate boundary of the City of Albuquerque;

   b. Is located fully or partially within the Albuquerque urbanized area as determined by the 2000 and 2010 Decennial Census. Maps of Census 2010 urbanized areas are available at: http://water.epa.gov/polwaste/npdes/stormwater/Urbanized-Area-Maps-for-NPDES-MS4-Phase-II-Stormwater-Permits.cfm;

   c. Is designated as a regulated MS4 pursuant to 40 CFR 122.32; or

   d. This permit may also authorize an operator of a MS4 covered by this permit for discharges from areas of a regulated small MS4 located outside an Urbanized Areas or areas designated by the Director provided the permittee complies with all permit conditions in all areas covered under the permit.

2. **Potentially Eligible MS4s.** MS4s located within the following jurisdictions and other areas, including any designated by the Director, are potentially eligible for authorization under this permit:

   - City of Albuquerque
   - AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
   - UNM (University of New Mexico)
   - NMDOT (New Mexico Department of Transportation District 3)
   - Bernalillo County
   - Sandoval County
   - Village of Corrales
   - City of Rio Rancho
   - Los Ranchos de Albuquerque
   - KAFB (Kirtland Air Force Base)
   - Town of Bernalillo
   - EXPO (State Fairgrounds/Expo NM)
   - SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
   - ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
   - Sandia Laboratories, Department of Energy (DOE)
   - Pueblo of Sandia
   - Pueblo of Isleta
   -Pueblo of Santa Ana

3. **Eligibility**. To be eligible for this permit, the operator of the MS4 must provide:

   a. Public Participation: Prior submitting the Notice of Intent (NOI), the operator of the MS4 must follow the local notice and comment to procedures at Part I.D.5.h.(i).

   b. National Historic Preservation Act (NHPA) Eligibility Provisions

   In order to be eligible for coverage under this permit, the applicant must be in compliance with the National Historic Preservation Act. Discharges may be authorized under this permit only if:

(i) Criterion A: storm water discharges, allowable non-storm water discharges, and discharge-related activities do not affect a property that is listed or is eligible for listing on the National Register of Historic Places as maintained by the Secretary of the Interior; or

(ii) Criterion B: the applicant has obtained and is in compliance with a written agreement with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) (or equivalent tribal authority) that outlines all measures the MS4 operator will undertake to mitigate or prevent adverse effect to the historic property.

Appendix C of this permit provides procedures and references to assist with determining permit eligibility concerning this provision. You must document and incorporate the results of your eligibility determination in your SWMP.

The permittee shall also comply with the requirements in Part IV.U.

4. **Authorized Non-Stormwater Discharges**. The following non-stormwater discharges need not be prohibited unless determined by the permittees, U.S. Environmental Protection Agency (EPA), or New Mexico Environment Department (NMED) to be significant contributors of pollutants to the municipal separate storm sewer system (MS4). Any such discharge that is identified as significant contributor pollutants to the MS4, or as causing or contributing to a water quality standards violation, must be addressed as an illicit discharge under the illicit discharge and improper disposal practices established pursuant to Part I.D.5.e of this permit. For all of the discharges listed below, not treated as illicit discharges, the permittee must document the reason these discharges are not expected to be significant contributors of pollutants to the MS4. This documentation may be based on either the nature of the discharge or any pollution prevention/treatment requirements placed on such discharges by the permittee.

- potable water sources, including routine water line flushing;
- lawn, landscape, and other irrigation waters provided all pesticides, herbicides and fertilizers have been applied in accordance with approved manufacturing labeling and any applicable permits for discharges associated with pesticide, herbicide and fertilizer application;
- diverted stream flows;
- rising ground waters;
- uncontaminated groundwater infiltration (as defined at 40 CFR §35.2005 (20));
- uncontaminated pumped groundwater;
- foundation and footing drains;
- air conditioning or compressor condensate;
- springs;
- water from crawl space pumps;
- individual residential car washing;
- flows from riparian habitats and wetlands;
- dechlorinated swimming pool discharges;
- street wash waters that do not contain detergents and where no un-remediated spills or leaks of toxic or hazardous materials have occurred;
- discharges or flows from fire fighting activities (does not include discharges from fire fighting training activities); and,
- other similar occasional incidental non-stormwater discharges (e.g. non-commercial or charity car washes, etc.)

5. **Limitations of Coverage**. This permit does not authorize:

a. Non-Storm Water: Discharges that are mixed with sources of non-storm water unless such non-storm water discharges are:

(i) In compliance with a separate NPDES permit; or

(ii) Exempt from permitting under the NPDES program; or

(iii) Determined not to be a substantial contributor of pollutants to waters of the United States. See Part I.A.4.

b. Industrial Storm Water: Storm water discharges associated with industrial activity as defined in 40 CFR §122.26(b)(14)(i)-(ix) and (xi).

c. Construction Storm Water: Storm water discharges associated with construction activity as defined in 40 CFR §122.26(b)(14)(x) or 40 CFR §122.26(b)(15).

d. Currently Permitted Discharges: Storm water discharges currently covered under another NPDES permit.

e. Discharges Compromising Water Quality: Discharges that EPA, prior to authorization under this permit, determines will cause, have the reasonable potential to cause, or contribute to an excursion above any applicable water quality standard. Where such a determination is made prior to authorization, EPA may notify you that an individual permit application is necessary in accordance with Part IV.M. However, EPA may authorize your coverage under this permit after you have included appropriate controls and implementation procedures in your SWMP designed to bring your discharge into compliance with water quality standards.

f. Discharges Inconsistent with a TMDL: You are not eligible for coverage under this permit for discharges of pollutants of concern to waters for which there is an applicable total maximum daily load (TMDL) established or approved by EPA unless you incorporate into your SWMP measures or controls that are consistent with the assumptions and requirements of such TMDL. To be eligible for coverage under this general permit, you must incorporate documentation into your SWMP supporting a determination of permit eligibility with regard to waters that have an EPA-established or approved TMDL. If a wasteload allocation has been established that would apply to your discharge, you must comply with the requirements established in Part I.C.2.b.(i). Where an EPA-approved or established TMDL has not specified a wasteload allocation applicable to municipal storm water discharges, but has not specifically excluded these discharges, adherence to a SWMP that meets the requirements in Part I.C.2.b.(ii) of this general permit will be presumed to be consistent with the requirements of the TMDL. If the EPA-approved or established TMDL specifically precludes such discharges, the operator is not eligible for coverage under this general permit.

6. **Authorization Under This General Permit**

a. Obtaining Permit Coverage.

(i) An MS4 operator seeking authorization to discharge under this general permit must submit electronically a complete notice of intent (NOI) to the e-mail address provided in Part I.B.3 (see suggested EPA R6 MS4 NOI format located in EPA website at http://epa.gov/region6/water/npdes/sw/ms4/index.htm), in accordance with the deadlines in Part I.B.1 of this permit. The NOI must include the information and attachments required by Parts I.B.2, Part I.A.3, Part I.D.5.h.(i), and I.A.5.f of this permit. By submitting a signed NOI, the applicant certifies that all eligibility criteria for permit coverage have been met. If EPA notifies a discharger (either directly, by public notice, or by making information available on the Internet) of other NOI options that become available at a later date, such as electronic submission of forms or information, the MS4 operator may take advantage of those options to satisfy the NOI submittal requirements.

(ii) If an operator changes or a new operator is added after an NOI has been submitted, the operator must submit a new or revised NOI to EPA.

(iii) An MS4 operator who submits a complete NOI and meets the eligibility requirements in Part I of this permit is authorized to discharge storm water from the MS4 under the terms and conditions of this general permit only upon written notification by the Director. After review of the NOI and any public comments on the NOI, EPA may condition permit coverage on correcting any deficiencies or on including a schedule to respond to any public comments. (See also Parts I.A.3 and Part I.D.5.h.(i).)

(iv) If EPA notifies the MS4 operator of deficiencies or inadequacies in any portion of the NOI (including the SWMP), the MS4 operator must correct the deficient or inadequate portions and submit a written statement to EPA certifying that appropriate changes have been made. The certification must be submitted within the time-frame specified by EPA and must specify how the NOI has been amended to address the identified concerns.

(v) The NOI must be signed and certified in accordance with Parts IV.H.1 and 4. Signature for the NOI, which effectively takes the place of an individual permit application, may not be delegated to a lower level under Part IV.H.2

b. Terminating Coverage.

(i) A permittee may terminate coverage under this general permit by submitting a notice of termination (NOT). Authorization to discharge terminates at midnight on the day the NOT is post-marked for delivery to EPA.

(ii) A permittee must submit an NOT to EPA within 30 days after the permittee:

(a) Ceases discharging storm water from the MS4,

(b) Ceases operations at the MS4, or

(c) Transfers ownership of or responsibility for the facility to another operator.

(iii) The NOT will consist of a letter to EPA and must include the following information:

(a) Name, mailing address, and location of the MS4 for which the notification is submitted;

(b) The name, address and telephone number of the operator addressed by the NOT;

(c) The NPDES permit number for the MS4;

(d) An indication of whether another operator has assumed responsibility for the MS4, the discharger has ceased operations at the MS4, or the storm water discharges have been eliminated; and

(e) The following certification:

I certify under penalty of law that all storm water discharges from the identified MS4 that are authorized by an NPDES general permit have been eliminated, or that I am no longer the operator of the MS4, or that I have ceased operations at the MS4. I understand that by submitting this Notice of Termination I am no longer authorized to discharge storm water under this general permit, and that discharging pollutants in storm water to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by an NPDES permit. I also understand that the submission of this Notice of Termination does not release an operator from liability for any violations of this permit or the Clean Water Act.

(f) NOTs, signed in accordance with Part IV.H.1 of this permit, must be sent to the e-mail address in Part I.B.3. Electronic submittal of the NOT required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

B. NOTICE OF INTENT REQUIREMENTS

1. **Deadlines for Notification**.

a. Designations: Small MS4s automatically designated under 40 CFR 122.32(a)(1), large MS4s located within the corporate boundary of the COA including the COA and former co-permittees under the NPDES permit No

NMS000101, and MS4s designated under 40 CFR 122.26(a)(1)(v), 40 CFR 122.26(a)(9)(i)(C) or (D), or 40 CFR 122.32(a)(2) are required to submit individual NOIs by the dates listed in Table 1. Any MS4 designated as needing a permit after issuance of this permit will be given an individualized deadline for NOI submittal by the Director at the time of designation.

In lieu of creating duplicate program elements for each individual permittee, implementation of the SWMP, as required in Part I.D, may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part D. For these programs with cooperative elements, the permittee may submit individual NOIs as established in Table 1. See also "Permittees with Cooperative Elements in their SWMP " under Part.I.B.4 and "Shared Responsibilities and Cooperative Programs" under Part I.D.3.

Table 1 Deadlines to Submit NOI

Permittee Class Type	NOI Deadlines
Class A: MS4s within the Cooperate Boundary of the COA including former co-permittees under the NPDES permit No NMS000101	90 days from effective date of the permit or 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class B: MS4s designated under 40 CFR 122.32(a)(1). Based on 2000 Decennial Census Map	90 days from effective date of the permit or 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class C: MS4s designated under 40 CFR 122.26(a)(1)(v), 40 CFR 122.26(a)(9)(i)(C) or (D), or 40 CFR 122.32(a)(2) or MS4s newly designated under 122.32(a)(1) based on 2010 Decennial Census Map	180 days from effective date of the permit or notice of designation, unless the notice of designation grants a later date or; 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.
Class D: MS4s within Indian Country Lands designed under 40 CFR 122.26(a)(1)(v), 122.26(a)(9)(i)(C) or (D), 122.32(a)(1), or 122.32(a)(2)	180 days from effective date of the permit or notice of designation, unless the notice of designation grants a later date or; 180 days from effective date of the permit if participating in cooperative programs for one or more program elements.

See Appendix A for list of potential permittees in the Middle Rio Grande Watershed

b. New Operators. For new operators of all or a part of an already permitted MS4 (due to change on operator or expansion of the MS4) who will take over implementation of the existing SWMP covering those areas, the NOI must be submitted 30 days prior to taking over operational control of the MS4. Existing permittees who are expanding coverage of their MS4 area (e.g., city annexes part of unincorporated county MS4) are not required to submit a new NOI, but must comply with Part I.D.6.d.

c. Submitting a Late NOI. MS4s not able to meet the NOI deadline in Table I and Part I.B.1.b due to delays in determining eligibility should notify EPA of the circumstance and progress to date at the address in Part I.B.3 and then proceed with a late NOI. MS4 operators are not prohibited from submitting an NOI after the dates provided in Table 1 and Part I.B.1.b. If a late NOI is submitted, the authorization is only for discharges that occur after permit coverage is effective. The permitting authority reserves the right to take appropriate enforcement actions for any unpermitted discharges.

d. End of Administrative Continued Coverage under Previous Permit. Administrative continuance is triggered by a timely reapplication. Discharges submitting an NOI for coverage under this permit are considered to have met

the timely reapplication requirement if NOI is submitted by the deadlines included in Table 1 of Part I.B.1. For MS4s previously covered under either NMS000101 or NMR040000, continued coverage under those permits ends: a) the day after the applicable deadline for submittal of an NOI if a complete NOI has not been submitted or b) upon notice of authorization under this permit if a complete and timely NOI is submitted.

2. **Contents of Notice of Intent**. An MS4 operator eligible for coverage under this general permit must submit an NOI to discharge under this general permit. The NOI will consist of a letter to EPA containing the following information (see suggested EPA R6 MS4 NOI Format located in EPA website at http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm) and must be signed in accordance with Part IV.H of this permit:

   a. The legal name of the MS4 operator and the name of the urbanized area and core municipality (or Indian reservation/pueblo) in which the operator's MS4 is located;

   b. The full facility mailing address and telephone number;

   c. The name and phone number of the person or persons responsible for overall coordination of the SWMP;

   d. An attached location map showing the boundaries of the MS4 under the applicant's jurisdiction. The map must include streets or other demarcations so that the exact boundaries can be located;

   e. The area of land served by the applicant's MS4 (in square miles);

   f. The latitude and longitude of the approximate center of the MS4;

   g. The name(s) of the waters of the United States that receive discharges from the system.

   h. If the applicant is participating in a cooperative program element or is relying on another entity to satisfy one or more permit obligations (see Part I.D.3), identify the entity(ies) and the element(s) the entity(ies) will be implementing;

   i. Information on each of the storm water minimum control measures in Part I.D.5 of this permit and how the SWMP will reduce pollutants in discharges to the Maximum Extent Practicable. For each minimum control measure, include the following:

      (i) Description of the best management practices (BMPs) that will be implemented;

      (ii) Measurable goals for each BMP; and

      (iii) Time frames (i.e., month and year) for implementing each BMP;

   j. Based on the requirements of Part I.A.3.b describe how the eligibility criteria for historic properties have been met;

   k. Indicate whether or not the MS4 discharges to a receiving water for which EPA has approved or developed a TMDL. If so, describe how the eligibility requirements of Part I.A.5.f and Part I.C.2 have been met.

      Note: If an individual permittee or a group of permittees seeks an alternative sub-measureable goal for TMDL controls under Part I.C.2.b.(i).(c).B, the permittee or a group of permittees must submit a preliminary proposal with the NOI. This proposal shall include, but is not limited to, the elements included in Appendix B under Section B.2.

   l. Signature and certification by an appropriate official (see Part IV.H). The NOI must include the certification statement from Part IV.H.4.

3. **Where to Submit.** The MS4 operator must submit the signed NOI to EPA via e-mail at R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4) and NMED to the address provided in Part III.D.4. See also Part III.D.4 to determine if a copy must be provided to a Tribal agency.

   The following MS4 operators: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA must submit the signed NOI to the Pueblo of Sandia to the address provided in Part III.D.4.

   Note: See suggested EPA R6 MS4 NOI Format located in EPA website at http://www.epa.gov/region6/water/npdes/sw/ms4/index.htm. A complete copy of the signed NOI should be maintained on site. Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

4. **Permittees with Cooperative Elements in their SWMP.** Any MS4 that meets the requirements of Part I.A of this general permit may choose to partner with one or more other regulated MS4 to develop and implement a SWMP or SWMP element. The partnering MS4s must submit separate NOIs and have their own SWMP, which may incorporate jointly developed program elements. If responsibilities are being shared as provided in Part I.D.3 of this permit, the SWMP must describe which permittees are responsible for implementing which aspects of each of the minimum measures. All MS4 permittees are subject to the provisions in Part I.D.6.

   Each individual MS4 in a joint agreement implementing a permit condition will be independently assessed for compliance with the terms of the joint agreement. Compliance with that individual MS4s obligations under the joint agreement will be deemed compliance with that permit condition. Should one or more individual MS4s fail to comply with the joint agreement, causing the joint agreement program to fail to meet the requirements of the permit, the obligation of all parties to the joint agreement is to develop within 30 days and implement within 90 days an alternative program to satisfy the terms of the permit.

C. SPECIAL CONDITIONS

1. **Compliance with Water Quality Standards**. Pursuant to Clean Water Act §402(p)(3)(B)(iii) and 40 CFR §122.44(d)(1), this permit includes provisions to ensure that discharges from the permittee's MS4 do not cause or contribute to exceedances of applicable surface water quality standards, in addition to requirements to control discharges to the maximum extent practicable (MEP) set forth in Part I.D. Permittees shall address stormwater management through development of the SWMP that shall include the following elements and specific requirements included in Part VI.

   a. Permittee's discharges shall not cause or contribute to an exceedance of surface water quality standards (including numeric and narrative water quality criteria) applicable to the receiving waters. In determining whether the SWMP is effective in meeting this requirement or if enhancements to the plan are needed, the permittee shall consider available monitoring data, visual assessment, and site inspection reports.

   b. Applicable surface water quality standards for discharges from the permittees' MS4 are those that are approved by EPA and any other subsequent modifications approved by EPA upon the effective date of this permit found at New Mexico Administrative Code §20.6.4. Discharges from various portions of the MS4 also flow downstream into waters with Pueblo of Isleta and Pueblo of Sandia Water Quality Standards;

   c. The permittee shall notify EPA and the Pueblo of Isleta in writing as soon as practical but not later than thirty (30) calendar days following each Pueblo of Isleta water quality standard exceedance at an in-stream sampling location. In the event that EPA determines that a discharge from the MS4 causes or contributes to an exceedance of applicable surface water quality standards and notifies the permittee of such an exceedance, the permittee shall, within sixty (60) days of notification, submit to EPA, NMED, Pueblo of Isleta (upon request) and Pueblo of Sandia (upon request), a report that describes controls that are currently being implemented and additional controls that will be implemented to prevent pollutants sufficient to ensure that the discharge will no longer cause or contribute to an exceedance of applicable surface water quality standards. The permittee shall implement such additional controls upon notification by EPA and shall incorporate such measures into their SWMP as described in Part I.D of this permit. NMED or the affected Tribe may provide information

documenting exceedances of applicable water quality standards caused or contributed to by the discharges authorized by this permit to EPA Region 6 and request EPA take action under this paragraph.

d. Phase I Dissolved Oxygen Program (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): Within one year from effective date of the permit , the permittees shall revise the May 1, 2012 Strategy to continue taking measures to address concerns regarding discharges to the Rio Grande by implementing controls to eliminate conditions that cause or contribute to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. The permittees shall:

(i) Continue identifying structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;

(ii) Continue implementing controls, and updating/revising as necessary, to eliminate structural elements or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the United States;

(iii) To verify the remedial action in the North Diversion Channel Embayment, the COA and AMAFCA shall continue sampling for DO and temperature until the data indicate the discharge does not exceed applicable dissolved oxygen water quality standards in waters of the United States; and

(iv) Submit a revised strategy to FWS for consultation and EPA for approval from a year of effective date of the permit and progress reports with the subsequent Annual Reports. Progress reports to include:

(a) Summary of data.

(b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States. Including summary of findings of the assessment required in Part I.C.1.d.(i).

(c) Conclusions drawn, including support for any determinations.

(d) Activities undertaken to eliminate MS4 discharge contribution to exceedances of applicable dissolved oxygen water quality standards in waters of the United States.

(e) Account of stakeholder involvement.

e. PCBs (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit and Bernalillo County): The permittee shall address concerns regarding PCBs in channel drainage areas specified in Part I.C.1.e.(vi) by developing or continue updating/revising and implementing a strategy to identify and eliminate controllable sources of PCBs that cause or contribute to exceedances of applicable water quality standards in waters of the United States. Bernalillo County shall submit the proposed PCB strategy to EPA within two (2) years from the effective date of the permit and submit a progress report with the third and with subsequent Annual Reports. COA and AMAFCA shall submit a progress report with the first and with the subsequent Annual Reports. The progress reports shall include:

(i) Summary of data.

(ii) Findings regarding controllable sources of PCBs in the channel drainages area specified in Part I.C.1.e.(vi) that cause or contribute to exceedances of applicable water quality standards in waters of the United States via the discharge of municipal stormwater.

(iii) Conclusions drawn, including supporting information for any determinations.

(iv) Activities undertaken to eliminate controllable sources of PCBs in the drainage areas specified in Part I.C.1.e.(vi) that cause or contribute to exceedances of applicable water quality standards in waters of the United States via the discharge of municipal stormwater including proposed activities that extend beyond the five (5) year permit term.

(v) Account of stakeholder involvement in the process.

(vi) Channel Drainage Areas: The PCB strategy required in Part I.C.1.e is only applicable to:

COA and AMAFCA Channel Drainage Areas:
- San Jose Drain
- North Diversion Channel

Bernalillo County Channel Drainage Areas:
- Adobe Acres Drain
- Alameda Outfall Channel
- Paseo del Norte Outfall Channel
- Sanchez Farm Drainage Area

A cooperative strategy to address PCBs in the COA, AMAFCA and Bernalillo County's drainage areas may be developed between Bernalillo County, AMAFCA, and the COA. If a cooperative strategy is developed, the cooperative strategy shall be submitted to EPA within three (3) years from the effective date of the permit and submit a progress report with the fourth and with subsequent Annual Reports,

Note: COA and AMAFCA must continue implementing the existing PCB strategy until a new Cooperative PCB Strategy is submitted to EPA.

f. Temperature (Applicable only to the COA and AMAFCA as a continuation of program in 2012 NMS000101 individual permit): The permittees must continue assessing the potential effect of stormwater discharges in the Rio Grande by collecting and evaluating additional data. If the data indicates there is a potential of stormwater discharges contributing to exceedances of applicable temperature water quality standards in waters of the United States, within thirty (30) days such as findings, the permittees must develop and implement a strategy to eliminate conditions that cause or contribute to these exceedances. The strategy must include:

(i) Identify structural controls, post construction design standards, or pollutants contributing to raised temperatures in the receiving waters of the Rio Grande. Both dry and wet weather discharges shall be addressed. Assessment may be made using available data or collecting additional data;

(ii) Develop and implement controls to eliminate structural controls, post construction design standards, or the discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for temperature in waters of the United States; and

(iii) Provide a progress report with the first and with subsequent Annual Reports. The progress reports shall include:

(a) Summary of data.

(b) Activities undertaken to identify MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.

(c) Conclusions drawn, including supporting information for any determinations.

(d) Activities undertaken to reduce MS4 discharge contribution to exceedances of applicable temperature water quality standards in waters of the United States.

(e) Accounting of stakeholder involvement.

2. **Discharges to Impaired Waters with and without approved TMDLs.** Impaired waters are those that have been identified pursuant to Section 303(d) of the Clean Water Act as not meeting applicable surface water quality standards. This may include both waters with EPA-approved Total Maximum Daily Loads (TMDLs) and those for which a TMDL has not yet been approved. For the purposes of this permit, the conditions for discharges to impaired waters also extend to controlling pollutants in MS4 discharges to tributaries to the listed impaired waters in the Middle Rio Grande watershed boundary identified in Appendix A.

   a. Discharges of pollutant(s) of concern to impaired water bodies for which there is an EPA approved total maximum daily load (TMDL) are not eligible for this general permit unless they are consistent with the approved TMDL. A water body is considered impaired for the purposes of this permit if it has been identified, pursuant to the latest EPA approved CWA §303(d) list, as not meeting New Mexico Surface Water Quality Standards.

   b. The permittee shall control the discharges of pollutant(s) of concern to impaired waters and waters with approved TMDLs as provided in sections (i) and (ii) below, and shall assess the success in controlling those pollutants.

      (i) Discharges to Water Quality Impaired Water Bodies with an Approved TMDL
      If the permittee discharges to an impaired water body with an approved TMDL (see Appendix B), where stormwater has the potential to cause or contribute to the impairment, the permittee shall include in the SWMP controls targeting the pollutant(s) of concern along with any additional or modified controls required in the TMDL and this section. The SWMP and required annual reports must include information on implementing any focused controls required to reduce the pollutant(s) of concern as described below:

         (a) Targeted Controls: The SWMP submitted with the first annual report must include a detailed description of all targeted controls to be implemented, such as identifying areas of focused effort or implementing additional Best Management Practices (BMPs) that will be implemented to reduce the pollutant(s) of concern in the impaired waters.

         (b) Measurable Goals: For each targeted control, the SWMP must include a measurable goal and an implementation schedule describing BMPs to be implemented during each year of the permit term. Where the impairment is for bacteria, the permittee must, at minimum comply with the activites and schedules described in Table 1.a of Part I.C.2.(iii).

         (c) Identification of Measurable Goal: The SWMP must identify a measurable goal for the pollutant(s) of concern. The value of the measurable goal must be based on one of the following options:

            A. If the permittee is subject to a TMDL that identifies an aggregate Waste Load Allocation (WLA) for all or a class of permitted MS4 stormwater sources, then the SWMP may identify such WLA as the measurable goal. Where an aggregate WLA measurable goal is used, all affected MS4 operators are jointly responsible for progress in meeting the measurable goal and shall (jointly or individually) develop a monitoring/assessment plan. This program element may be coordinated with the monitoring required in Part III.A.

            B. Alternatively, if multiple permittees are discharging into the same impaired water body with an approved TMDL (which has an aggregate WLA for all permitted stormwater MS4s), the MS4s may combine or share efforts, in consultation with/and the approval of NMED, to determine an alternative sub-measurable goal derived from the WLA for the pollutant(s) of concern (e.g., bacteria) for their respective MS4. The SWMP must clearly define this alternative approach and must describe how the sub-measurable goals would cumulatively support the aggregate WLA. Where an aggregate WLA measurable goal has been broken into sub-measurable goals for individual MS4s, each permittee is only responsible for progress in meeting its WLA sub-measurable goal.

C. If the permittee is subject to an individual WLA specifically assigned to that permittee, the measurable goal must be the assigned WLA. Where WLAs have been individually assigned, or where the permittee is the only regulated MS4 within the urbanized area that is discharging into the impaired watershed with an approved TMDL, the permittee is only responsible for progress in meeting its WLA measurable goal.

(d) Annual Report: The annual report must include an analysis of how the selected BMPs have been effective in contributing to achieving the measurable goal and shallll include graphic representation of pollutant trends, along with computations of annual percent reductions achieved from the baseline loads and comparisons with the target loads.

(e) Impairment for Bacteria: If the pollutant of concern is bacteria, the permittee shall include focused BMPs addressing the five areas below, as applicable, in the SWMP and implement as appropriate. If a TMDL Implementation Plan (a plan created by the State or a Tribe) is available, the permittee may refer to the TMDL Implementation Plan for appropriate BMPs. The SWMP and annual report must include justification for not implementing a particular BMP included in the TMDL Implementation Plan. The permittee may not exclude BMPs associated with the minimum control measures required under 40 CFR §122.34 from their list of proposed BMPs. The BMPs shall, as appropriate, address the following:

A. Sanitary Sewer Systems
- Make improvements to sanitary sewers;
- Address lift station inadequacies;
- Identify and implement operation and maintenance procedures;
- Improve reporting of violations; and
- Strengthen controls designed to prevent over flows

B. On-site Sewage Facilities (for entities with appropriate jurisdiction)
- Identify and address failing systems; and
- Address inadequate maintenance of On-Site Sewage Facilities (OSSFs).

C. Illicit Discharges and Dumping
- Place additional effort to reduce waste sources of bacteria; for example, from septic systems, grease traps, and grit traps.

D. Animal Sources
- Expand existing management programs to identify and target animal sources such as zoos, pet waste, and horse stables.

E. Residential Education: Increase focus to educate residents on:
- Bacteria discharging from a residential site either during runoff events or directly;
- Fats, oils, and grease clogging sanitary sewer lines and resulting overflows;
- Decorative ponds; and
- Pet waste.

(f) Monitoring or Assessment of Progress: The permittee shall monitor or assess progress in achieving measurable goals and determining the effectiveness of BMPs, and shall include documentation of this monitoring or assessment in the SWMP and annual reports. In addition, the SWMP must include methods to be used. This program element may be coordinated with the monitoring required in Part III.A. The permittee may use the following methods either individually or in conjunction to evaluate progress towards the measurable goal and improvements in water quality as follows:

A. Evaluating Program Implementation Measures: The permittee may evaluate and report progress towards the measurable goal by describing the activities and BMPs implemented, by identifying the appropriateness of the identified BMPs, and by evaluating the success of implementing the measurable goals. The permittee may assess progress by using program implementation indicators

such as: (1) number of sources identified or eliminated; (2) decrease in number of illegal dumping; (3) increase in illegal dumping reporting; (4) number of educational opportunities conducted; (5) reductions in SSOs; or, 6) increase in illegal discharge detection through dry screening, etc.; and

B. Assessing Improvements in Water Quality: The permittee may assess improvements in water quality by using available data for segment and assessment units of water bodies from other reliable sources, or by proposing and justifying a different approach such as collecting additional instream or outfall monitoring data, etc. Data may be acquired from NMED, local river authorities, partnerships, and/or other local efforts as appropriate. Progress towards achieving the measurable goal shall be reported in the annual report. Annual reports shall report the measurable goal and the year(s) during the permit term that the MS4 conducted additional sampling or other assessment activities.

(g) Observing no Progress towards the Measurable Goal: If, by the end of the third year from the effective date of the permit, the permittee observes no progress toward the measurable goal either from program implementation or water quality assessments, the permittee shall identify alternative focused BMPs that address new or increased efforts towards the measurable goal. As appropriate, the MS4 may develop a new approach to identify the most significant sources of the pollutant(s) of concern and shall develop alternative focused BMPs (this may also include information that identifies issues beyond the MS4's control). These revised BMPs must be included in the SWMP and subsequent annual reports.

Where the permittee originally used a measurable goal based on an aggregated WLA, the permittee may combine or share efforts with other MS4s discharging to the same impaired stream segment to determine an alternative sub-measurable goal for the pollutant(s) of concern for their respective MS4s, as described in Part I.C.2.b.(i).(c).B above. Permittees must document, in their SWMP for the next permit term, the proposed schedule for the development and subsequent adoption of alternative sub-measurable goals for the pollutant(s) of concern for their respective MS4s and associated assessment of progress in meeting those individual goals.

(ii) Discharges Directly to Water Quality Impaired Water Bodies without an Approved TMDL:
The permittee shall also determine whether the permitted discharge is directly to one or more water quality impaired water bodies where a TMDL has not yet been approved by NMED and EPA. If the permittee discharges directly into an impaired water body without an approved TMDL, the permittee shall perform the following activities:

(a) Discharging a Pollutant of Concern: The permittee shall:

A. Determine whether the MS4 may be a source of the pollutant(s) of concern by referring to the CWA §303(d) list and then determining if discharges from the MS4 would be likely to contain the pollutant(s) of concern at levels of concern. The evaluation of CWA §303(d) list parameters should be carried out based on an analysis of existing data (e.g., Illicit Discharge and Improper Disposal Program) conducted within the permittee's jurisdiction.

B. Ensure that the SWMP includes focused BMPs, along with corresponding measurable goals, that the permittee will implement, to reduce, the discharge of pollutant(s) of concern that contribute to the impairment of the water body. (note: Only applicable if the permittee determines that the MS4 may discharge the pollutant(s) of concern to an impaired water body without a TMDL. The SWMP submitted with the first annual report must include a detailed description of proposed controls to be implemented along with corresponding measurable goals.

C. Amend the SWMP to include any additional BMPs to address the pollutant(s) of concern.

(b) Impairment for Bacteria: Where the impairment is for bacteria, the permittee shall identify potential significant sources and develop and implement targeted BMPs to control bacteria from those sources (see Part I.C.2.b.(i).(e).A through E.. The permittee must, at minimum comply with the activities and

schedules described in Table 1.a of Part I.C.2.(iii). The annual report must include information on compliance with this section, including results of any sampling conducted by the permittee.

Note: Probable pollutant sources identified by permittees should be submitted to NMED on the following form: ftp://ftp.nmenv.state.nm.us/www/swqb/Surveys/PublicProbableSourceIDSurvey.pdf

(c) Impairment for Nutrients: Where the impairment is for nutrients (e.g., nitrogen or phosphorus), the permittee shall identify potential significant sources and develop and implement targeted BMPs to control nutrients from potential sources. The permittee must, at minimum comply with the activities and schedules described in Table 1.b of Part I.C,2, (iii). The annual report must include information on compliance with this section, including results of any sampling conducted by the permittee.

(d) Impairment for Dissolved Oxygen: See Endangered Species Act (ESA) Requirements in Part I.C.3. These program elements may be coordinated with the monitoring required in Part III.A.

(iii) Program Development and Implementation Schedules: Where the impairment is for nutrient constituent (e.g., nitrogen or phosphorus) or bacteria, the permittee must at minimum comply with the activities and schedules in Table 1.a and Table 1.b.

Table 1.a. Pre-TMDL Bacteria Program Development and Implementation Schedules

Activity	Class Permittee				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Identify potential significant sources of the pollutant of concern entering your MS4	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a public education program to reduce the discharge of bacteria in municipal storm water contributed by (if applicable) by pets, recreational and exhibition livestock, and zoos.	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit	Fourteen (14) months from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of bacteria in municipal storm water contributed by areas within your MS4 served by on-site wastewater treatment systems.	Fourteen (14) months from effective date of permit	Fourteen (14) moths from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Review results to date from the Illicit Discharge Detection and Elimination program (see Part I.D.5.e) and modify as necessary to prioritize the detection and elimination of discharges contributing bacteria to the MS4	Fourteen (14) months from effective date of permit	Fourteen (14) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit

Develop (or modify an existing program ***) and implement a program to reduce the discharge of bacteria in municipal storm water contributed by other significant source identified in the Illicit Discharge Detection and Elimination program (see Part I.D.5.e)	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Twenty (20) months from effective date of permit
Include in the Annual Reports progress on program implementation and reducing the bacteria and updates their measurable goals as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
(***) Permittees previously covered under permit NMS000101 or NMR040000
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

Table 1.b. Pre-TMDL Nutrient Program Development and Implementation Schedules

Activity	**Class Permittee**				
	A Phase I MS4s	**B Phase II MS4s (2000 Census)**	**C New Phase II MS4s (2010 Census **)**	**D MS4s within Indian Lands**	**Cooperative (*) Any Permittee with cooperative programs**
Identify potential significant sources of the pollutant of concern entering your MS4	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a public education program to reduce the discharge of pollutant of concern in municipal storm water contributed by residential and commercial use of fertilizer	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by fertilizer use at municipal operations (e.g., parks, roadways, municipal facilities)	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit

Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by municipal and private golf courses within your jurisdiction	One (1) year from effective date of permit	One (1)year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Develop (or modify an existing program ***) and implement a program to reduce the discharge of the pollutant of concern in municipal storm water contributed by other significant source identified in the Illicit Discharge Detection and Elimination program (see Part I.D.5.e)	One (1) year from effective date of permit	One (1) year from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Include in the Annual Reports progress on program implementation and reducing the nutrient pollutant of concern and updates their measurable goals	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
(***) Permittees previously covered under permit NMS000101 or NMR040000
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

These program elements may be coordinated with the monitoring required in Part III.A.

3. **Endangered Species Act (ESA) Requirements**. Consistent with U.S. FWS Biological Opinion dated August 21, 2014 to ensure actions required by this permit are not likely to jeopardize the continued existence of any currently listed as endangered or threatened species or adversely affect its critical habitat, permittees shall meet the following requirements and include them in the SWMP:

   a. Dissolved Oxygen Strategy in the Receiving Waters of the Rio Grande:

      (i) The permittees must identify (or continue identifying if previously covered under permit NMS000101) structural controls, natural or man-made topographical and geographical formations, MS4 operations, or oxygen demanding pollutants contributing to reduced dissolved oxygen in the receiving waters of the Rio Grande. The permittees shall implement controls, and update/revise as necessary, to eliminate discharge of pollutants at levels that cause or contribute to exceedances of applicable water quality standards for dissolved oxygen in waters of the Rio Grande. The permittees shall submit a summary of findings and a summary of activities undertaken under Part I.C.3.a.(i) with each Annual Report. The SWMP submitted with the first and fourth annual reports must include a detailed description of controls implemented (or/and proposed control to be implemented) along with corresponding measurable goals. (Applicable to all permittees).

      (ii) As required in Part I.C.1.d, the COA and AMAFCA shall revise the May 1, 2012 Strategy for dissolved oxygen to address dissolved oxygen at the North Diversion Channel Embayment and/or other MS4 locations. The permittees shall submit the revised strategy to FWS and EPA for approval within a year of permit issuance and progress reports with the subsequent Annual Reports (see also Part I.C.1.d.(iv)). The permittees shall ensure that actions to reduce pollutants or remedial activities selected for the North Diversion Channel Embayment and its watershed are implemented such that there is a reduction in

frequency and magnitude of all low oxygen storm water discharge events that occur in the Embayment or downstream in the MRG as indicated in Table 1.c. Actions to meet the year 3 measurable goals must be taken within 2 years from the effective date of the permit. Actions to meet the year 5 measurable goals must be taken within 4 years from the effective date of the permit.

Table 1.c Measurable Goals of Anoxic and Hypoxia Levels Measured by Permit Year

Permit Year	*Anoxic Events*, max*	*Hypoxic Events**, max*
Year 1	*18*	*36*
Year 2	*18*	*36*
Year 3	*9*	*18*
Year 4	*9*	*18*
Year 5	*4*	*9*

Notes:

- * Anoxic Events: See Appendix G, for oxygen saturation and dissolved oxygen concentrations at various water temperatures and atmospheric pressures for the North Diversion Channel area that are considered anoxic and associated with the Rio Grande Silvery minnow lethality.
- ** Hypoxic Events: See Appendix for G, for oxygen saturation and dissolved oxygen concentrations at various water temperatures and atmospheric pressures for the North Diversion Channel area that are considered hypoxic and associated with the Rio Grande silvery minnow harassment.

(a) The revised strategy shall include:

A. A Monitoring Plan describing all procedures necessary to continue conducting continuous monitoring of dissolved oxygen (DO) and temperature in the North Diversion Channel Embayment and at one (1) location in the Rio Grande downstream of the mouth of the North Diversion Channel within the action area (e.g., Central Bridge). The monitoring plan to be developed will describe the methodology used to assure its quality, and will identify the means necessary to address any gaps that occur during monitoring, in a timely manner (that is, within 24 to 48 hours).

B. A Quality Assurance and Quality Control (QA/QC) Plan describing all standard operating procedures, quality assurance and quality control plans, maintenance, and implementation schedules that will assure timely and accurate collection and reporting of water temperature, dissolved oxygen, oxygen saturation, and flow. The QA/QC plan should include all procedures for estimating oxygen data when any oxygen monitoring equipment fail. Until a monitoring plan with quality assurance and quality control is submitted by EPA, any data, including any provisional or incomplete data from the most recent measurement period (e.g. if inoperative monitoring equipment for one day, use data from previous day) shall be used as substitutes for all values in the calculations for determinations of incidental takes. Given the nature of the data collected as surrogate for incidental take, all data, even provisional data (e.g., oxygen/water temperature data, associated metadata such as flows, date, times), shall be provided to the Service in a spreadsheet or database format within two weeks after formal request.

(b) Reporting: The COA and AMAFCA shall provide

A. An Annual Incidental Take Report to EPA and the Service that includes the following information: beginning and end date of any qualifying stormwater events, dissolved oxygen values and water temperature in the North Diversion Channel Embayment, dissolved oxygen values and water temperature at a downstream monitoring station in the MRG, flow rate in the North Diversion Channel, mean daily flow rate in the MRG, evaluation of oxygen and temperature data

as either anoxic or hypoxic using Table 2 of the BO, and estimate the number of silvery minnows taken based on Appendix A of the BO. Electronic copy of The Annual Incidental Take Report should be provided with the Annual Report required under Part III.B no later than December 1 for the proceeding calendar year.

B. A summary of data and findings with each Annual Report to EPA and the Service. All data collected (including provisional oxygen and water temperature data, and associated metadata), transferred, stored, summarized, and evaluated shall be included in the Annual Report. If additional data is requested by EPA or the Service, The COA and AMAFCA shall provide such as information within two weeks upon request,

The revised strategy required under Part I.C.3.a.(ii),the Annual Incidental Take Reports required under Part I.C.3.a.(ii).(b).A, and Annual Reports required under Part III.B can be submitted to FWS via e-mail nmesfo@fws.gov and joel_lusk@fws.gov, or by mail to the New Mexico Ecological Services field office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. (Only Applicable to the COA and AMAFCA

b. Sediment Pollutant Load Reduction Strategy (Applicable to all pemittees): The permittee must develop, implement, and evaluate a sediment pollutant load reduction strategy to assess and reduce pollutant loads associated with sediment (e.g., metals, etc. adsorbed to or traveling with sediment, as opposed to clean sediment) into the receiving waters of the Rio Grande. The strategy must include the following elements:

(i) Sediment Assessment: The permittee must identify and investigate areas within its jurisdiction that may be contributing excessive levels (e.g., levels that may contribute to exceedance of applicable Water Quality Standards) of pollutants in sediments to the receiving waters of the Rio Grande as a result of stormwater discharges. The permittee must identify structural elements, natural or man-made topographical and geographical formations, MS4 operations activities, and areas indicated as potential sources of sediments pollutants in the receiving waters of the Rio Grande. At the time of assessment, the permittee shall record any observed erosion of soil or sediment along ephemeral channels, arroyos, or stream banks, noting the scouring or sedimentation in streams. The assessment should be made using available data from federal, state, or local studies supplemented as necessary with collection of additional data. The permittee must describe, in the first annual report, all standard operating procedures, quality assurance plans to assure that accurate data are collected, summarized, evaluated and reported.

(ii) Estimate Baseline Loading: Based on the results of the sediment pollutants assessment required in Part I.C.3.b.(i) above the permittee must provide estimates of baseline total sediment loading and relative potential for contamination of those sediments by urban activities for drainage areas, sub-watersheds, Impervious Areas (IAs), and/or Directly Connected Impervious Area (DCIAs) draining directly to a surface waterbody or other feature used to convey waters of the United States. Sediment loads may be provided for targeted areas in the entire Middle Rio Grande Watershed (see Appendix A) using an individual or cooperative approach. Any data available and/or preliminary numeric modeling results may be used in estimating loads.

(iii) Targeted Controls: Include a detailed description of all proposed targeted controls and BMPs that will be implemented to reduce sediment pollutant loads calculated in PartI.C.3.b.(ii) above during the next ten (10) years of permit issuance. For each targeted control, the permittee must include interim measurable goals (e.g., interim sediment pollutant load reductions) and an implementation and maintenance schedule, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions. Any data available and/or preliminary numeric modeling results may be used in establishing the targeted controls, BMPs, and interim measurable goals. The permittee must prioritize pollutant load reduction efforts and target areas (e..g. drainage areas, sub-watersheds, IAs, DCIAs) that generate the highest annual average pollutant loads.

(iv) Monitoring and Interim Reporting: The permittee shall monitor or assess progress in achieving interim measurable goals and determining the effectiveness of BMPs, and shall include documentation of this

monitoring or assessment in the SWMP and annual reports. In addition, the SWMP must include methods to be used. This program element may be coordinated with the monitoring required in Part III.A.

(v) Progress Evaluation and Reporting: The permittee must assess the overall success of the Sediment Pollutant Load Reduction Strategy and document both direct and indirect measurements of program effectiveness in a Progress Report to be submitted with the fifth Annual Report. Data must be analyzed, interpreted, and reported so that results can be applied to such purposes as documenting effectiveness of the BMPs and compliance with the ESA requirements specified in Part I.C.3.b. The Progress Report must include:

(a) A list of species likely to be within the action area:

(b) Type and number of structural BMPs installed;

(c) Evaluation of pollutant source reduction efforts;

(d) Any recommendation based on program evaluation;

(e) Description of how the interim sediment load reduction goals established in Part I.C.3.b.(iii) were achieved; and

(f) Future planning activities needed to achieve increase of sediment load reduction required in Part I.C.3.d.(iii).

(vi) Critical Habitat (Applicable to all permittees): Verify that the installation of stormwater BMPs will not occur in or adversely affect currently listed endangered or threatened species critical habitat by reviewing the activities and locations of stormwater BMP installation within the location of critical habitat of currently listed endangered or threatened species at the U.S. Fish and Wildlife service website http://criticalhabitat.fws.gov/crithab/.

D. STORMWATER MANAGEMENT PROGRAM (SWMP)

1. **General Requirements**. The permittee must develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from a MS4 to the maximum extent practicable (MEP), to protect water quality (including that of downstream state or tribal waters), and to satisfy applicable surface water quality standards. The permittees shall continue implementation of existing SWMPs, and where necessary modify or revise existing elements and/or develop new elements to comply with all discharges from the MS4 authorized in Part I.A. The updated SWMP shall satisfy all requirements of this permit, and be implemented in accordance with Section 402(p)(3)(B) of the Clean Water Act (Act), and the Stormwater Regulations (40 CFR §122.26 and §122.34). This permit does not extend any compliance deadlines set forth in the previous permits (NMS000101 with effective date March 1, 2012 and permits No: NM NMR040000 and NMR04000I with effective date July 1, 2007).

   If a permittee is already in compliance with one or more requirements in this section because it is already subject to and complying with a related local, state, or federal requirement that is at least as stringent as this permit's requirement, the permittee may reference the relevant requirement as part of the SWMP and document why this permit's requirement has been satisfied. Where this permit has additional conditions that apply, above and beyond what is required by the related local, state, or federal requirement, the permittee is still responsible for complying with these additional conditions in this permit.

2. **Legal Authority**. Each permittee shall implement the legal authority granted by the State or Tribal Government to control discharges to and from those portions of the MS4 over which it has jurisdiction. The difference in each co-permittee's jurisdiction and legal authorities, especially with respect to third parties, may be taken into account in developing the scope of program elements and necessary agreements (i.e. Joint Powers Agreement, Memorandum of Agreement, Memorandum of Understanding, etc.). Permittees may use a combination of statute, ordinance, permit, contract, order, interagency or inter-jurisdictional agreement(s) with other permittees to:

a. Control the contribution of pollutants to the MS4 by stormwater discharges associated with industrial activity and the quality of stormwater discharged from sites of industrial activity (applicable only to MS4s located within the corporate boundary of the COA);

b. Control the discharge of stormwater and pollutants associated with land disturbance and development activities, both during the construction phase and after site stabilization has been achieved (post-construction), consistent with Part I.D.5.a and Part I.D.5.b;

c. Prohibit illicit discharges and sanitary sewer overflows to the MS4 and require removal of such discharges consistent with Part I.D.5.e;

d. Control the discharge of spills and prohibit the dumping or disposal of materials other than stormwater (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

e. Control, through interagency or inter-jurisdictional agreements among permittees, the contribution of pollutants from one (1) portion of the MS4 to another;

f. Require compliance with conditions in ordinances, permits, contracts and/or orders; and

g. Carry out all inspection, surveillance and monitoring procedures necessary to maintain compliance with permit conditions.

3. **Shared Responsibility and Cooperative Programs**.

a. The SWMP, in addition to any interagency or inter-jurisdictional agreement(s) among permittees, (e.g., the Joint Powers Agreement to be entered into by the permittees), shall clearly identify the roles and responsibilities of each permittee.

b. Implementation of the SWMP may be achieved through participation with other permittees, public agencies, or private entities in cooperative efforts to satisfy the requirements of Part I.D in lieu of creating duplicate program elements for each individual permittee.

(i) Implementation of one or more of the control measures may be shared with another entity, or the entity may fully take over the measure. A permittee may rely on another entity only if:

(a) the other entity, in fact, implements the control measure;

(b) the control measure, or component of that measure, is at least as stringent as the corresponding permit requirement; or,

(c) the other entity agrees to implement the control measure on the permittee's behalf. Written acceptance of this obligation is expected. The permittee must maintain this obligation as part of the SWMP description. If the other entity agrees to report on the minimum measure, the permittee must supply the other entity with the reporting requirements in Part III.D of this permit. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure component.

c. Each permittee shall provide adequate finance, staff, equipment, and support capabilities to fully implement its SWMP and all requirements of this permit.

4. **Measurable Goals**. The permittees shall control the discharge of pollutants from its MS4. The permittee shall implement the provisions set forth in Part I.D.5 below, and shall at a minimum incorporate into the SWMP the control measures listed in Part I.D.5 below. The SWMP shall include measurable goals, including interim milestones, for each control measure, and as appropriate, the months and years in which the MS4 will undertake the required actions and the frequency of the action.

5. **Control Measures**.

a. Construction Site Stormwater Runoff Control.

(i) The permittee shall develop, revise, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. **Permittees previously covered under permit NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the construction site stormwater management program to the permittees's own construction projects)

(ii) The program must include the development, implementation, and enforcement of, at a minimum:

(a) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal or local law;

(b) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices (both structural and non-structural);

(c) Requirements for construction site operators to control waste such as, but not limited to, discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality (see EPA guidance at http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=117);

(d) Procedures for site plan review which incorporate consideration of potential water quality impacts. The site plan review must be conducted prior to commencement of construction activities, and include a review of the site design, the planned operations at the construction site, the planned control measures during the construction phase (including the technical criteria for selection of the control measures), and the planned controls to be used to manage runoff created after the development;

(e) Procedures for receipt and consideration of information submitted by the public;

(f) Procedures for site inspection (during construction) and enforcement of control measures, including provisions to ensure proper construction, operation, maintenance, and repair. The procedures must clearly define who is responsible for site inspections; who has the authority to implement enforcement procedures; and the steps utilized to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and the quality of the receiving water. If a construction site operator fails to comply with procedures or policies established by the permittee, the permittee may request EPA enforcement assistance. The site inspection and enforcement procedures must describe sanctions and enforcement mechanism(s) for violations of permit requirements and penalties with detail regarding corrective action follow-up procedures, including enforcement escalation procedures for recalcitrant or repeat offenders. Possible sanctions include non-monetary penalties (such as stop work orders and/or permit denials for non-compliance), as well as monetary penalties such as fines and bonding requirements;

(g) Procedures to educate and train permittee personnel involved in the planning, review, permitting, and/or approval of construction site plans, inspections and enforcement. Education and training shall also be provided for developers, construction site operators, contractors and supporting personnel, including requiring a stormwater pollution prevention plan for construction sites within the permitee's jurisdiction;

(h) Procedures for keeping records of and tracking all regulated construction activities within the MS4, i.e. site reviews, inspections, inspection reports, warning letters and other enforcement documents. A

summary of the number and frequency of site reviews, inspections (including inspector's checklist for oversight of sediment and erosion controls and proper disposal of construction wastes) and enforcement activities that are conducted annually and cumulatively during the permit term shall be included in each annual report; and

(iii) Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres within the MS4 jurisdiction. Site inspections are to be followed by any necessary compliance or enforcement action. Follow-up inspections are to be conducted to ensure corrective maintenance has occurred; and, all projects must be inspected at completion for confirmation of final stabilization.

(iv) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area to ensure that the construction stormwater runoff controls eliminate erosion and maintain sediment on site. Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.

(v) The site plan review required in Part I.D.5.a.(ii)(d) must include an evaluation of opportunities for use of GI/LID/Sustainable practices and when the opportunity exists, encourage project proponents to incorporate such practices into the site design to mimic the pre-development hydrology of the previously undeveloped site. For purposes of this permit, pre-development hydrology shall be met according to Part I.D.5.b of this permit. (consistent with any limitations on that capture). Include a reporting requirement of the number of plans that had opportunities to implement these practices and how many incorporated these practices.

(vi) The permittee must include in the SWMP a description of the mechanism(s) that will be utilized to comply with each of the elements required in Part I.D.5.a.(i) throughout Part I.D.5.a.(v), including description of each individual BMP (both structural or non-structural) or source control measures and its corresponding measurable goal.

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The permittee must include in each annual report:

(a) A summary of the frequency of site reviews, inspections and enforcement activities that are conducted annually and cumulatively during the permit term.

(b) The number of plans that had the opportunity to implement GI/LID/Sustainable practices and how many incorporated the practices.

Program Flexibility Elements

(viii) The permittee may use storm water educational materials locally developed or provided by the EPA (refer to http://water.epa.gov/polwaste/npdes/swbmp/index.cfm, http://www.epa.gov/smartgrowth/parking.htm, http://www.epa.gov/smartgrowth/stormwater.htm), the NMED, environmental, public interest or trade organizations, and/or other MS4s.

(ix) The permittee may develop or update existing construction handbooks (e.g., the COA NPDES Stormwater Management Guidelines for Construction and Industrial Activities Handbook) to be consistent with promulgated construction and development effluent limitation guidelines.

(x) The construction site inspections required in Part I.D.5.a.(iii) may be carried out in conjunction with the permittee's building code inspections using a screening prioritization process.

Table 2. Construction Site Stormwater Runoff Control - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.a.(ii)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of the permit
Develop requirements and procedures as required in Part I.D.5.a.(ii)(b) through in Part I.D.5.a.(ii)(h)	Ten (10) months from effective date of permit	Thirteen (13) months from effective date of permit	Sixteen (16) months from effective date of permit	Sixteen (16) months from effective date of permit	Eighteen (18) months from effective date of permit
Annually conduct site inspections of 100 percent of all construction projects cumulatively disturbing one (1) or more acres as required in Part I.D.5.a.(iii)	Ten (10) months from effective date of permit	Start Thirteen (13) months from effective date of permit and annually thereafter	Start Sixteen (16) months from effective date of permit and annually thereafter	Start eighteen (18) months from effective date of permit and thereafter	Start two (2) years from effective date of permit and thereafter
Coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.a.(iv)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Evaluation of GI/LID/Sustainable practices in site plan reviews as required in Part I.D.5.a.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.a.(vi) and in Part I.D.5.a.(vii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.a.(viii) through Part I.D.5.a.(x)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

b. Post-Construction Stormwater Management in New Development and Redevelopment

(i) The permittee must develop, revise, implement, and enforce a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs, updating as necessary, to comply with the requirements of this permit.** (Note: Highway Departments and Flood Control Authorities may only apply the post-construction stormwater management program to the permittee's own construction projects)

(ii) The program must include the development, implementation, and enforcement of, at a minimum:

(a) Strategies which include a combination of structural and/or non-structural best management practices (BMPs) to control pollutants in stormwater runoff.

(b) An ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law. The ordinance or policy must:

Incorporate a stormwater quality design standard that manages on-site the 90th percentile storm event discharge volume associated with new development sites and 80th percentile storm event discharge volume associated with redevelopment sites, through stormwater controls that infiltrate, evapotranspire the discharge volume, except in instances where full compliance cannot be achieved, as provided in Part I.D.5.b.(v). The stormwater from rooftop discharge may be harvested and used on-site for non-commercial use. Any controls utilizing impoundments that are also used for flood control that are located in areas where the New Mexico Office of the State Engineer requirements at NMAC 19.26.2.15 (see also Section 72-5-32 NMSA) apply must drain within 96 hours unless the state engineer has issued a waiver to the owner of the impoundment.

Options to implement the site design standard include, but not limited to: management of the discharge volume achieved by canopy interception, soil amendments, rainfall harvesting, rain tanks and cisterns, engineered infiltration, extended filtration, dry swales, bioretention, roof top disconnections, permeable pavement, porous concrete, permeable pavers, reforestation, grass channels, green roofs and other appropriate techniques, and any combination of these practices, including implementation of other stormwater controls used to reduce pollutants in stormwater (e.g., a water quality facility).

Estimation of the 90th or 80th percentile storm event discharge volume is included in EPA Technical Report entitled "*Estimating Predevelopment Hydrology in the Middle Rio Grande Watershed, New Mexico, EPA Publication Number 832-R-14-007*". Permittees can also estimate:

Option A: a site specific 90th or 80th percentile storm event discharge volume using methodology specified in the referenced EPA Technical Report.

Option B: a site specific pre-development hydrology and associated storm event discharge volume using methodology specified in the referenced EPA technical Report.

(c) The permittee must ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with preconstruction BMP design; failure to construct BMPs

in accordance with the agreed upon pre-construction design; and ineffective post-construction operation and maintenance of BMPs;

(d) The permittee must ensure that the post-construction program requirements are constantly reviewed and revised as appropriate to incorporate improvements in control techniques;

(e) Procedure to develop and implement an educational program for project developers regarding designs to control water quality effects from stormwater, and a training program for plan review staff regarding stormwater standards, site design techniques and controls, including training regarding GI/LID/Sustainability practices. Training may be developed independently or obtained from outside resources, i.e. federal, state, or local experts;

(f) Procedures for site inspection and enforcement to ensure proper long-term operation, maintenance, and repair of stormwater management practices that are put into place as part of construction projects/activities. Procedure(s) shall include the requirement that as-built plans be submitted within ninety (90) days of completion of construction projects/activities that include controls designed to manage the stormwater associated with the completed site (post-construction stormwater management). Procedure(s) may include the use of dedicated funds or escrow accounts for development projects or the adoption by the permittee of all privately owned control measures. This may also include the development of maintenance contracts between the owner of the control measure and the permittee. The maintenance contract shall include verification of maintenance practices by the owner, allows the MS4 owner/operator to inspect the maintenance practices, and perform maintenance if inspections indicate neglect by the owner;

(g) Procedures to control the discharge of pollutants related to commercial application and distribution of pesticides, herbicides, and fertilizers where permittee(s) hold jurisdiction over lands not directly owned by that entity (e.g., incorporated city). The procedures must ensure that herbicides and pesticides applicators doing business within the permittee's jurisdiction have been properly trained and certified, are encouraged to use the least toxic products, and control use and application rates according to the applicable requirements; and

(h) Procedure or system to review and update, as necessary, the existing program to ensure that stormwater controls or management practices for new development and redevelopment projects/activities continue to meet the requirements and objectives of the permit.

(iii) The permittee must coordinate with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private new development and redevelopment projects/activities within the permit area to ensure the hydrology associated with new development and redevelopment sites mimic to the extent practicable the pre-development hydrology of the previously undeveloped site, except in instances where the pre-development hydrology requirement conflicts with applicable water rights appropriation requirements. For purposes of this permit, pre-development hydrology shall be met by capturing the 90th percentile storm event runoff (consistent with any limitations on that capture) which under undeveloped natural conditions would be expected to infiltrate or evapotranspirate on-site and result in little, if any, off-site runoff. (Note: This permit does not prevent permittees from requiring additional controls for flood control purposes.) Planning documents include, but are not limited to: comprehensive or master plans, subdivision ordinances, general land use plan, zoning code, transportation master plan, specific area plans, such as sector plan, site area plans, corridor plans, or unified development ordinances.

(iv) The permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices. The assessment shall include a list of the identified impediments, necessary regulation changes, and recommendations and proposed schedules to incorporate policies and standards to relevant documents and procedures to maximize infiltration, recharge, water harvesting, habitat improvement, and hydrological management of stormwater runoff as allowed under the applicable water rights appropriation requirements. The permittee must develop a report of the assessment findings, which is to be used to provide information to the permittee, of the regulation changes necessary to remove impediments and allow implementation of these practices.

(v) Alternative Compliance for Infeasibility due to Site Constrains:

(a) Infeasibility to manage the design standard volume specified in Part I(D)(5)(b)(ii)(b), or a portion of the design standard volume, onsite may result from site constraints including the following:

A. too small a lot outside of the building footprint to create the necessary infiltrative capacity even with amended soils;

B. soil instability as documented by a thorough geotechnical analysis;

C. a site use that is inconsistent with capture and reuse of storm water;

D. other physical conditions; or,

E. to comply with applicable requirements for on-site flood control structures leaves insufficient area to meet the standard.

(b) A determination that it is infeasible to manage the design standard volume specified in Part I.D.5.b.(ii)(b), or a portion of the design standard volume, on site may not be based solely on the difficulty or cost of implementing onsite control measures, but must include multiple criteria that rule out an adequate combination of the practices set forth in Part I.D,5.b.(v).

(c) This permit does not prevent imposition of more stringent requirements related to flood control. Where both the permittee's site design standard ordinance or policy and local flood control requirements on site cannot be met due to site conditions, the standard may be met through a combination of on-site and off-site controls.

(d) Where applicable New Mexico water law limits the ability to fully manage the design standard volume on site, measures to minimize increased discharge consistent with requirements under New Mexico water law must still be implemented.

(e) In instances where an alternative to compliance with the standard on site is chosen, technical justification as to the infeasibility of on-site management of the entire design standard volume, or a portion of the design standard volume, is required to be documented by submitting to the permittee a site-specific hydrologic and/or design analysis conducted and endorsed by a registered professional engineer, geologist, architect, and/or landscape architect.

(f) When a Permittee determines a project applicant has demonstrated infeasibility due to site constraints specified in Part I.D.5.b.(v) to manage the design standard volume specified in Part I.D.5.b.(ii).(b) or a portion of the design standard volume on-site, the Permittee shall require one of the following mitigation options:

A. Off-site mitigation. The off-site mitigation option only applies to redevelopment sites and cannot be applied to new development. Management of the standard volume, or a portion of the volume, may be implemented at another location within the MS4 area, approved by the permittee. The permittee shall identify priority areas within the MS4 in which mitigation projects can be completed. The permittee shall determine who will be responsible for long-term maintenance on off-site mitigation projects.

B. Ground Water Replenishment Project: Implementation of a project that has been determined to provide an opportunity to replenish regional ground water supplies at an offsite location.

C. Payment in lieu. Payment in lieu may be made to the permittee, who will apply the funds to a public stormwater project. MS4s shall maintain a publicly accessible database of approved projects for which these payments may be used.

D. *Other.* In a situation where alternative options A through C above are not feasible and the permittee wants to establish another alternative option for projects, the permitte may submit to the EPA for approval, the alternative option that meets the standard.

(vi) The permittee must estimate the number of acres of impervious area (IA) and directly connected impervious area (DCIA). For the purpose of his part, IA includes conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops. DCIA is the portion of IA with a direct hydraulic connection to the permittee's MS4 or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. DCIA typically does not include isolated impervious areas with an indirect hydraulic connection to the MS4 (e.g., swale or detention basin) or that otherwise drain to a pervious area.

(vii) The permittee must develop an inventory and priority ranking of MS4-owned property and infrastructure (including public right-of-way) that may have the potential to be retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges to and from its MS4. In determining the potential for retrofitting, the permittee shall consider factors such as the complexity and cost of implementation, public safety, access for maintenance purposes, subsurface geology, depth to water table, proximity to aquifers and subsurface infrastructure including sanitary sewers and septic systems, and opportunities for public use and education under the applicable water right requirements and restrictions. In determining its priority ranking, the permittee shall consider factors such as schedules for planned capital improvements to storm and sanitary sewer infrastructure and paving projects; current storm sewer level of service and control of discharges to impaired waters, streams, and critical receiving water (drinking water supply sources);

(viii) The permittee must incorporate watershed protection elements into relevant policy and/or planning documents as they come up for regular review. If a relevant planning document is not scheduled for review during the term of this permit, the permittee must identify the elements that cannot be implemented until that document is revised, and provide to EPA and NMED a schedule for incorporation and implementation not to exceed five years from the effective date of this permit. As applicable to each permittee's MS4 jurisdiction, policy and/or planning documents must include the following:

(a) A description of master planning and project planning procedures to control the discharge of pollutants to and from the MS4.

(b) Minimize the amount of impervious surfaces (roads, parking lots, roofs, etc.) within each watershed, by controlling the unnecessary creation, extension and widening of impervious parking lots, roads and associated development. The permittee may evaluate the need to add impervious surface on a case-by-case basis and seek to identify alternatives that will meet the need without creating the impervious surface.

(c) Identify environmentally and ecologically sensitive areas that provide water quality benefits and serve critical watershed functions within the MS4 and ensure requirements to preserve, protect, create and/or restore these areas are developed and implemented during the plan and design phases of projects in these identified areas. These areas may include, but are not limited to critical watersheds, floodplains, and areas with endangered species concerns and historic properties. Stakeholders shall be consulted as appropriate.

(d) Implement stormwater management practices that minimize water quality impacts to streams, including disconnecting direct discharges to surface waters from impervious surfaces such as parking lots.

(e) Implement stormwater management practices that protect and enhance groundwater recharge as allowed under the applicable water rights laws.

(f) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

(g) Develop and implement policies to protect native soils, prevent topsoil stripping, and prevent compaction of soils.

(h) The program must be specifically tailored to address local community needs (e.g. protection to drinking water sources, reduction of water quality impacts) and must be designed to attempt to maintain pre-development runoff conditions.

(ix) The permittee must update the SWMP as necessary to include a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.b.(i) throughout Part I.D.5.b.(viii) as well as the citations and descriptions of design standards for structural and non-structural controls to control pollutants in stormwater runoff, including discussion of the methodology used during design for estimating impacts to water quality and selecting structural and non-structural controls. Description of measurable goals for each BMP (structural or non-structural) or each stormwater control must be included in the SWMP.

(x) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report. The following information must be included in each annual report:

(a) Include a summary and analysis of all maintenance, inspections and enforcement, and the number and frequency of inspections performed annually.

(b) A cumulative listing of the annual modifications made to the Post-Construction Stormwater Management Program during the permit term, and a cumulative listing of annual revisions to administrative procedures made or ordinances enacted during the permit term.

(c) According to the schedule presented in the Program Development and Implementation Schedule in Table 3, the permittee must

A. Report the number of MS4-owned properties and infrastructure that have been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges. The permittee may also include in its annual report non-MS4 owned property that has been retrofitted with control measures designed to control the frequency, volume, and peak intensity of stormwater discharges.

B. As required in Part I.D.5.b.(vi), report the tabulated results for IA and DCIA and its estimation methodology. In each subsequent annual report, the permittee shall estimate the number of acres of IA and DCIA that have been added or removed during the prior year. The permittee shall include in its estimates the additions and reductions resulting from development, redevelopment, or retrofit projects undertaken directly by the permittee; or by private developers and other parties in a voluntary manner on in compliance with the permittee's regulations.

Program Flexibility Elements:

(xi) The permittee may use storm water educational materials locally developed or provided by EPA (refer to http://water.epa.gov/polwaste/npdes/swbmp/index.cfm, http://www.epa.gov/smartgrowth/parking.htm, and http://www.epa.gov/smartgrowth/stormwater.htm); the NMED; environmental, public interest or trade organizations; and/or other MS4s.

(xii) When choosing appropriate BMPs, the permittee may participate in locally-based watershed planning efforts, which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, the permittee may adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures.

(xiii) The permittee may incorporate the following elements in the Post-Construction Stormwater Management in New Development and Redevelopment program required in Part I.D.5.b.(ii)(b):

(a) Provide requirements and standards to direct growth to identified areas to protect environmentally and ecologically sensitive areas such as floodplains and/or other areas with endangered species and historic properties concerns;

(b) Include requirements to maintain and/or increase open space/buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; and

(c) Encourage infill development in higher density urban areas, and areas with existing storm sewer infrastructure.

Table 3. Post-Construction Stormwater Management in New Development and Redevelopment - Program Development and Implementation Schedules

Activity	Permittee Class				
	A **Phase I MS4s**	**B** **Phase II MS4s (2000 Census)**	**C** **New Phase II MS4s (2010 Census **)**	**D** **MS4s within Indian Lands**	**Cooperative (*)** **Any Permittee with cooperative programs**
Development of strategies as required in Part I.D.5.b.(ii).(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Twelve (12) months from effective date of permit	Twelve (12) months from effective date of permit	Fourteen (14) months from effective date of permit
Development of an ordinance or other regulatory mechanism as required in Part I.D.5.b.(ii).(b)	Twenty (24) months from effective date of permit	Thirty (30) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit	Thirty six (36) months from effective date of permit
Implementation and enforcement, via the ordinance or other regulatory mechanism, of site design standards as required in Part I.D.5.b.(ii).(b)	Within thirsty six (36) months from effective date of the permit	Within forty two (42) months from the effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit	Within forty eight (48) months from effective date of the permit
Ensure appropriate implementation of structural controls as required in Part I.D.5.b.(ii).(c) and Part I.D.5.b.(ii).(d)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop procedures as required in Part I.D.5.b.(ii).(e), Part I.D.5.b.(ii).(f), Part I.D.5.b.(ii).(g), and Part I.D.5.b.(ii).(h)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit

Coordinate internally with all departments and boards with jurisdiction over the planning, review, permitting, or approval of public and private construction projects/activities within the permit area as required in Part I.D.5.b.(iii)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	One (1) year from effective date of permit
As required in Part I.D.5.b.(iv), the permittee must assess all existing codes, ordinances, planning documents and other applicable regulations, for impediments to the use of GI/LID/Sustainable practices	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit
As required in Part I.D.5.b.(iv), develop and submit a report of the assessment findings on GI/LID/Sustainable practices.	Eleven (11) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Twenty seven (27) months from effective date of permit
Estimation of the number of acres of IA and DCIA as required in Part I.D.5.b.(vi)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Inventory and priority ranking as required in section in Part I.D.5.b.(vii)	Within fifteen (15) months from effective date of the permit	Within twenty four (24) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within thirty six (36) months from effective date of the permit	Within forty two (42) months from effective date of the permit
Incorporate watershed protection elements as required in Part I.D.5.b.(viii)	Ten (10) months from effective date of permit	One (1) year from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.b.(ix) and Part I.D.5.b.(x).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include program elements in Part I.D.5.b.(xi) and Part I.D.5.b.(xii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

c. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations.

(i) The permittee must develop, revise and implement an operation and maintenance program that includes a training component and the ultimate goal of preventing or reducing pollutant runoff from municipal operations. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit**. The program must include:

(a) Development and implementation of an employee training program to incorporate pollution prevention and good housekeeping techniques into everyday operations and maintenance activities. The employee training program must be designed to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance. The permittee must also develop a tracking procedure and ensure that employee turnover is considered when determining frequency of training;

(b) Maintenance activities, maintenance schedules, and long term inspections procedures for structural and non-structural storm water controls to reduce floatable, trash, and other pollutants discharged from the MS4.

(c) Controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations, snow disposal areas operated by the permittee, and waste transfer stations;

(d) Procedures for properly disposing of waste removed from the separate storm sewers and areas listed in Part I.D.5.c.(i).(c) (such as dredge spoil, accumulated sediments, floatables, and other debris); and

(e) Procedures to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices.

Note: The permittee may use training materials that are available from EPA, NMED, Tribe, or other organizations.

(ii) The Pollution Prevention/Good Housekeeping program must include the following elements:

(a) Develop or update the existing list of all stormwater quality facilities by drainage basin, including location and description;

(b) Develop or modify existing operational manual for de-icing activities addressing alternate materials and methods to control impacts to stormwater quality;

(c) Develop or modify existing program to control pollution in stormwater runoff from equipment and vehicle maintenance yards and maintenance center operations located within the MS4;

(d) Develop or modify existing street sweeping program. Assess possible benefits from changing frequency or timing of sweeping activities or utilizing different equipment for sweeping activities;

(e) A description of procedures used by permittees to target roadway areas most likely to contribute pollutants to and from the MS4 (i.e., runoff discharges directly to sensitive receiving water, roadway receives majority of de-icing material, roadway receives excess litter, roadway receives greater loads of oil and grease);

(f) Develop or revise existing standard operating procedures for collection of used motor vehicle fluids (at a minimum oil and antifreeze) and toxics (including paint, solvents, fertilizers, pesticides, herbicides,

and other hazardous materials) used in permittee operations or discarded in the MS4, for recycle, reuse, or proper disposal;

(g) Develop or revised existing standard operating procedures for the disposal of accumulated sediments, floatables, and other debris collected from the MS4 and during permittee operations to ensure proper disposal;

(h) Develop or revised existing litter source control programs to include public awareness campaigns targeting the permittee audience; and

(i) Develop or review and revise, as necessary, the criteria, procedures and schedule to evaluate existing flood control devices, structures and drainage ways to assess the potential of retrofitting to provide additional pollutant removal from stormwater. Implement routine review to ensure new and/or innovative practices are implemented where applicable.

(j) Enhance inspection and maintenance programs by coordinating with maintenance personnel to ensure that a target number of structures per basin are inspected and maintained per quarter;

(k) Enhance the existing program to control the discharge of floatables and trash from the MS4 by implementing source control of floatables in industrial and commercial areas;

(l) Include in each annual report, a cumulative summary of retrofit evaluations conducted during the permit term on existing flood control devices, structures and drainage ways to benefit water quality. Update the SWMP to include a schedule (with priorities) for identified retrofit projects;

(m) Flood management projects: review and revise, as necessary, technical criteria guidance documents and program for the assessment of water quality impacts and incorporation of water quality controls into future flood control projects. The criteria guidance document must include the following elements:

A. Describe how new flood control projects are assessed for water quality impacts.

B. Provide citations and descriptions of design standards that ensure water quality controls are incorporated in future flood control projects.

C. Include method for permittees to update standards with new and/or innovative practices.

D. Describe master planning and project planning procedures and design review procedures.

(n) Develop procedures to control the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied, by the permittee's employees or contractors, to public right-of-ways, parks, and other municipal property. The permittee must provide an updated description of the data monitoring system for all permittee departments utilizing pesticides, herbicides and fertilizers.

(iii) Comply with the requirements included in the EPA Multi Sector General Permit (MSGP) to control runoff from industrial facilities (as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi)) owned or operated by the permittees and ultimately discharge to the MS4. The permittees must develop or update:

(a) A list of municipal/permittee operations impacted by this program,

(b) A map showing the industrial facilities owned and operated by the MS4,

(c) A list of the industrial facilities (other than large construction activities defined as industrial activity) that will be included in the industrial runoff control program by category and by basin. The list must include the permit authorization number or a MSGP NOI ID for each facility as applicable.

(iv) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.c.(i) throughout Part I.D.5.c.(iii) and its corresponding measurable goal.

(v) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 4. Pollution Prevention/Good Housekeeping for Municipal/Co-permittee Operations - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
-Develop or update the Pollution Prevention/Good House Keeping program to include the elements in Part I.D.5.c.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Fourteen (14) months from effective date of the permit	Eighteen (18) months from effective date of the permit
-Enhance the program to include the elements in Part I.D.5.c.(ii)	Ten (10) months from effective date of the permit	One (1) year from effective date of the permit	Two (2) years from effective date of the permit	Two (2) years from effective date of the permit	Thirty (30) months from effective date of the permit
-Develop or update a list and a map of industrial facilities owned or operated by the permittee as required in Part I.D.5.c.(iii)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.c.(iv) and Part I.D.5.c.(v)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

d. Industrial and High Risk Runoff (Applicable only to Class A permittees)

(i) The permittee must control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity as defined in 40 CFR 122.26(b)(14)(i)-(ix) and (xi). If no such industrial activities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.

(ii) The permittee must continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report. The program shall include:

(a) A description of a program to identify, monitor, and control pollutants in stormwater discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.); hazardous waste treatment, storage, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee(s) determines are contributing a substantial pollutant loading to the

MS4. (Note: If no such facilities are in a permittees jurisdiction, that permittee may certify that this program element does not apply.); and

(b) Priorities and procedures for inspections and establishing and implementing control measures for such discharges.

(iii) Permittees must comply with the monitoring requirements specified in Part III.A.4;

(iv) The permittee must modify the following as necessary:

(a) The list of the facilities included in the program, by category and basin;

(b) Schedules and frequency of inspection for listed facilities. Facility inspections may be carried out in conjunction with other municipal programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.), but must include random inspections for facilities not normally visited by the municipality;

(c) The priorities for inspections and procedures used during inspections (e.g. inspection checklist, review for NPDES permit coverage; review of stormwater pollution prevention plan; etc.); and

(d) Monitoring frequency, parameters and entity performing monitoring and analyses (MS4 permittees or subject facility). The monitoring program may include a waiver of monitoring for parameters at individual facilities based on a "no-exposure" certification;

(v) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.d.(i) throughout Part I.D.5.d.(iv) and its corresponding measurable goal.

(vi) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Program Flexibility Elements:

(vii) The permittee may:

(a) Use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;

(b) Allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:

A. A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

B. Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.

(c) Accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

Table 5: Industrial and High Risk Runoff - Program Development and Implementation Schedules:

Activity	Permittee Class	
	A **Phase I MS4s**	**Cooperative (*)** **Any Permittee with cooperative programs**
Ordinance (or other control method) as required in Part I.D.5.d.(i)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Continue implementation and enforcement of the Industrial and High Risk Runoff program, assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the annual report as required in Part I.D.5.d.(ii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Meet the monitoring requirements in Part I.D.5.d.(iii)	Ten (10) months from effective date of the permit	Twelve (12) months from effective date of the permit
Include requirements in Part I.D.5.d.(iv)	Ten (10) months from permit effective date of the permit	Twelve (12) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.d.(v) and Part I.D.5.d.(vi)	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.d.(vii)	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs. Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

e. Illicit Discharges and Improper Disposal

(i) The permittee shall develop, revise, implement, and enforce a program to detect and eliminate illicit discharges (as defined at 40 CFR 122.26(b)(2)) entering the MS4. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The permittee must:

(a) Develop, if not already completed, a storm sewer system map, showing the names and locations of all outfalls as well as the names and locations of all waters of the United States that receive discharges from those outfalls. Identify all discharges points into major drainage channels draining more than twenty (20) percent of the MS4 area;

(b) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into the MS4, and implement appropriate enforcement procedures and actions;

(c) Develop and implement a plan to detect and address non-stormwater discharges, including illegal dumpling, to the MS4. The permittee must include the following elements in the plan:

A. Procedures for locating priority areas likely to have illicit discharges including field test for selected pollutant indicators (ammonia, boron, chlorine, color, conductivity, detergents, *E. coli*, enterococci, total coliform, fluoride, hardness, pH, potassium, conductivity, surfactants), and visually screening outfalls during dry weather;

B. Procedures for enforcement, including enforcement escalation procedures for recalcitrant or repeat offenders;

C. Procedures for removing the source of the discharge;

D. Procedures for program evaluation and assessment; and

E. Procedures for coordination with adjacent municipalities and/or state, tribal, or federal regulatory agencies to address situations where investigations indicate the illicit discharge originates outside the MS4 jurisdiction.

(d) Develop an education program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials. The permittee shall inform public employees, businesses and the general public of hazards associated with illegal discharges and improper disposal of waste.

(e) Establish a hotline to address complaints from the public.

(f) Investigate suspected significant/severe illicit discharges within forty-eight (48) hours of detection and all other discharges as soon as practicable; elimination of such discharges as expeditiously as possible; and, requirement of immediate cessation of illicit discharges upon confirmation of responsible parties.

(g) Review complaint records for the last permit term and develop a targeted source reduction program for those illicit discharge/improper disposal incidents that have occurred more than twice in two (2) or more years from different locations. (Applicable only to class A and B permittees)

(h) If applicable, implement the program using the priority ranking develop during last permit term

(ii) The permittee shall address the following categories of non-stormwater discharges or flows (e.g., illicit discharges) only if they are identified as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(90)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water.

Note: Discharges or flows from fire fighting activities are excluded from the effective prohibitions against non-stormwater and need only be addressed where they are identified a significant sources of pollutants to water of the United States).

(iii) The permittee must screen the entire jurisdiction at least once every five (5) years and high priority areas at least once every year. High priority areas include any area where there is ongoing evidence of illicit discharges or dumping, or where there are citizen complaints on more than five (5) separate events within twelve (12) months. The permittee must:

(a) Include in its SWMP document a description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected.

(b) Comply with the dry weather screening program established in Table 6 and the monitoring requirements specified in Part III.A.2.

(c) If applicable, implement the priority ranking system develop in previous permit term.

(iv) Waste Collection Programs: The permittee must develop, update, and implement programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal, and to collect household hazardous waste materials (including paint, solvents, fertilizers, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Where available, collection programs operated by third parties may be a component of the programs. Permittees shall enhance these programs by establishing the following elements as a goal in the SWMP:

A. Increasing the frequency of the collection days hosted;

B. Expanding the program to include commercial fats, oils and greases; and

C. Coordinating program efforts between applicable permittee departments.

(v) Spill Prevention and Response. The permittee must develop, update and implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The permittees must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit. The Spill Prevention and Response program shall include:

(a) Where discharge of material resulting from a spill is necessary to prevent loss of life, personal injury, or severe property damage, the permittee(s) shall take, or insure the party responsible for the spill takes, all reasonable steps to control or prevent any adverse effects to human health or the environment: and

(b) The spill response program may include a combination of spill response actions by the permittee (and/or another public or private entity), and legal requirements for private entities within the permittee's municipal jurisdiction.

(vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.e.(i) throughout Part I.D.5.e.(v) and its corresponding measurable goal. A description of the means, methods, quality assurance and controls protocols, and schedule for successfully implementing the required screening, field monitoring, laboratory analysis, investigations, and analysis evaluation of data collected

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

(viii) The permittee must expeditiously revise as necessary, within nine (9) months from the effective date of the permit, the existing permitting/certification program to ensure that any entity applying for the use of Right of Way implements controls in their construction and maintenance procedures to control pollutants entering the MS4. (Only applicable to NMDOT)

Program Flexibility Elements

(ix) The permittee may:

(a) Divide the jurisdiction into assessment areas where monitoring at fewer locations would still provide sufficient information to determine the presence or absence of illicit discharges within the larger area;

(b) Downgrade high priority areas after the area has been screened at least once and there are citizen complaints on no more than five (5) separate events within a twelve (12) month period;

(c) Rely on a cooperative program with other MS4s for detection and elimination of illicit discharges and illegal dumping;

(d) If participating in a cooperative program with other MS4s, required detection program frequencies may be based on the combined jurisdictional area rather than individual jurisdictional areas and may use assessment areas crossing jurisdictional boundaries to reduce total number of screening locations (e.g., a shared single screening location that would provide information on more than one jurisdiction); and

(e) After screening a non-high priority area once, adopt an "in response to complaints only" IDDE for that area provided there are citizen complaints on no more than two (2) separate events within a twelve (12) month period.

(f) Enhance the program to utilize procedures and methodologies consistent with those described in "Illicit Discharge Detection and Elimination, A Guidance Manual for Program Development and Technical Assessments."

Table 6. Illicit Discharges and Improper Disposal - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census ***)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Mapping as required in Part I.D.5.e.(i)(a)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Fourteen (14) months from effective date of permit
Ordinance (or other control method) as required in Part I.D.5.e.(i)(b)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop and implement a IDDE plan as required in Part I.D.5.e.(i)(c)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop an education program as required in Part I.D.5.e.(i)(d)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Establish a hotline as required in Part I.D.5.e.(i)(e)	Update as necessary	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Investigate suspected significant/severe illicit discharges as required in Part I.D.5.e.(i)(f)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Review complaint records and develop a targeted source reduction program as required in Part I.D.5.e.(i)(g)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	N/A	N/A	One (1) year from effective date of permit

Screening of system as required in Part I.D.5.e.(iii) as follows: a.) High priority areas**	1 / year	1 / year	1 / year	1 / year	1 / year
b.) Whole system	-Screen 20% of the MS4 per year	- Screen 20% of the MS4 per year	-Years 1 – 2: develop procedures as required in Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 2: develop procedures as required Part I.D.5.e.(i)(c) -Year 3: screen 30% of the MS4 -Year 4: screen 20% of the MS4 -Year 5: screen 50% of the MS4	-Years 1 – 3: develop procedures as require in Part I.D.5.e.(i)(c) -Year 4: screen 30% of the MS4 -Year 5: screen 70% of the MS4
Develop, update, and implement a Waste Collection Program as required in Part I.D.5.e.(iv)	Ten (10) months from effective date of permit	Eighteen (18) months from effective date of permit	Two (2) years from effective date of permit	Two (2) years from effective date of permit	Thirty (30) months from effective date of permit
Develop, update and implement a Spill Prevention and Response program to prevent, contain, and respond to spills that may discharge into the MS4 as required in Part I.D.5.e.(v)	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	One (1) year from effective date of permit	One (1) year from effective date of permit	Eighteen (18) months from effective date of permit
Update the SWMP document and annual report as required in Part I.D.5.e.(iii), Part I.D.5.e.(vi), and Part I.D.5.e.(vii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.e.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) High priority areas include any area where there is ongoing evidence of illicit discharges or dumpling, or where there are citizen complaints on more than five (5) separate events within twelve (12) months
(***) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

f. Control of Floatables Discharges

(i) The permittee must develop, update, and implement a program to address and control floatables in discharges into the MS4. The floatables control program shall include source controls and, where necessary, structural controls. **Permittees previously covered under NMS000101 or NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.** The following elements must be included in the program:

(a) Develop a schedule for implementation of the program to control floatables in discharges into the MS4 (Note: AMAFCA and the City of Albuquerque should update the schedule according to the findings of the 2005 AMAFCA/COA Floatable and Gross Pollutant Study and other studies); and

(b) Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type.

(ii) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.f.(i).

(iii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

Table 7. Control of Floatables Discharges - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
- Develop a schedule to implement the program as required in Part I.D.5.f.(i)(a)	Ten (10) months from the effective date of the permit	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	One (1) year from the effective date of the permit	Eighteen (18) months from the effective date of the permit
-Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type as required in Part I.D.5.f.(i)(b)	Ten (10) months from the effective date of the permit	One (1) year from the effective date of the permit	Two (2) years from the effective date of the permit	Two (2) years from the effective dae of the permit	Thirty (30) months from the effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.f.(ii) and Part I.D.5.f.(iii).	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

g. Public Education and Outreach on Stormwater Impacts

(i) The permittee shall, individually or cooperatively, develop, revise, implement, and maintain a comprehensive stormwater program to educate the community, employees, businesses, and the general public of hazards associated with the illegal discharges and improper disposal of waste and about the impact that stormwater discharges on local waterways, as well as the steps that the public can take to reduce pollutants in stormwater. **Permittees previously covered under NMS000101 and NMR040000 must continue existing programs while updating those programs, as necessary, to comply with the requirements of this permit.**

(ii) The permittee must implement a public education program to distribute educational knowledge to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff. The permittee must:

(a) Define the goals and objectives of the program based on high priority community-wide issues;

(b) Develop or utilize appropriate educational materials, such as printed materials, billboard and mass transit advertisements, signage at select locations, radio advertisements, television advertisements, and websites;

(c) Inform individuals and households about ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes;

(d) Inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups;

(e) Use tailored public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed cleanups; and

(f) Use materials or outreach programs directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant stormwater impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permittee may tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children. The permittee must make information available for non-English speaking residents, where appropriate.

(iii) The permittee must include the following information in the Stormwater Management Program (SWMP) document:

(a) A description of a program to promote, publicize, facilitate public reporting of the presence of illicit discharges or water quality associated with discharges from municipal separate storm sewers;

(b) A description of the education activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(c) A description of the mechanism(s) utilized to comply with each of the elements required in Part I.D.5.g.(i) and Part I.D.5.g.(ii) and its corresponding measurable goal.

(iv) The permittee must assess the overall success of the program, and document both direct and indirect measurements of program effectiveness in the Annual Report.

Program Flexibility Elements

(v) Where necessary to comply with the Minimum Control Measures established in Part I.D.5.g.(i) and Part I.D.5.g.(ii), the permittee should develop a program or modify/revise an existing education and outreach program to:

(a) Promote, publicize, and facilitate the use of Green Infrastructure (GI)/Low Impact Development (LID)/Sustainability practices; and

(b) Include an integrated public education program (including all permittee departments and programs within the MS4) regarding litter reduction, reduction in pesticide/herbicide use, recycling and proper

disposal (including yard waste, hazardous waste materials, and used motor vehicle fluids), and GI/LID/Sustainable practices (including xeriscaping, reduced water consumption, water harvesting practices allowed by the New Mexico State Engineer Office).

(vi) The permittee may collaborate or partner with other MS4 operators to maximize the program and cost effectiveness of the required outreach.

(vii) The education and outreach program may use citizen hotlines as a low-cost strategy to engage the public in illicit discharge surveillance.

(viii) The permittee may use stormwater educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The permittee may also integrate the education and outreach program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include:

(a) Classroom education on stormwater;

A. Develop watershed map to help students visualize area impacted.

B. Develop pet-specific education

(b) Establish a water committee/advisor group;

(c) Contribute and participate in Stormwater Quality Team;

(d) Education/outreach for commercial activities;

(e) Hold regular employee trainings with industry groups

(f) Education of lawn and garden activities;

(g) Education on sustainable practices;

(h) Education/outreach of pet waste management;

(i) Education on the proper disposal of household hazardous waste;

(j) Education/outreach programs aimed at minority and disadvantaged communities and children;

(k) Education/outreach of trash management;

(l) Education/outreach in public events;

A. Participate in local events—brochures, posters, etc.

B. Participate in regional events (i.e., State Fair, Balloon Fiesta).

(m) Education/outreach using the media (e.g. publish local newsletters);

(n) Education/outreach on water conservation practices designed to reduce pollutants in storm water for home residences.

Table 8. Public Education and Outreach on Stormwater Impacts - Program Development and Implementation Schedules

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Develop, revise, implement, and maintain an education and outreach program as required in Part I.D.5.g.(i) and Part I.D.5.g.(ii)	Ten (10) months from the effective date of the permit	Eleven (11) months from the effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.g.(iii) and Part I.D.5.g.(iv)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.g.(v) through Part I.D.5.g.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

h. Public Involvement and Participation

(i) The permittee must provide local public notice of and make available for public review a copy of the complete NOI and attachments (see Part I.B.2). Local public notice may be made by newspaper notice, notice at a council meeting, posting on the internet, or other method consistent with state/tribal/local public notice requirements.

The permittee must consider all public comments received during the public notice period and modify the NOI, or include a schedule to modify the SWMP, as necessary, or as required by the Director modify the NOI or/and SWMP in response to such comments. The Permittees must include in the NOI any unresolved public comments and the MS4's response to these comments. Responses provided by the MS4 will be considered as part of EPA's decision-making process. See also Appendix E Providing Comments or Requesting a Public Hearing on an Operator's NOI.

(ii) The permittee shall develop, revise, implement and maintain a plan to encourage public involvement and provide opportunities for participation in the review, modification and implementation of the SWMP; develop and implement a process by which public comments to the plan are received and reviewed by the person(s) responsible for the SWMP; and, make the SWMP available to the public and to the operator of any MS4 or Tribal authority receiving discharges from the MS4. **Permittee previously covered under NMS000101 or NMR040000 must continue existing public involvement and participation programs while updating those programs, as necessary, to comply with the requirements of this permit.**

(iii) The plan required in Part I.D.5.h.(ii) 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 permittee must include the following elements in the plan:

(a) A detailed description of the general plan for informing the public of involvement and participation opportunities, including types of activities; target audiences; how interested parties may access the SWMP; and how the public was involved in development of the SWMP;

(b) The development and implementation of at least one (1) assessment of public behavioral change following a public education and/or participation event;

(c) A process to solicit involvement by environmental groups, environmental justice communities, civic organizations or other neighborhoods/organizations interested in water quality-related issues, including but not limited to the Middle Rio Grande Water Quality Work Group, the Middle Rio Grande Bosque Initiative, the Middle Rio Grande Endangered Species Act Collaborative Program, the Middle Rio Grande-Albuquerque Reach Watershed Group, the Pueblos of Santa Ana, Sandia and Isleta, Albuquerque Bernalillo County Water Utility Authority, UNM Colleges and Schools, and Chartered Student Organizations; and

(d) An evaluation of opportunities to utilize volunteers for stormwater pollution prevention activities and awareness throughout the area.

(iv) The permittee shall comply with State, Tribal and local public notice requirements when implementing a public involvement/ participation program.

(v) The public participation process must reach out to all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local stormwater management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts.

(vi) The permittee must include in the SWMP a description of the mechanism(s) utilized to comply with each of the elements required in Parts I.D.5.h.(i) throughout Part I.D.5.h.(iv) and its corresponding measurable goal.

(vii) The permittee shall assess the overall success of the program, and document the program effectiveness in the annual report.

(viii) The permittee must provide public accessibility of the Storm Water Management Program (SWMP) document and Annual Reports online via the Internet and during normal business hours at the MS4 operator's main office, a local library, posting on the internet and/or other readily accessible location for public inspection and copying consistent with any applicable federal, state, tribal, or local open records requirements. Upon a showing of significant public interest, the MS4 operator is encouraged to hold a public meeting (or include in the agenda of in a regularly scheduled city council meeting, etc.) on the NOI, SWMP, and Annual Reports. (See Part III B)

Program Flexibility Elements

(ix) The permittee may integrate the public Involvement and participation program with existing education and outreach programs in the Middle Rio Grande area. Example of existing programs include: Adopt-A-Stream Programs; Attitude Surveys; Community Hotlines (e.g. establishment of a "311"-type number and system established to handle storm-water-related concerns, setting up a public tracking/reporting

system, using phones and social media); Revegetation Programs; Storm Drain Stenciling Programs; Stream cleanup and Monitoring program/events.

Table 9. Public Involvement and Participation - *Program Development and Implementation Schedules*

Activity	Permittee Class				
	A Phase I MS4s	**B** Phase II MS4s (2000 Census)	**C** New Phase II MS4s (2010 Census **)	**D** MS4s within Indian Lands	**Cooperative (*)** Any Permittee with cooperative programs
Develop (or update), implement, and maintain a public involvement and participation plan as required in Part I.D.5.h.(ii) and Part I.D.5.h.(iii)	Ten (10) months from effective date of the permit	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit
Comply with State, Tribal, and local notice requirements when implementing a Public Involvement and Participation Program as required in Part I.D.5.h.(iv)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	Twelve (12) months from effective date of the permit	Twelve (12) months from effective date of the permit	Fourteen (14) months from effective date of the permit
Include elements as required in Part I.D.5.h.(v)	Ten (10) months from effective date of the permit	Eleven (11) months from effective date of the permit	One (1) year from effective date of the permit	One (1) year from effective date of the permit	Eighteen (18) months from effective date of the permit
Update the SWMP document and annual report as required in Part I.D.5.h.(vi), Part I.D.5.h.(vii), and Part I.D.5.h.(viii)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary
Enhance the program to include requirements in Part I.D.5.h.(ix)	Update as necessary	Update as necessary	Update as necessary	Update as necessary	Update as necessary

(*) During development of cooperative programs, the permittee must continue to implement existing programs.
(**) or MS4s designated by the Director
Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

6. **Stormwater Management Program Review and Modification**.

   a. Program Review. Permittee shall participate in an annual review of its SWMP in conjunction with preparation of the annual report required in Part III.B. Results of the review shall be discussed in the annual report and shall include an assessment of:

      (i) SWMP implementation, progress in achieving measurable goals, and compliance with program elements and other permit conditions;

      (ii) the effectiveness of its SWMP, and any necessary modifications, in complying with the permit, including requirements to control the discharge of pollutants, and comply with water quality standards and any applicable approved TMDLs; and the adequacy of staff, funding levels, equipment, and support capabilities to fully implement the SWMP and comply with permit conditions.

(a) Project staffing requirements, in man hours, for the implementation of the MS4 program during the upcoming year.

(b) Staff man hours used during the previous year for implementing the MS4 program. Man hours may be estimated based on staff assigned, assuming a forty (40) hour work week.

b. Program Modification. The permittee(s) may modify its SWMP with prior notification or request to the EPA and NMED in accordance with this section.

(i) Modifications adding, but not eliminating, replacing, or jeopardizing fulfillment of any components, controls, or requirements of its SWMP may be made by the permittee(s) at any time upon written notification to the EPA.

(ii) Modifications replacing or eliminating an ineffective or unfeasible component, control or requirement of its SWMP, including monitoring and analysis requirements described in Parts III.A and V, may be requested in writing at any time. If request is denied, the EPA will send a written explanation of the decision. Modification requests shall include the following:

(a) a description of why the SWMP component is ineffective, unfeasible (including cost prohibitions), or unnecessary to support compliance with the permit;

(b) expectations on the effectiveness of the proposed replacement component; and

(c) an analysis of how the proposed replacement component is expected to achieve the goals of the component to be replaced.

(iii) Modifications resulting from schedules contained in Part VI may be requested following completion of an interim task or final deadline.

(iv) Modification requests or notifications shall be made in writing, signed in accordance with Part IV.H.

c. Program Modifications Required by EPA. Modifications requested by EPA shall be made in writing, set forth the time schedule for the permittee(s) to develop the modifications, and offer the permittee(s) the opportunity to propose alternative program modifications to meet the objective of the requested modification. The EPA may require changes to the SWMP as needed to:

(i) Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;

(ii) Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements;

(iii) Include such other conditions deemed necessary by the EPA to comply with the goals and requirements of the Clean Water Act; or

(iv) If, at any time, EPA determines that the SWMP does not meet permit requirements.

d. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation: The permittee(s) shall implement the SWMP:

(i) On all new areas added to their portion of the MS4 (or for which they become responsible for implementation of stormwater quality controls) as expeditiously as possible, but not later than one (1) year from addition of the new areas. Implementation may be accomplished in a phased manner to allow additional time for controls that cannot be implemented immediately;

(ii) Within ninety (90) days of a transfer of ownership, operational authority, or responsibility for SWMP implementation, the permittee(s) shall have a plan for implementing the SWMP on all affected areas. The plan may include schedules for implementation; and information on all new annexed areas and any resulting updates required to the SWMP shall be submitted in the annual report.

7. **Retention of Program Records**. The permittee shall retain SWMP records developed in accordance with Part I.D, Part IV.P, and Part VI for at least five (5) years after coverage under this permit terminates.

8. **Qualifying State, Tribal or Local Program**. The permittee may substitute the BMPs and measurable goals of an existing storm water pollution control program to qualify for compliance with one or more of the minimum control measures if the existing measure meets the requirements of the minimum control measure as established in Part I.D.5

PART II. NUMERIC DISCHARGE LIMITATIONS

A. DISCHARGE LIMITATIONS. Reserved

PART III. MONITORING, ASSESSMENT, AND REPORTING REQUIREMENTS:

A. MONITORING AND ASSESSMENT

The permittee must develop, in consultation with NMED and EPA (and affected Tribes if monitoring locations would be located on Tribal lands), and implement a comprehensive monitoring and assessment program designed to meet the following objectives:

- Assess compliance with this permit;
- Assess the effectiveness of the permittee's stormwater management program;
- Assess the impacts to receiving waters resulting from stormwater discharges;
- Characterize stormwater discharges;
- Identify sources of elevated pollutant loads and specific pollutants;
- Detect and eliminate illicit discharges and illegal connections to the MS4; and
- Assess the overall health and evaluate long-term trends in receiving water quality.

The permittee shall be select specific monitoring locations sufficient to assess effects of storm water discharges on receiving waters. The monitoring program may take advantage of monitoring stations/efforts utilized by the permittees or others in previous stormwater monitoring programs or other water quality monitoring efforts. Data collected by others at such stations may be used to satisfy part, or all, of the permit monitoring requirements provided the data collection by that party meets the requirements established in Part III.A.1 throughout Part III.A.5. The comprehensive monitoring and assessment program shall be described in the SWMP document and the results must be provided in each annual report.

Implementation of the comprehensive monitoring and assessment program may be achieved through participation with other permittees to satisfy the requirements of Part III.A.1 throughout Part III.A.5 below in lieu of creating duplicate program elements for each individual permittee.

1. **Wet Weather Monitoring**: The permittees shall conduct wet weather monitoring to gather information on the response of receiving waters to wet weather discharges from the MS4 during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Wet Weather Monitoring shall be conducted at outfalls, internal sampling stations, and/or in-stream monitoring locations at each water of the US that runs in each entity or entities' jurisdiction(s). Permittees may choose either Option A or Option B below:

   a. *Option A*: Individual monitoring

      (i) Class A: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD_5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Phase I permittees must include additional parameters from monitoring conducted under permit NMS000101 (from last 10 years) whose mean values are at or above a WQS. Permittee must sample these pollutants a minimum of 10 events during the permit term with at least 5 events in wet season and 4 events in dry season.

      (ii) Class B, C, and D: Perform wet weather monitoring at a location coming into the MS4 jurisdictional area (upstream) and leaving the MS4 jurisdictional area (downstream), see Appendix D. Monitor for TSS, TDS, COD, BOD_5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and gross alpha. Monitoring of temperature shall be also

conducted at outfalls and/or Rio Grande monitoring locations. If applicable, include additional parameters from monitoring conducted under permits NMR040000 or/and NMR04000I whose mean values are at or above a WQS; sample these pollutants a minimum of 8 events per location during the permit term with at least 4 events in wet season and 2 events in dry season.

b. *Option B*: Cooperative Monitoring Program

Develop a cooperative wet weather monitoring program with other permittees in the Middle Rio Grande watershed (see map in Appendix A). The program will monitor waters coming into the watershed (upstream) and leaving the watershed (downstream), see suggested sampling locations in Appendix D. The program must include sampling for TSS, TDS, COD, BOD5, DO, oil and grease, *E.coli*, pH, total kjeldahl nitrogen, nitrate plus nitrite, dissolved phosphorus, total ammonia plus organic nitrogen, total phosphorus, PCBs and Gross alpha. Monitoring of temperature shall be also conducted at outfalls and/or Rio Grande monitoring locations. Permittees must include additional parameters from monitoring conducted under permits NMS000101, NMR040000 or/and NMR04000I whose mean values are at or above a WQS. The monitoring program must sample the pollutants for a minimum of 7 storm events per location during the permit term with at least 3 events wet season and 2 events in dry season.

Note: Seasonal monitoring periods are: Wet Season: July 1 through October 31; Dry Season: November 1 through June 30.

c. Wet weather monitoring shall be performed only when the predicted (or actual) rainfall magnitude of a storm event is greater than 0.25 inches and an antecedent dry period of at least forty-eight (48) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology will consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each (or a flow weighted automatic composite, see Part III.A.5.a.(i)). Individual grab samples shall be preserved and delivered to the laboratory where samples will be combined into a single composite sample from each monitoring location.

d. Monitoring methodology at each MS4 monitoring location shall be collected during any portion of the monitoring location's discharge hydrograph (i.e. first flush, rising limb, peak, and falling limb) after a discernible increase in flow at the tributary inlet.

e. The permittee must comply with the schedules contained in Table 10. The results of the Wet Weather Monitoring must be provided in each annual report.

f. DO, pH, conductivity, and temperature shall be analyzed in the field within fifteen (15) minutes of sample collection.

g. Alternate wet weather monitoring locations established in Part III.A.1.a or Part III.A.1.b may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the EPA and NMED in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the EPA, use of an alternate monitoring location (except for those with numeric effluent limitations) may commence thirty (30) days from the date of the request. For monitoring locations where numeric effluent limitations have been established, the permit must be modified prior to substitution of alternate monitoring locations. At least six (6) samples shall be collected during the first year of monitoring at substitute monitoring locations. If there are less than six sampleable events, this should be document for reporting purposes.

h. Response to monitoring results: The monitoring program must include a contingency plan for collecting additional monitoring data within the MS4 or at additional appropriate instream locations should monitoring results indicate that MS4 discharges may be contributing to instream exceedances of WQS. The purpose of this additional monitoring effort would be to identify sources of elevated pollutant loadings so they could be addressed by the SWMP.

Table 10. Wet Weather Monitoring Program Implementation Schedules:

Activity	Permittee Class				
	A Phase I MS4s	**B Phase II MS4s (2000 Census)**	**C New Phase II MS4s (2010 Census **)**	**D MS4s within Indian Lands**	**Cooperative (*) Any Permittee with cooperative programs**
Submit wet weather monitoring preference to EPA (i.e., individual monitoring program vs. cooperative monitoring program) with NOI submittals	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)	NOI submittal Deadline (see Table 1)
Submit a detailed description of the monitoring scheme to EPA and NMED for approval. The monitoring scheme should include: a list of pollutants; a description of monitoring sites with an explanation of why those sites were selected; and a detailed map of all proposed monitoring sites	Ten (10) months from effective date of permit	Ten (10) months from effective date of permit	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Twelve (12) months from effective date of permit
Submit certification that all wet weather monitoring sites are operational and begin sampling	Eleven (11) months from effective date of permit	Eleven (11) months from effective date of permit	Thirteen (13) months from effective date of permit	Thirteen (13) months from effective date of permit	Fourteen (14) months from effective date of permit
Update SWMP document and submit annual reports	Annually	Annually	Annually	Annually	Annually

(**) or MS4s designated by the Director

Note: The deadlines established in this table may be extended by the Director for any MS4 designated as needing a permit after issuance of this permit to accommodate expected date of permit coverage.

2. **Dry Weather Discharge Screening of MS4**: Each permittee shall identify, investigate, and address areas within its jurisdiction that may be contributing excessive levels of pollutants to the Municipal Separate Storm Sewer System as a result of dry weather discharges (i.e., discharges from separate storm sewers that occur without the direct influence of runoff from storm events, e.g. illicit discharges, allowable non-stormwater, groundwater infiltration, etc.). Due to the arid and semi-arid conditions of the area, the dry weather discharges screening program may be carried out during both wet season (July 1 through October 31) and dry Season (November 1 through June 30). Results of the assessment

shall be provided in each annual report. This program may be coordinated with the illicit discharge detection and elimination program required in Part I.D.5.e. The dry weather screening program shall be described in the SWMP and comply with the schedules contained in Part I.D.5.e.(iii). The permittee shall

a. Include sufficient screening points to adequately assess pollutant levels from all areas of the MS4.

b. Screen for, at a minimum, BOD_5, sediment or a parameter addressing sediment (e.g., TSS or turbidity), E. coli, Oil and Grease, nutrients, any pollutant that has been identified as cause of impairment of a waterbody receiving discharges from that portion of the MS4, including temperature.

c. Specify the sampling and non-sampling techniques to be issued for initial screening and follow-up purposes. Sample collection and analysis need not conform to the requirements of 40 CFR Part 136; and

d. Perform monitoring only when an antecedent dry period of at least seventy-two (72) hours after a rain event greater than 0.1 inch in magnitude is satisfied. Monitoring methodology shall consist of collecting a minimum of four (4) grab samples spaced at a minimum interval of fifteen (15) minutes each. Grab samples will be combined into a single composite sample from each station, preserved, and delivered to the laboratory for analysis. A flow weighted automatic composite sample may also be used.

3. **Floatable Monitoring:** The permittees shall establish locations for monitoring/assessing floatable material in discharges to and/or from their MS4. Floatable material shall be monitored at least twice per year at priority locations and at minimum of two (2) stations except as provided in Part III.A.3. below. The amount of collected material shall be estimated in cubic yards.

   a. One (1) station should be located in the North Diversion (only applicable to the COA and AMAFCA).

   b. Non-traditional MS4 as defined in Part VII shall sample/assess at one (1) station.

   c. Phase II MS4s shall sample/assess at one (1) station within their jurisdiction or participate in a cooperative floatable monitoring plan addressing impacts on perennial waters of the US on a larger watershed basis.

   A cooperative monitoring program may be established in partnership with other MS4s to monitor and assess floatable material in discharges to and/or from a joint jurisdictional area or watershed basis.

4. **Industrial and High Risk Runoff Monitoring** (Applicable only to Class A permittees): The permittees shall monitor stormwater discharges from Type 1 and 2 industrial facilities which discharge to the MS4 provided such facilities are located in their jurisdiction. (Note: if no such facilities are in the permittee's jurisdiction, the permittee must certify that this program element does not apply). The permittee shall:

   a. Conduct analytical monitoring of Type 1 facilities that discharge to the MS4. Type 1 facilities are municipal landfills; hazardous waste treatment, disposal and recovery facilities; facilities that are subject to EPCRA Title III, Section 313; and industrial facilities the permittee(s) determines are contributing a substantial pollutant loading to the MS4.

      (i) The following parameters shall be monitored:
      - any pollutants limited in an existing NPDES permit to a subject facility;

- oil and grease;
- chemical oxygen demand (COD);
- pH;
- biochemical oxygen demand, five-day (BOD_5);
- total suspended solids (TSS);
- total phosphorous;
- total Kjeldahl nitrogen (TKN);
- nitrate plus nitrite nitrogen;
- any discharge information required under 40 CFR §122.21(g)(7)(iii) and (iv);
- total cadmium;
- total chromium;
- total copper;
- total lead;
- total nickel;
- total silver;
- total zinc; and,
- PCBs.

(ii) Frequency of monitoring shall be established by the permittee(s), but may not be less than once per year;

(iii) In lieu of the above parameter list, the permittee(s) may alter the monitoring requirement for any individual Type 1 facility:

(a) To coincide with the corresponding industrial sector-specific monitoring requirements of the 2008 Multi-Sector General Stormwater Permit or any applicable general permit issued after September 2008. This exception is not contingent on whether a particular facility is actually covered by the general permit; or

(b) To coincide with the monitoring requirements of any individual permit for the stormwater discharges from that facility, and

(c) Any optional monitoring list must be supplemented by pollutants of concern identified by the permittee(s) for that facility.

b. Conduct appropriate monitoring (e.g. analytic, visual), as determined by the permittee(s), at Type 2 facilities that discharge to the MS4. Type 2 facilities are other municipal waste treatment, storage, or disposal facilities (e.g. POTWs, transfer stations, incinerators) and industrial or commercial facilities the permittee(s) believed contributing pollutants to the MS4. The permittee shall include in each annual report, a list of parameters of concern and monitoring frequencies required for each type of facility.

c. May use analytical monitoring data, on a parameter-by-parameter basis, that a facility has collected to comply with or apply for a State or NPDES discharge permit (other than this permit), so as to avoid unnecessary cost and duplication of effort;

d. May allow the facility to test only one (1) outfall and to report that the quantitative data also apply to the substantially identical outfalls if:

(i) A Type 1 or Type 2 industrial facility has two (2) or more outfalls with substantially identical effluents, and

(ii) Demonstration by the facility that the stormwater outfalls are substantially identical, using one (1) or all of the following methods for such demonstration. The NPDES Stormwater Sampling Guidance Document (EPA 833-B-92-001), available on EPA's website at provides detailed guidance on each of the three options: (1) submission of a narrative description and a site map; (2) submission of matrices; or (3) submission of model matrices.

b. May accept a copy of a "no exposure" certification from a facility made to EPA under 40 CFR §122.26(g), in lieu of analytic monitoring.

5. **Additional Sample Type, Collection and Analysis:**

a. Wet Weather (or Storm Event) Discharge Monitoring: If storm event discharges are collected to meet the objectives of the Comprehensive Monitoring and Assessment Program required in Part III.A (e.g., assess compliance with this permit; assess the effectiveness of the permittee's stormwater management program; assess the impacts to receiving waters resulting from stormwater discharges), the following requirements apply:

(i) Composite Samples: Flow-weighted composite samples shall be collected as follows:

(a) Composite Method – Flow-weighted composite samples may be collected manually or automatically. For both methods, equal volume aliquots may be collected at the time of sampling and then flow-proportioned and composited in the laboratory, or the aliquot volume may be collected based on the flow rate at the time of sample collection and composited in the field.

(b) Sampling Duration – Samples shall be collected for at least the first three (3) hours of discharge. Where the discharge lasts less than three (3) hours, the permittee should report the value. .

(c) Aliquot Collection – A minimum of three (3) aliquots per hour, separated by at least fifteen (15) minutes, shall be collected. Where more than three (3) aliquots per hour are collected, comparable intervals between aliquots shall be maintained (e.g. six aliquots per hour, at least seven (7) minute intervals).

(ii) Grab Samples: Grab samples shall be taken during the first two (2) hours of discharge.

b. Analytical Methods: Analysis and collection of samples shall be done in accordance with the methods specified at 40 CFR §136. Where an approved 40 CFR §136 method does not exist, any available method may be used unless a particular method or criteria for method selection (such as sensitivity) has been specified in the permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

Screening level tests may utilize less expensive "field test kits" using test methods not approved by EPA under 40 CFR 136, provided the manufacturers published detection ranges are adequate for the illicit discharge detection purposes.

EPA Method 1668 shall be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. For purposes of sediment sampling in dry weather as part of a screening program to identify area(s) where PCB control/clean-up efforts may need to be focused, either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

EPA Method 900.0 shall be utilized when gross alpha water column monitoring is conducted to determine compliance with permit requirements.

B. ANNUAL REPORT

The permittees shall submit an annual report to be submitted by no later than **December 1st**. See suggested form at http://epa.gov/region6/water/npdes/sw/ms4/index.htm. The report shall cover the previous year from **July 1st to June 30rd** and include the below separate sections. Additionally, the year one (1) and year four (4) annual report shall include submittal of a complete SWMP revision.

At least forty five (45) days prior to submission of each Annual Report, the permittee must provide public notice of and make available for public review and comment a draft copy of the Annual Report. All public input must be considered in preparation of the final Annual Reports and any changes to the SWMP.

Note: A complete copy of the signed Annual Report should be maintained on site.

1. **SWMP(s) status of implementation**: shall include the status of compliance with all schedules established under this permit and the status of actions required in Parts I, III, and VI.

2. **SWMP revisions**: shall include revisions, if necessary, to the assessments of controls or BMPs reported in the permit application (or NOI for coverage under this permit) under 40 CFR §122.26(d)(2)(v) and §122.34(d)(1)(i) are to be included, as well as a cumulative list of all SWMP revisions during the permit term.

   Class A permittees shall include revisions, if necessary, to the fiscal analysis reported in the permit application (or NOI for coverage under this permit) under §122.26(d)(2)(vi).

3. **Performance assessment**: shall include:

   a. an assessment of performance in terms of measurable goals, including, but not limited to, a description of the number and nature of enforcement actions and inspections, public education and public involvement efforts;

   b. a summary of the data, including monitoring data, that is accumulated throughout the monitoring year (July 1 to June 30); actual values of representative monitoring results shall be included, if results are above minimum quantification level (MQL); and

   c. an identification of water quality improvements or degradation.

4. **Annual expenditures**: for the reporting period, with a breakdown for the major elements of the stormwater management program and the budget for the year following each annual report. (Applicable only to Class A permittees)

5. **Annual Report Responsibilities for Cooperative Programs:** preparation of a system-wide report with cooperative programs may be coordinated among cooperating MS4s and then used as part of individual Annual Reports. The report of a cooperative program element shall indicate which, if any, permittee(s) have failed to provide the required information on the portions of the MS4 for which they are responsible to the cooperation permittees.

   a. Joint responsibility for reports covering cooperative programs elements shall be limited to participation in preparation of the overview for the entire system and inclusion of the identity of any permittee who failed to provide input to the annual report.

b. Individual permittees shall be individually responsible for content of the report relating to the portions of the MS4 for which they are responsible and for failure to provide information for the system-wide annual report no later than July 31st of each year.

6. **Public Review and Comment**: a brief summary of any issues raised by the public on the draft Annual Report, along with permittee's responses to the public comments.

7. **Signature on Certification of Annual Reports**: The annual report shall be signed and certified, in accordance with Part IV.H and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been apprised of the content of the Annual Report. Annual report shall be due no later than December 1st of each year. A complete copy of the signed Annual Report should be maintained on site.

C. CERTIFICATION AND SIGNATURE OF RECORDS.

All reports required by the permit and other information requested by the EPA shall be signed and certified in accordance with Part IV.H.

D. REPORTING: WHERE AND WHEN TO SUBMIT

1. Monitoring results (Part III.A.1, Part III.A.3, Part III.A.5.a) obtained during the reporting period running from July 1st to June 30th shall be submitted on discharge monitoring report (DMR) forms along with the annual report required by Part III.B. A separate DMR form is required for each monitoring period (season) specified in Part III.A.1. If any individual analytical test result is less than the minimum quantification level (MQL) listed for that parameter, then a value of zero (0) may be used for that test result for the discharge monitoring report (DMR) calculations and reporting requirements. The annual report shall include the actual value obtained, if test result is less than the MQL (See Appendix F).

2. Signed copies of DMRs required under Part III, the Annual Report required by Part III.B, and all other reports required herein, shall be submitted in electronic form to R6_MS4Permits@epa.gov (note: there is an underscore between R6 and MS4).

   Copy of a suggested Annual Report Format is located in EPA R6 website: http://epa.gov/region6/water/npdes/sw/ms4/index.htm.

   Electronic submittal of the documents required in the permit using a compatible Integrated Compliance Information System (ICIS) format would be allowed if available.

3. Requests for SWMP updates, modifications in monitoring locations, or application for an individual permit shall, be submitted to,:

   U.S. EPA, Region 6
   Water Quality Protection Division
   Operations Support Office (6WQ-O)
   1445 Ross Avenue
   Dallas, Texas 75202-2733

4. Additional Notification. Permittee(s) shall also provide copies of NOIs, DMRs, annual reports, NOTs, requests for SWMP updates, items for compliance with permit requirements for Compliance with Water Quality Standards in Part I.C.1, TMDL's reports established in Part I.C.2, monitoring scheme, reports, and certifications required in Part III.A.1, programs or changes in monitoring locations, and all other reports required herein, to:

New Mexico Environment Department
Attn: Bruce Yurdin, Program Manager
Surface Water Quality Bureau
Point Source Regulation Section
P.O. Box 5469
Santa Fe, New Mexico 87502

Pueblo of Sandia Environment Department
Attn: Scott Bulgrin, Water Quality Manager
481 Sandia Loop
Bernalillo, NM 87004
(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Sandia: AMAFCA, Sandoval County, Village of Corrales, City of Rio Rancho, Town of Bernalillo, SSCAFCA, and ESCAFCA)

Pueblo of Isleta
Attn: Ramona M. Montoya, Environment Division Manager
P.O. Box 1270
Isleta NM 87022

(Notes: Only the City of Albuquerque, Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA), New Mexico Department of Transportation (NMDOT) District 3, KAFB (Kirtland Air Force Base), Sandia Labs (DOE), and Bernalillo County). All parties submitting an NOI or NOT shall notify the Pueblo of Isleta in writing that a NOI or NOT has been submitted to EPA

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004
(Note: Only those MS4s with discharges upstream of or to waters under the jurisdictional of the Pueblo of Santa Ana)

PART IV. STANDARD PERMIT CONDITIONS

A. DUTY TO COMPLY.

The permittee(s) must comply with all conditions of this permit insofar as those conditions are applicable to each permittee, either individually or jointly. Any permit noncompliance constitutes a violation of the Clean Water Act (The Act) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

B. PENALTIES FOR VIOLATIONS OF PERMIT CONDITIONS.

The EPA will adjust the Civil and administrative penalties listed below in accordance with the Civil Monetary Penalty Inflation Adjustment Rule (Federal Register: Dec. 31, 1996, Volume 61, No. 252, pages 69359-69366, as corrected, March 20, 1997, Volume 62, No. 54, pages 13514-13517) as mandated by the Debt Collection Improvement Act of 1996 for inflation on a periodic basis. This rule allows EPA's penalties to keep pace with inflation. The Agency is required to review its penalties at least once every four years thereafter and to adjust them as necessary for inflation according to a specified formula. The civil and administrative penalties listed below were adjusted for inflation starting in 1996.

1. **Criminal Penalties**.
   a. Negligent Violations: The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one (1) year, or both.

   b. Knowing Violations: The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three (3) years, or both.

   c. Knowing Endangerment: The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than fifteen (15) years, or both.

   d. False Statement: The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two (2) years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four (4) years, or by both. (See Section 309(c)(4) of the Act).

2. **Civil Penalties**. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $27,500 per day for each violation.

3. **Administrative Penalties**. The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to an administrative penalty, as follows:

   a. Class I penalty: Not to exceed $11,000 per violation nor shall the maximum amount exceed $27,500.

b. Class II penalty: Not to exceed $11,000 per day for each day during which the violation continues nor shall the maximum amount exceed $137,500.

C. **DUTY TO REAPPLY**. If the permittee wishes to continue an activity regulated by this permit after the permit expiration date, the permittee must apply for and obtain a new permit. The application shall be submitted at least 180 days prior to expiration of this permit. The EPA may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date. Continuation of expiring permits shall be governed by regulations promulgated at 40 CFR §122.6 and any subsequent amendments.

D. **NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE**. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

E. **DUTY TO MITIGATE**. The permittee(s) shall take all reasonable steps to control or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

F. **DUTY TO PROVIDE INFORMATION**. The permittee(s) shall furnish to the EPA, within a time specified by the EPA, any information which the EPA may request to determine compliance with this permit. The permittee(s) shall also furnish to the EPA upon request copies of records required to be kept by this permit.

G. **OTHER INFORMATION**. When the permittee becomes aware that he or she failed to submit any relevant facts or submitted incorrect information in any report to the EPA, he or she shall promptly submit such facts or information.

H. **SIGNATORY REQUIREMENTS**. For a municipality, State, or other public agency, all DMRs, SWMPs, reports, certifications or information either submitted to the EPA or that this permit requires be maintained by the permittee(s), shall be signed by either a:

1. Principal executive officer or ranking elected official; or

2. Duly authorized representative of that person. A person is a duly authorized representative only if:

   a. The authorization is made in writing by a person described above and submitted to the EPA.

   b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position.

3. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new written authorization satisfying the requirements of this paragraph must be submitted to the EPA prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. Certification: Any person signing documents under this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

I. **PENALTIES FOR FALSIFICATION OF MONITORING SYSTEMS.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by fines and imprisonment described in Section 309 of the Act.

J. **OIL AND HAZARDOUS SUBSTANCE LIABILITY.** Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under section 311 of the Act or section 106 of CERCLA.

K. **PROPERTY RIGHTS.** The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

L. **SEVERABILITY.** The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

M. **REQUIRING A SEPARATE PERMIT.**

1. The EPA may require any permittee authorized by this permit to obtain a separate NPDES permit. Any interested person may petition the EPA to take action under this paragraph. The Director may require any permittee authorized to discharge under this permit to apply for a separate NPDES permit only if the permittee has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form (as necessary), a statement setting a deadline for the permittee to file the application, and a statement that on the effective date of the separate NPDES permit, coverage under this permit shall automatically terminate. Separate permit applications shall be submitted to the address shown in Part III.D. The EPA may grant additional time to submit the application upon request of the applicant. If an owner or operator fails to submit, prior to the deadline of the time extension, a separate NPDES permit application as required by the EPA, then the applicability of this permit to the permittee is automatically terminated at the end of the day specified for application submittal.

2. Any permittee authorized by this permit may request to be excluded from the coverage of this permit by applying for a separate permit. The permittee shall submit a separate application as specified by 40 CFR §122.26(d) for Class A permittees and by 40 CFR §122.33(b)(2) for Class B, C, and D permittees, with reasons supporting the request to the Director. Separate permit applications shall be submitted to the address shown in Part III.D.3. The request may be granted by the issuance of a separate permit if the reasons cited by the permittee are adequate to support the request.

3. When an individual NPDES permit is issued to a discharger otherwise subject to this permit, or the permittee is authorized to discharge under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit or the date of authorization of coverage under the alternative general permit, whichever the case may be. When an individual NPDES permit is denied to an operator otherwise subject to this permit, or the operator is denied for coverage under an alternative NPDES general permit, the applicability of this permit to the individual NPDES permittee is automatically terminated on the date of such denial, unless otherwise specified by the permitting authority.

N. **STATE / ENVIRONMENTAL LAWS.**

1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Act.

2. No condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations.

O. PROPER OPERATION AND MAINTENANCE. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit and with the requirements of stormwater management programs. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

P. MONITORING AND RECORDS.

1. The permittee must retain records of all monitoring information, including, all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of Discharge Monitoring Reports (DMRs), a copy of the NPDES permit, and records of all data used to complete the NOI for this permit, for a period of at least three years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended by request of the permitting authority at any time.

2. The permittee must submit its records to the permitting authority only when specifically asked to do so. The permittee must retain a description of the SWMP required by this permit (including a copy of the permit language) at a location accessible to the permitting authority. The permittee must make its records, including the NOI and the description of the SWMP, available to the public if requested to do so in writing.

3. Records of monitoring information shall include:
   a. The date, exact place, and time of sampling or measurements;
   b. The initials or name(s) of the individual(s) who performed the sampling or measurements;
   c. The date(s) analyses were performed;
   d. The time(s) analyses were initiated;
   e. The initials or name(s) of the individual(s) who performed the analyses;
   f. References and written procedures, when available, for the analytical techniques or methods used; and
   g. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

4. The permittee must maintain, for the term of the permit, copies of all information and determinations used to document permit eligibility under Parts I.A.5.f and Part I.A.3.b.

Q. MONITORING METHODS. Monitoring must be conducted according to test procedures approved under 40 CFR §136, unless other test procedures have been specified in this permit. The minimum quantification levels (MQLs) in Appendix F are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

R. INSPECTION AND ENTRY. The permittee shall allow the EPA or an authorized representative of EPA, or the State, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;

2. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substance or parameters at any location.

S. **PERMIT ACTIONS**. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

T. **ADDITIONAL MONITORING BY THE PERMITTEE(S)**. If the permittee monitors more frequently than required by this permit, using test procedures approved under 40 CFR §136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased monitoring frequency shall also be indicated on the DMR.

U. **ARCHEOLOGICAL AND HISTORIC SITES** (Applicable to areas within the corporate boundary of the City of Albuquerque and Tribal lands). This permit does not authorize any stormwater discharges nor require any controls to control stormwater runoff which are not in compliance with any historic preservation laws.

1. In accordance with the Albuquerque Archaeological Ordinance (Section 2-12-2, 14-16-5, and 14-14-3-4), an applicant for either:

   a. A preliminary plan for any subdivision that is five acres or more in size; or

   b. A site development plan or master development plan for a project that is five acres or more in size on property that is zoned SU-1 Special Use, IP Industrial Park, an SU-2 zone that requires site plan review, PC Planned Community with a site, or meets the Zoning Code definition of a Shopping Center must first obtain either a Certificate of No Effect or a Certificate of Approval from the City Archaeologist. Details of the requirements for a Certificate of No Effect or a Certificate of Approval are described in the ordinance. Failure to obtain a certificate as required by ordinance shall subject the property owner to the penalties of §1-1-99 ROA 1994.

2. If municipal excavation and/or construction projects implementing requirements of this permit will result in the disturbance of previously undisturbed land, and the project is not required to have a separate NPDES permit (e.g. general permit for discharge of stormwater associated with construction activity), then the permittee may seek authorization for stormwater discharges from such sites of disturbance by:

   a. Submitting, thirty (30) days prior to commencing land disturbance, the following to the State Historic Preservation Officer (SHPO) and to appropriate Tribes and Tribal Historic Preservation Officers for evaluation of possible effects on properties listed or eligible for listing on the National Register of Historic Places:

      (i) A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground, and

      (ii) A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.

      (iii) The addresses of the SHPO. Sandia Pueblo, and Isleta Pueblo are:

      State Historic Preservation Officer
      New Mexico Historic Preservation Division

Bataan Memorial Building
407 Galisteo Street, Ste. 236
Santa Fe, New Mexico 87501

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Daniel Waseta, Director
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

3. If the permittee receives a request for an archeological survey or notice of adverse effects from the SHPO, the permittee shall delay such activity until:

   a. A cultural resource survey report has been submitted to the SHPO for a review and a determination of no effect or no adverse effect has been made, and

   b. If an adverse effect is anticipated, measures to minimize harm to historic properties have been agreed upon between the permittee and the SHPO.

4. If the permittee does not receive notification of adverse effects or a request for an archeological survey from the SHPO within thirty (30) days, the permittee may proceed with the activity.

5. Alternately, the permittee may obtain authorization for stormwater discharges from such sites of disturbance by applying for a modification of this permit. The permittee may apply for a permit modification by submitting the following information to the Permitting Authority 180 days prior to commencing such discharges:

   a. A letter requesting a permit modification to include discharges from activities subject to this provision, in accordance with the signatory requirements in Part IV.H.

   b. A description of the construction or land disturbing activity and the potential impact that this activity may have upon the ground; County in which the facility will be constructed; type of facility to be constructed; size area (in acres) that the facility will encompass; expected date of construction; and whether the facility is located on land owned or controlled by any political subdivision of New Mexico; and

   c. A copy of a USGS topographic map outlining the location of the project and other ancillary impact areas.

V. **CONTINUATION OF THE EXPIRED GENERAL PERMIT.** If this permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with the Administrative Procedures Act and remain in force and effect. Any permittee who was granted permit coverage prior to the expiration date will automatically remain covered by the continued permit until the earlier of:

1. Reissuance or replacement of this permit, at which time the permittee must comply with the Notice of Intent conditions of the new permit to maintain authorization to discharge; or

2. Issuance of an individual permit for your discharges; or

3. A formal permit decision by the permitting authority not to reissue this general permit, at which time the permittee must seek coverage under an alternative general permit or an individual permit.

W. **PERMIT TRANSFERS**: This permit is not transferable to any person except after notice to the permitting authority. The permitting authority may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act.

X. **ANTICIPATED NONCOMPLIANCE.** The permittee must give advance notice to the permitting authority of any planned changes in the permitted small MS4 or activity which may result in noncompliance with this permit. (see

Y. **PROCEDURES FOR MODIFICATION OR REVOCATION**: Permit modification or revocation will be conducted according to 40 CFR 122.62, 122.63, 122.64 and 124.5.

PART V. PERMIT MODIFICATION

A. **MODIFICATION OF THE PERMIT**. The permit may be reopened and modified, in accordance with 40 CFR §122.62, §122.63, and §124.5, during the life of the permit to address:

1. Changes in the State's Water Quality Management Plan, including Water Quality Standards;

2. Changes in applicable water quality standards, statutes or regulations;

3. A new permittee who is the owner or operator of a portion of the MS4;

4. Changes in portions of the SWMP that are considered permit conditions;

5. Construction activities implementing requirements of this permit that will result in the disturbance of previously undisturbed land and not required to have a separate NPDES permit; or

6. Other modifications deemed necessary by the EPA to meet the requirements of the Act.

B. **MODIFICATION OF THE SWMP(s).** Only those portions of the SWMPs specifically required as permit conditions shall be subject to the modification requirements of 40 CFR §124.5. Addition of components, controls, or requirements by the permittee(s); replacement of an ineffective or infeasible control implementing a required component of the SWMP with an alternate control expected to achieve the goals of the original control; and changes required as a result of schedules contained in Part VI shall be considered minor changes to the SWMP and not modifications to the permit. (See also Part I.D.6)

C. **CHANGES IN REPRESENTATIVE MONITORING SITES.** Changes in monitoring sites, other than those with specific numeric effluent limitations (as described in Part III.A.1.g), shall be considered minor modifications to the permit and shall be made in accordance with the procedures at 40 CFR §122.63.

PART VI. SCHEDULES FOR IMPLEMENTATION AND COMPLIANCE.

A. **IMPLEMENTATION AND AUGMENTATION OF THE SWMP(s).** The permittee(s) shall comply with all elements identified in Parts I and III for SWMP implementation and augmentation, and permit compliance. The EPA shall have sixty (60) days from receipt of a modification or augmentation made in compliance with Part VI to provide comments or request revisions. During the initial review period, EPA may extend the time period for review and comment. The permittee(s) shall have thirty (30) days from receipt of the EPA's comments or required revisions to submit a response. All changes to the SWMP or monitoring plans made to comply with schedules in Parts I and III must be approved by EPA prior to implementation.

B. **COMPLIANCE WITH EFFLUENT LIMITATIONS.** Reserved.

C. **REPORTING COMPLIANCE WITH SCHEDULES.** No later than fourteen (14) days following a date for a specific action (interim milestone or final deadline) identified in the Part VI schedule(s), the permittee(s) shall submit a written notice of compliance or noncompliance to the EPA in accordance with Part III.D.

D. **MODIFICATION OF THE SWMP(s).** The permittee(s) shall modify its SWMP, as appropriate, in response to modifications required in Part VI.A. Such modifications shall be made in accordance with Part V.B.

PART VII. DEFINITIONS

All definitions contained in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified, additional definitions of words or phrases used in this permit are as follows:

(1) **Baseline Load** means the load for the pollutant of concern which is present in the waterbody before BMPs or other water quality improvement efforts are implemented.

(2) **Best Management Practices (BMPs)** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to 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.

(3) **Bioretention** means the water quality and water quantity stormwater management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from stormwater runoff.

(4) **Canopy Interception** means the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

(5) **Contaminated Discharges:** The following discharges are considered contaminated:

- Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at any time since November 16, 1987; or
- Has had a discharge resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or
- Contributes to a violation of an applicable water quality standard.

(6) **Controls** or **Control Measures** or **Measures** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or control the pollution of waters of the United States. Controls 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.

(7) **Controllable Sources**: Sources, private or public, which fall under the jurisdiction of the MS4.

(8) **CWA** or **The Act** means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et.seq.

(9) **Co-permittee** means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(10) **Composite Sample** means a sample composed of two or more discrete samples. The aggregate sample will reflect the average water quality covering the compositing or sample period.

(11) **Core Municipality** means, for the purpose of this permit, the municipality whose corporate boundary (unincorporated area for counties and parishes) defines the municipal separate storm sewer system. (ex. City of Dallas for the Dallas Municipal Separate Storm Sewer System, Harris County for unincorporated Harris County).

(12) **Direct Connected Impervious Area (DCIA)** means the portion of impervious area with a direct hydraulic connection to the permitee's municipal separate storm sewer system or a waterbody via continuous paved surfaces, gutters, pipes, and other impervious features. Direct connected impervious area typically does not include isolated impervious areas with an indirect hydraulic connection to the municipal separate storm sewer system (e.g., swale or detention basin) or that otherwise drain to a pervious area.

(13) **Director** means the Regional Administrator or an authorized representative.

(14) **Discharge** for the purpose of this permit, unless indicated otherwise, means discharges from the municipal separate storm sewer system.

(15) **Discharge-related activities"** include: activities which cause, contribute to, or result in storm water point source pollutant discharges; and measures to control storm water discharges, including the sitting, construction and operation of best management practices (BMPs) to control, reduce or prevent storm water pollution.

(16) **Engineered Infiltration** means an underground device or system designed to accept stormwater and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the exfiltration rate.

(17) **Evaporation** means rainfall that is changed or converted into a vapor.

(18) **Evapotranspiration** means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration of plants.

(19) **Extended Filtration** means a structural stormwater practice which filters stormwater runoff through vegetation and engineered soil media. A portion of the stormwater runoff drains into an underdrain system which slowly releases it after the storm is over.

(20) **Facility** means any NPDES "point source" or any other facility (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

(21) **Flood Control Projects** mean major drainage projects developed to control water quantity rather than quality, including channelization and detention.

(22) **Flow-weighted composite sample** means a composite sample consisting of a mixture of aliquots collected at a constant time interval, where the volume of each aliquot is proportional to the flow rate of the discharge.

(23) **Grab Sample** means a sample which is taken from a wastestream on a one-time basis without consideration of the flow rate of the wastestream and without consideration of time.

(24) **Green Infrastructure** means an array of products, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services. As a general principal, Green Infrastructure techniques use soils and vegetation to infiltrate, evapotranspirate, and/or recycle stormwater runoff. When used as components of a stormwater management system, Green Infrastructure practices such as green roofs, porous pavement, rain gardens, and vegetated swales can produce a variety of environmental benefits. In addition to effectively retaining and infiltrating rainfall, these technologies can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, and sequester carbon while also providing communities with aesthetic and natural resource benefits.

(25) **Hydromodification** means the alteration of the natural flow of water through a landscape, and often takes the form of channel straightening, widening, deepening, or relocating existing, natural stream channels. It also can involve excavation of borrow pits or canals, building of levees, streambank erosion, or other conditions or practices that change the depth, width or location of waterways. Hydromodification usually results in water quality and habitat impacts.

(26) **Illicit connection** means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

(27) **Illicit discharge** means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(28) **Impervious Area (IA)** means conventional pavements, sidewalks, driveways, roadways, parking lots, and rooftops.

(29) **Indian Country** means:

a. All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
b. All dependent Indian communities within the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and
c. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. This definition includes all land held in trust for an Indian tribe.

(30) **Individual Residence** means, for the purposes of this permit, single or multi-family residences. (e.g. single family homes and duplexes, town homes, apartments, etc.)

(31) **Infiltration** means the process by which stormwater penetrates the soil.

(32) **Land application unit** means an area where wastes are applied onto or incorporated into the soil surface (excluding manure spreading operations) for treatment or disposal.

(33) **Landfill** means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit, surface impoundment, injection well, or waste pile.

(34) **Land Use** means the way in which land is used, especially in farming and municipal planning.

(35) **Large or medium municipal separate storm sewer system** means all municipal separate storm sewers that are either: (i) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendix F of 40 CFR §122); or (ii) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers are located in the incorporated places, townships, or towns within such counties (these counties are listed in Appendices H and I of 40 CFR §122); or (iii) owned or operated by a municipality other than those described in Paragraph (i) or (ii) and that are designated by the Regional Administrator as part of the large or medium municipal separate storm sewer system.

(36) **MEP** means maximum extent practicable, the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges. A discussion of MEP as it applies to small MS4s is found at 40 CFR 122.34. CWA section 402(p)(3)(B)(iii) requires that a municipal permit "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 other provisions such as the Administrator or the State determines appropriate for the control of such pollutants.

(37) **Measurable Goal** means a quantitative measure of progress in implementing a component of storm water management program.

(38) **Municipal Separate Storm Sewer (MS4)** means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs 40 CFR §122.26(b)(4), (b)(7), and (b)(16), or designated under paragraph 40 CFR §122.26(a)(1)(v).

(39) **Non-traditional MS4** means systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings. 40 CFR 122.26(a)(16)(iii).

(40) **NOI** means Notice of Intent to be covered by this permit (see Part I.B of this permit)

(41) **NOT** means Notice of Termination.

(42) **Outfall** means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(43) **Percent load reduction** means the difference between the baseline load and the target load divided by the baseline load.

(44) **Owner or operator** means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

(45) **Permittee** refers to any person (defined below) authorized by this NPDES permit to discharge to Waters of the United States.

(46) **Permitting Authority** means EPA, Region 6.

(47) **Person** means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

(48) **Point Source** means 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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

(49) **Pollutant** is defined at 40 CFR 122.2. Pollutant means dredged spoil, solid waste, incinerator residue, filter back-wash, sewage, garbage, sewage sludge. Munitions, chemical waste, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011), heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

(50) **Pre-development Hydrology**, Predevelopment hydrology is generally the rain volume at which runoff would be produced when a site or an area is in its natural condition, prior to development disturbances. For the Middle Rio Grande area, EPA considers predevelopment conditions to be a mix of woods and desert shrub.

(51) **Rainfall and Rainwater Harvesting** means the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

(52) **Soil amendment** means adding components to in-situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

(53) **Storm drainage projects** include stormwater inlets, culverts, minor conveyances and a host of other structures or devices.

(54) **Storm sewer**, unless otherwise indicated, means a municipal separate storm sewer.

(55) **Stormwater** means stormwater runoff, snow melt runoff, and surface runoff and drainage.

(56) **Stormwater Discharge Associated with Industrial Activity** means the discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant (See 40 CFR §122.26(b)(14) for specifics of this definition).

(57) **Target load** means the load for the pollutant of concern which is necessary to attain water quality goals (e.g. applicable water quality standards).

(58) **Stormwater Management Program (SWMP)** means a comprehensive program to manage the quality of stormwater discharged from the municipal separate storm sewer system. For the purposes of this permit, the Stormwater Management Program is considered a single document, but may actually consist of separate programs (e.g. "chapters") for each permittee.

(59) **Targeted controls** means practices implemented to address particular pollutant of concern. For example litter program targets floatables.

(60) **Time-weighted composite** means a composite sample consisting of a mixture of equal volume aliquots collected at a constant time interval.

(61) **Total Maximum Daily Load (TMDL)** means a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. A TMDL is the sum of individual wasteload allocations for point sources (WLA), load allocations for non-point sources and natural background (LA), and must consider seasonal variation and include a margin of safety. The TMDL comes in the form of a technical document or plan.

(62) **Toxicity** means an LC50 of <100% effluent.

(63) **Waste load allocation (WLA)** means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

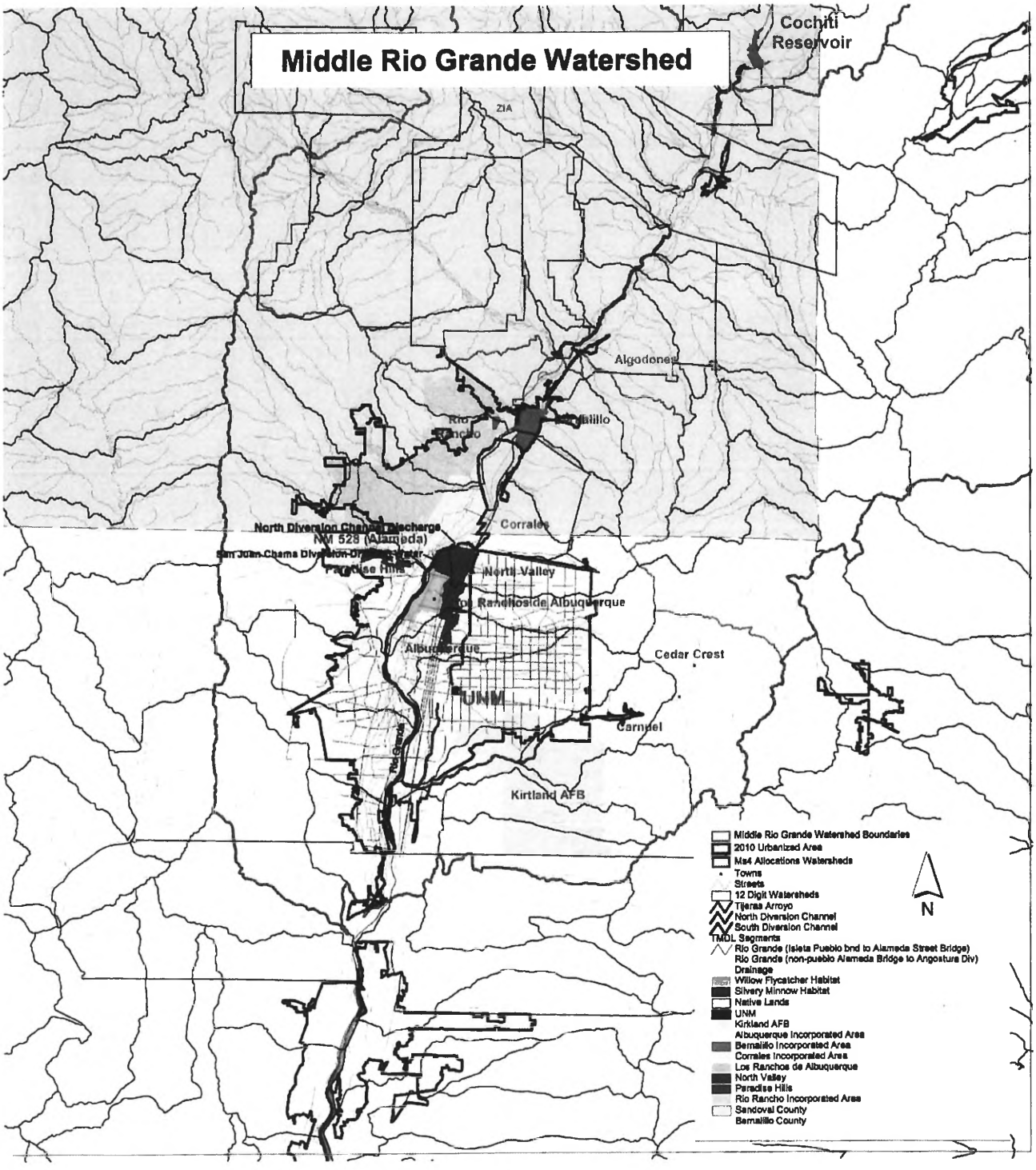
(64) **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(65) **Whole Effluent Toxicity (WET)** means the aggregate toxic effect of an effluent measured directly by a toxicity test.

PART VIII PERMIT CONDITIONS APPLICABLE TO SPECIFIC AREAS OR INDIAN COUNTY LANDS

Reserved

Appendix A - Middle Rio Grande Watershed Jurisdictions and Potential Permittees



Middle Rio Grande Watershed Jurisdictions and Potential Permittees

Class A:
City of Albuquerque
AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority)
UNM (University of New Mexico)
NMDOT (New Mexico Department of Transportation District 3)

Class B:
Bernalillo County
Sandoval County
Village of Corrales
City of Rio Rancho
Los Ranchos de Albuquerque
KAFB (Kirtland Air Force Base)
Town of Bernalillo
EXPO (State Fairgrounds/Expo NM)
SSCAFCA (Southern Sandoval County Arroyo Flood Control Authority)
NMDOT (New Mexico Department of Transportation District 3)

Class C:
ESCAFCA (Eastern Sandoval County Arroyo Flood Control Authority)
Sandia Labs (DOE)

Class D:
Pueblo of Sandia
Pueblo of Isleta
Pueblo of Santa Ana

Note: There could be additional potential permittees.
NMDOT Dist. 3 falls into the Class A type permittee, if an individual program is developed or/and implemented. The timelines for cooperative programs should be used, if NMDOT Dist. 3 cooperates with other permittees.

Appendix B - Total Maximum Daily Loads (TMDLs)

B.1. Approved Total Maximum Daily Loads (TMDLs) Tables

A bacteria TMDL for the Middle Rio Grande was approved by the New Mexico Water Quality Control Commission on April 13, 2010, and by EPA on June 30, 2010. The new TMDL modifies: 1) the indicator parameter for bacteria from fecal coliform to *E. coli*, and 2) the way the WLAs are assigned

Discharges to Impaired Waters – TMDL Waste Load Allocations (WLAs)[2] for *E. coli*: Rio Grande[1]

Stream Segment	Stream Name	Permittee Class	FLOW CONDITIONS & ASSOCIATED WLA (cfu/day)[3]				
			High	Moist	Mid-Range	Dray	Low
2105_50	Isleta Pueblo boundary to Alameda Street Bridge (based on flow at USGS Station NM08330000)	Class A[4]	3.36×10^{10}	8.41×10^{10}	5.66×10^{10}	2.09×10^{10}	4.67×10^{9}
		Class B[5] Class C[6]	3.73×10^{9}	9.35×10^{9}	6.29×10^{9}	2.32×10^{9}	5.19×10^{8}
2105.1_00	non-Pueblo Alameda Bridge to Angostura Diversion (based on flow at USGS Station NM08329928)	Class A	5.25×10^{10}	1.52×10^{10}	_	5.43×10^{9}	2.80×10^{9}
		Class B Class C	2.62×10^{11}	7.59×10^{10}	_	2.71×10^{10}	1.40×10^{10}

1 Total Maximum Daily Load for the Middle Rio Grande Watershed, NMED, 2010.
2 The WLAs for the stormwater MS4 permit was based on the percent jurisdiction area approach. Thus, the MS4 WLAs are a percentage of the available allocation for each hydrologic zone, where the available allocation = TMDL – WLA – MOS.
3 Flow conditions relate to percent of days the flow in the Rio Grande at a USGS Gauge exceeds a particular level: High 0-10%; Moist 10-40%; Mid-Range 40-60%; Dry 60-90%; and Low 90-100%. (Source: Figures 4.3 and 4.4 in 2010 Middle Rio Grande TMDL)
4 Phase I MS4s
5 Phase II MS4s (2000 Census)
6 New Phase II MS4s (2010 Census or MS4s designated by the Director)

Estimating Target Loadings for Particular Monitoring Location:

The Table in B.2 below provides a mechanism to calculate, based on acreage within a drainage area, a target loading value for a particular monitoring location.

B.2. Calculating Alternative Sub-measurable Goals

Individual permittees or a group of permittees seeking alternative sub-measureable goals under C.2.b.(i).(c).B should consult NMED. Preliminary proposals should be submitted with the Notice of Intent (NOI) under Part I.B.2.k according to the due dates specified in Part I.B.1.a of the permit. This proposal shall include, but is not limited to, the following items

B.2.1 Determine base loading for subwatershed areas consistent with TMDL

a. Using the table below, the permittee must develop a target load consistent with the TMDL for any sampling point in the watershed (even if it includes area outside the jurisdictional area of the permit).

E. coli loading on a per area basis (cfu/sq mi/day)

	high	moist	mid	dry	low
Alameda to Isleta	1.79E+09	4.48E+08	3.02E+08	1.11E+08	2.58E+07
Angostura to Alameda	3.25E+09	9.41E+08	5.19E+08	3.37E+08	1.74E+08

b. An estimation of the pertinent, subwatershed area that the permittee is responsible for and the basis for determining that area, including the means for excluding any tributary inholdings;

c. Using the total loading for the watershed (from part a) and the percentage of the watershed area that is part of the permitee(s) jurisdiction (part b) to calculate a base WLA for this subwatershed.

B.2.2 Set Alternative subwatershed targets

a. Permittee(s) may reallocate WLA within and between subwatershed based on factors including:

- Population density within the pertinent watershed area;
- Slope of the waterway;
- Percent impervious surface and how that value was determined;
- Stormwater treatment, installation of green infrastructure for the control or treatment of stormwater and stormwater pollution prevention and education programs within specific watersheds

b. A proposal for an alternative subwatershed target must include the rationale for the factor(s) used

B.2.3 Ensure overall compliance with TMDL WLA allocation

The permitee(s) will provide calculations demonstrating the total WLA under the alternative proposed in (Part II) is consistent with the baseline calculated in (Part I) based on their total jurisdictional area. Permittee(s) will not be allowed to allocate more area within the watershed than is accorded to them under their jurisdictional area. For permittees that work cooperatively, WLA calculations may be combined and used where needed within the sub-watershed amongst the cooperating parties.

WLA calculations must be sent as part of the Notice of Intent to EPA via e-mail at R6_MS4Permits@epa.gov. These calculations must also be sent to:

Sarah Holcomb
Industrial and Stormwater Team Leader
NMED Surface Water Quality Bureau
P.O. Box 5469,

Appendix C - Historic Properties Eligibility Procedures

MS4 operators must determine whether their MS4's storm water discharges, allowable non-storm water discharges, or construction of best management practices (BMPs) to control such discharges, have potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers who do not need to construct BMPs for permit coverage, a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for MS4s which are new storm water dischargers and for existing MS4s which are planning to construct BMPs for permit eligibility, MS4 operators should conduct further inquiry to determine whether historic properties may be affected by the storm water discharge or BMPs to control the discharge. In such instances, MS4 operators should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are "eligible for listing").

Due to the large number of entities seeking coverage under this permit and the limited number of personnel available to State and Tribal Historic Preservation Officers nationwide to respond to inquiries concerning the location of historic properties, EPA suggests that MS4 operators first access the "National Register of Historic Places" information listed on the National Park Service's web page (www.nps.gov/nr/). Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers are listed in Parts II and III of this appendix, respectively. In instances where a Tribe does not have a Tribal Historic Preservation Officer, MS4 operators should contact the appropriate Tribal government office when responding to this permit eligibility condition. MS4 operators may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register. Tribes that do not currently reside in an area may also have an interest in cultural properties in areas they formerly occupied. Tribal contact information is available at http://www.epa.gov/region06/6dra/oejta/tribalaffairs/index.html

The following three scenarios describe how MS4 operators can meet the permit eligibility criteria for protection of historic properties under this permit:

(1) If historic properties are not identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges (e.g., diversion channels or retention ponds), then the MS4 operator has met the permit eligibility criteria under Part I.A.3.b.(i).

(2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the MS4 operator has met the permit eligibility criteria under Part.I.A.3.b.(ii).

(3) If historic properties are identified in the path of an MS4's storm water and allowable non-storm water discharges or where construction activities are planned to install BMPs to control such discharges, and it is determined that there is the potential to adversely affect the property, the MS4 operator can still meet the permit eligibility criteria under Part I.A.3.b.(ii) if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the MS4 operator will follow to mitigate or prevent those adverse effects. The operator should notify EPA before exercising this option.

The contents of such a written agreement must be included in the MS4's Storm Water Management Program.

In situations where an agreement cannot be reached between an MS4 operator and the State or Tribal Historic Preservation Officer, MS4 operators should contact EPA for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages MS4 operators to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

MS4 operators are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

I. Internet Information on the National Register of Historic Places
An electronic listing of the ``National Register of Historic Places," as maintained by the National Park Service on its National Register Information System (NRIS), can be accessed on the Internet at www.nps.gov/nr/.

II. State Historic Preservation Officers (SHPO)
SHPO List for areas covered by the permit:

NEW MEXICO
Historic Preservation Div, Office of Cultural Affairs
Bataan Memorial Building, 407 Galisteo Street, Suite 236
Santa Fe, NM 87501
505-827-6320 FAX: 505-827-6338

III. Tribal Historic Preservation Officers
(THPO)
In instances where a Tribe does not have a Tribal Historic Preservation Officer, please contact the appropriate Tribal government office when responding to this permit eligibility condition.

Tribal Historic Preservation Officers:
Mescalero Apache Tribe
P.O. Box 227
Mescalero, New Mexico 88340

Pueblo of Sandia Environment Department
Attn: Frank Chaves, Environment Director
481 Sandia Loop
Bernalillo, New Mexico 87004

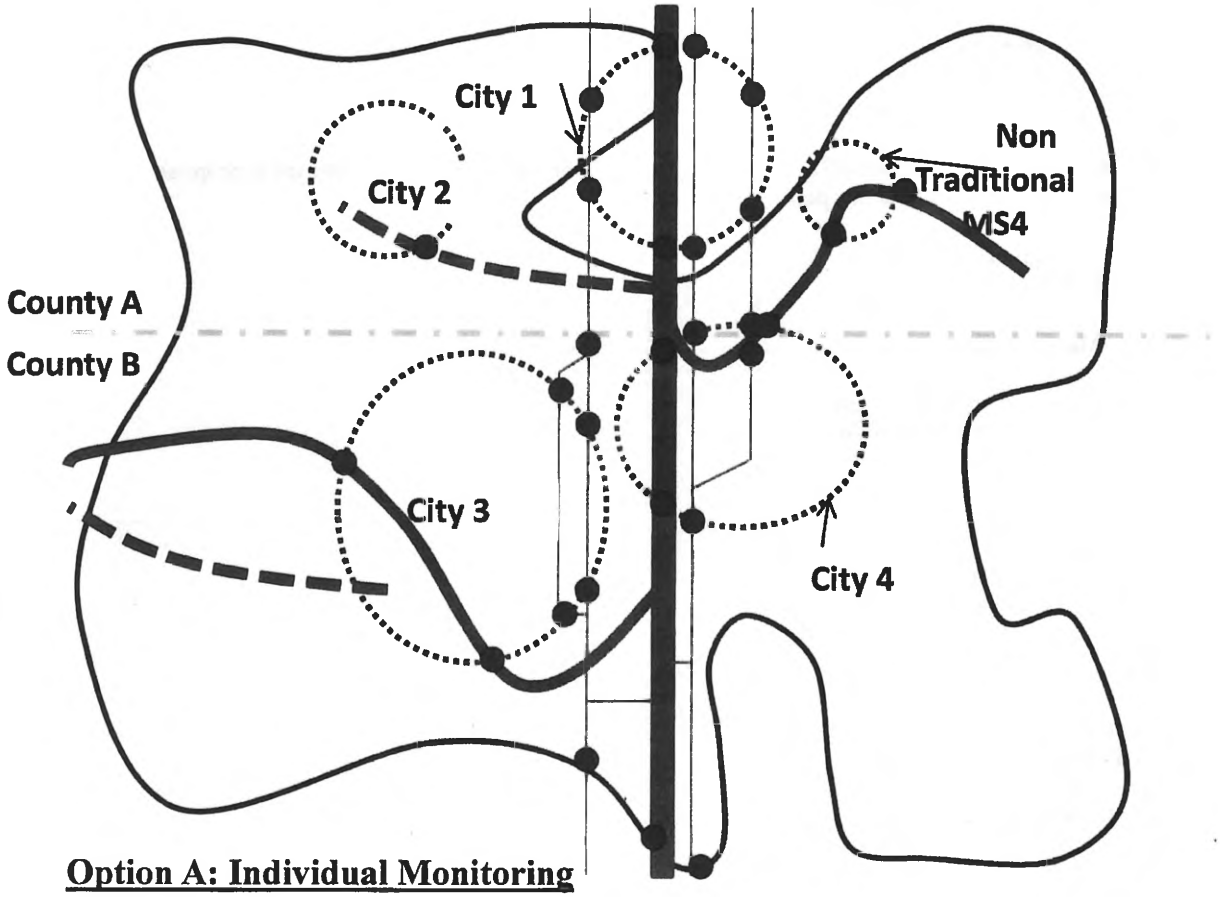
Pueblo of Isleta
Department of Cultural and Historic Preservation
Attn: Dr. Henry Walt, THPO
P.O. Box 1270
Isleta NM 87022

Water Resources Division Manager
Pueblo of Santa Ana
2 Dove Road
Santa Ana Pueblo, New Mexico 87004

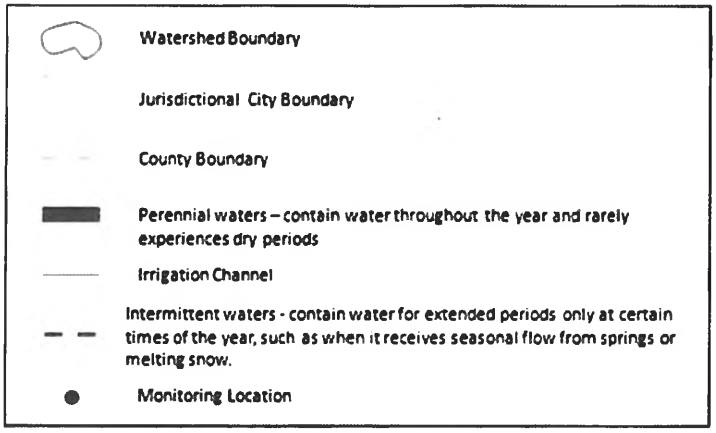
For more information:
National Association of Tribal Historic
Preservation Officers
P.O. Box 19189
Washington, DC 20036-9189
Phone: (202) 628-8476
Fax: (202) 628-2241

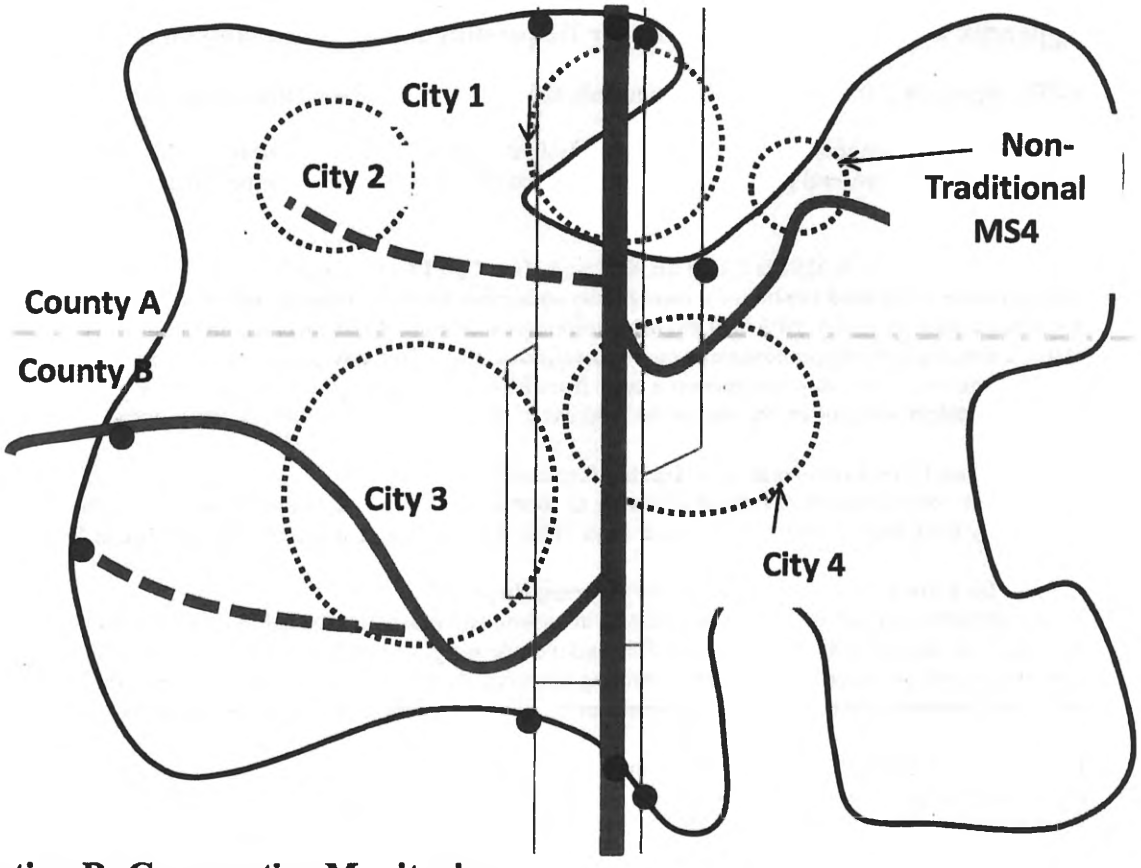
IV. Advisory Council on Historic Preservation
Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803, Washington, DC 20004 Telephone: (202) 606-8503, Fax: (202) 606-8647/8672, E-mail: achp@achp.gov

Appendix D - Suggested Initial Phase Sampling Location Concepts – Wet Weather Monitoring



Option A: Individual Monitoring





Option B: Cooperative Monitoring

	Watershed Boundary
	Jurisdictional City Boundary
	County Boundary
	Perennial waters – contain water throughout the year and rarely experiences dry periods
	Irrigation Channel
	Intermittent waters - contain water for extended periods only at certain times of the year, such as when it receives seasonal flow from springs or melting snow.
	Monitoring Location

Appendix E - Providing Comments or Requesting a Public Hearing on an MS4 Operator's NOI

NOTE: Appendix E is for public information only and does not impose conditions on the permittee.

Any interested person may provide comments or request a public hearing on a Notice of Intent (NOI) submitted under this general permit. The general permit itself is not reopened for comment during the period an NOI is available for review and comment.

A. How Will I Know A MS4 is Filing an NOI and How Can I Get a Copy?
The permittee is required to provide a local public notice that they are filing an NOI and make a copy of the draft NOI submittal available locally. EPA will put basic information from all NOIs received on the Internet at: **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm .** You may contact the listed MS4 representative for local access to the NOI. You may also request a copy from EPA by contacting Ms. Dorothy Brown at 214-665-8141 or **brown.dorothy@epa.gov** or via mail at the Address in Item D below, attention Dorothy Brown.

B. When Can I File Comments or a Hearing Request?
You can file comments and/or request a hearing as soon as a NOI is filed, but your request must be postmarked or physically received by EPA within thirty (30) calendar days of the date the NOI is posted on the web site in Section A.

C. How Do I File Comments or Make My Hearing Request?
Your comments and/or hearing request must be in writing and must state the nature of the issues proposed to be raised in the hearing. You should be as specific as possible and include suggested remedies where possible. You should include any data supporting your position(s). If you are submitting the request on behalf of a group or organization, you should describe the nature and membership of the group or organization. Electronic format comments in MS-WORD or PDF format are preferred.

D. Where Do I Send Copies of My Comments or Hearing Request?
Electronic Format: Submit one copy of your comments or hearing request via e-mail to Ms. Dorothy Brown at brown.dorothy@epa.gov and copy the Operator of the MS4 at the address on the NOI (send hard copy to MS4 Operator if no e-mail address provided). You may also submit via compact disk or diskette formatted for PCs to addresses for hard copy below. (Hard Copy: You must send an original and one copy of your comments or hearing request to EPA at the address below and a copy to the Operator of the MS4 at the address provided on the NOI)

U.S. EPA Region 6
Water Quality Protection Division (6WQ-NP)
Attn: Dorothy Brown
1445 Ross Ave., Suite 1200
Dallas, TX 75202

E. How Will EPA Determine Whether or Not To Hold a Public Hearing?
EPA will evaluate all hearing requests received on an NOI to determine if a significant degree of public interest exists and whether issues raised may warrant clarification of the MS4 Operator's NOI submittal. EPA will hold a public hearing if a significant amount of public interest is evident. EPA may also, at the Agency's discretion, hold either a public hearing or an informal public meeting to clarify issues related to the NOI submittal. EPA may hold a single public hearing or public meeting covering more than one MS4 (e.g., for all MS4s in an Urbanized Area, etc.).

F. How Will EPA Announce a Pubic Hearing or Public Meeting?
EPA will provide public notice of the time and place for any public hearing or public meeting in a major newspaper with local distribution and via the Internet at **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm.**

G. What Will EPA Do With Comments on an NOI?
EPA will take all comments made directly or in the course of a public hearing or public meeting into consideration in determining whether or not the MS4 that submitted the NOI is appropriately covered under the general permit. The MS4 operator will have the opportunity to provide input on issues raised. The Director may require the MS4 operator to supplement or amend the NOI submittal in order to be authorized under the general permit or may direct the MS4 Operator to submit an individual permit application. A summary of issues raised and EPA's responses will be made available online at **http://www.epa.gov/region6/6wq/npdes/sw/sms4/index.htm.** A hard copy may also be requested by contacting Ms. Dorothy Brown (see paragraph D)

Appendix F - Minimum Quantification Levels (MQL's)

The following Minimum Quantification Levels (MQL's) are to be used for reporting pollutant data for NPDES permit applications and/or compliance reporting.

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
METALS, RADIOACTIVITY, CYANIDE and CHLORINE			
Aluminum	2.5	Molybdenum	10
Antimony	60	Nickel	0.5
Arsenic	0.5	Selenium	5
Barium	100	Silver	0.5
Beryllium	0.5	Thalllium	0.5
Boron	100	Uranium	0.1
Cadmium	1	Vanadium	50
Chromium	10	Zinc	20
Cobalt	50	Cyanide	10
Copper	0.5	Cyanide, weak acid dissociable	10
Lead	0.5	Total Residual Chlorine	33
Mercury (*)	0.0005 0.005		
DIOXIN			
2,3,7,8-TCDD	0.00001		
VOLATILE COMPOUNDS			
Acrolein	50	1,3-Dichloropropylene	10
Acrylonitrile	20	Ethylbenzene	10
Benzene	10	Methyl Bromide	50
Bromoform	10	Methylene Chloride	20
Carbon Tetrachloride	2	1,1,2,2-Tetrachloroethane	10
Chlorobenzene	10	Tetrachloroethylene	10
Clorodibromomethane	10	Toluene	10
Chloroform	50	1,2-trans-Dichloroethylene	10
Dichlorobromomethane	10	1,1,2-Trichloroethane	10
1,2-Dichloroethane	10	Trichloroethylene	10
1,1-Dichloroethylene	10	Vinyl Chloride	10
1,2-Dichloropropane	10		
ACID COMPOUNDS			
2-Chlorophenol	10	2,4-Dinitrophenol	50
2,4-Dichlorophenol	10	Pentachlorophenol	5
2,4-Dimethylphenol	10	Phenol	10
4,6-Dinitro-o-Cresol	50	2,4,6-Trichlorophenol	10

POLLUTANTS	MQL µg/l	POLLUTANTS	MQL µg/l
		BASE/NEUTRAL	
Acenaphthene	10	Dimethyl Phthalate	10
Anthracene	10	Di-n-Butyl Phthalate	10
Benzidine	50	2,4-Dinitrotoluene	10
Benzo(a)anthracene	5	1,2-Diphenylhydrazine	20
Benzo(a)pyrene	5	Fluoranthene	10
3,4-Benzofluoranthene	10	Fluorene	10
Benzo(k)fluoranthene	5	Hexachlorobenzene	5
Bis(2-chloroethyl)Ether	10	Hexachlorobutadiene	10
Bis(2-chloroisopropyl)Ether	10	Hexachlorocyclopentadiene	10
Bis(2-ethylhexyl)Phthalate	10	Hexachloroethane	20
Butyl Benzyl Phthalate	10	Indeno(1,2,3-cd)Pyrene	5
2-Chloronapthalene	10	Isophorone	10
Chrysene	5	Nitrobenzene	10
Dibenzo(a,h)anthracene	5	n-Nitrosodimethylamine	50
1,2-Dichlorobenzene	10	n-Nitrosodi-n-Propylamine	20
1,3-Dichlorobenzene	10	n-Nitrosodiphenylamine	20
1,4-Dichlorobenzene	10	Pyrene	10
3,3'-Dichlorobenzidine	5	1,2,4-Trichlorobenzene	10
Diethyl Phthalate	10		
		PESTICIDES AND PCBS	
Aldrin	0.01	Beta-Endosulfan	0.02
Alpha-BHC	0.05	Endosulfan sulfate	0.02
Beta-BHC	0.05	Endrin	0.02
Gamma-BHC	0.05	Endrin Aldehyde	0.1
Chlordane	0.2	Heptachlor	0.01
4,4'-DDT and derivatives	0.02	Heptachlor Epoxide	0.01
Dieldrin	0.02	PCBs **	0.2
Alpha-Endosulfan	0.01	Toxaphene	0.3

(MQL's Revised November 1, 2007)

(*) Default MQL for Mercury is 0.005 unless Part I of your permit requires the more sensitive Method 1631 (Oxidation / Purge and Trap / Cold vapor Atomic Fluorescence Spectrometry), then the MQL shall be 0.0005.

(**) EPA Method 1668 should be utilized when PCB water column monitoring is conducted to determine compliance with permit requirements. Either the Arochlor test (EPA Method 8082) or USGS test method (8093) may be utilized for purposes of sediment sampling as part of a screening program, but must use EPA Method 1668 (latest revision) for confirmation and determination of specific PCB levels at that location.

Appendix G – Oxygen Saturation and Dissolved Oxygen Concentrations North Diversion Channel Area

Concentrations of dissolved oxygen in water at various atmospheric pressures and temperatures with 100 percent oxygen saturation, 54.3 percent oxygen saturation (associated with hypoxia and harassment of silvery minnows), and 8.7 percent oxygen saturation (associated with anoxia and lethality of silvery minnows) at the North Diversion Channel (NDC) (based on USGS DO website <http://water.usgs.gov/software/DOTABLES/> for pressures between 628 to 648 millimeters of mercury (Hg)). Source: Biological Consultation Cons. #22420-2011-F-0024-R001

Water temp.	100% Oxygen Saturation at NDC			54.3% saturation = Harassmen			8.7% saturation= 50%Lethality		
(°C)	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	648mmHg	628mmHg	638mmHg	64Bmm Hg
0	12.1	12.3	12.5	66	6.7	6.8	1.1	1.1	1.1
1	11.7	11.9	12.1	64	6.5	6.6	1.0	1.0	1 1
2	11.4	11.6	11.8	6.2	6.3	8.4	1.0	1.0	1.0
3	11.1	11.3	11.5	6.0	6.1	6.2	1.0	1.0	1.0
4	10.8	11	11.2	5.9	6.0	6.1	0.9	1.0	1.0
5	10.5	10.7	10.9	5.7	5.8	5 9	0.9	0.9	0.9
6	10.3	10.4	10.6	5.6	5.8	5.0	0.9	0.9	0.9
7	10	10.2	10.3	5.4	5.5	5.6	0.9	09	0.9
8	9.8	9.9	10.1	5.3	5.4	5.5	0.9	0.9	0.9
8	9.5	9.7	9.6	52	53	5.3	08	0.8	0.9
10	93	9.5	96	50	5.2	5.2	0.0	0.8	0.8
11	9.1	9.2	9.4	4.9	5.0	5.1	0.8	0.8	08
12	8.9	9	9.2	4.8	4.9	5.0	0.8	0.8	08
13	8.7	8.8	9	4.7	4.8	4.9	0.8	0.8	0.8
14	8.5	8.6	8.8	4.8	4.7	4.8	0.7	0.7	0.0
15	8.3	8.4	8.8	4.5	4.6	4.7	0.7	0.7	0.7
16	0.1	83	0.4	4.4	4.5	4.6	07	0.7	0.7
17	8	8.1	8.2	4.3	4.4	4.5	0.7	0.7	0.7
16	7.8	7.9	8	4.2	43	43	07	0.7	0.7
19	76	7.8	7.9	4.1	4.2	4.3	0.7	07	0.7
20	7.5	76	7.7	4.1	4.1	42	07	07	0.7
21	7.3	7.4	7.6	4.0	4.0	4.1	0.6	0.6	0.7
22	7.2	7.3	7.4	3.9	4.0	4.0	0.6	0.6	0.6
23	7	72	7.3	3.8	3.9	4.0	0.6	0.6	0.6
24	6.9	7	7.1	3.7	3.8	3.9	0.6	0.6	0.6
25	6.8	69	7	3.7	3.7	3.6	0.6	0.6	0.6
26	6.7	68	6.9	3.6	3.7	3.7	0.6	0.6	06
27	6.5	8.6	8.8	3.5	3.6	3.7	06	0.6	0.8
26	6.4	8.5	8.6	3.5	3.5	3.6	0.6	0.8	08
29	6.3	8.4	6.5	3.4	3.5	3.5	0.5	06	0.8
20	82	83	6.4	3.4	3.4	3.5	0.5	0.5	0.8
31	6.1	6.2	6.3	3.3	3.4	3.4	0.5	0.5	OS
32	6	6.1	6.2	3.3	3.3	34	0.5	0.5	0.5
33	5.0	6	6.1	3.2	3.3	3.3	0.5	0.5	0.5
34	5.8	5.9	6	3.1	3.2	3.3	0.5	0.5	0.5
	5.7	5.6	5.9	31	3.1	3.2	0.5	0.5	0.5

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EXHIBIT 3

Boise, ID – Boise/Garden City Area MS4 Permit

(Permit No. IDS-027561)

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United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Authorization to Discharge Under the
National Pollutant Discharge Elimination System

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

Ada County Highway District,
Boise State University,
City of Boise,
City of Garden City.
Drainage District #3,
and the Idaho Transportation Department District #3,

(hereinafter "the Permittees")

are authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this Permit to waters of the United States, including the Boise River and its tributaries, in accordance with the conditions set forth herein.

This Permit will become effective February 1, 2013.

This Permit, and the authorization to discharge, expires at midnight, January 30, 2018.

Permittees must reapply for permit reissuance on or before August 3, 2017, 180 days before the expiration of this Permit, if the Permittees intend to continue operations and discharges from the MS4s beyond the term of this Permit.

Signed this 12th day of December, 2012.

Daniel D. Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency

Table of Contents

I. Applicability

A. Permit Area. This Permit covers all areas within the corporate boundary of the City of Boise and Garden City, Idaho, which are served by the municipal separate storm sewer systems (MS4s) owned or operated by the Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3, and/or the Idaho Transportation Department District #3 (the Permittees).

B. Discharges Authorized Under This Permit. Subject to the conditions set forth herein, the Permittees are authorized to discharge storm water to waters of the United States from the MS4s identified in Part I.A.

As provided in Part I.D, this Permit also authorizes the discharge of flows from the MS4s which are categorized as allowable non-storm water discharge, storm water discharge associated with industrial activity, and storm water discharge associated with construction activity.

C. Permittees' Responsibilities

1. **Individual Responsibility**. Each Permittee is individually responsible for Permit compliance related only to portions of the MS4 owned or operated solely by that Permittee, or where this Permit requires a specific Permittee to take an action.
2. **Joint Responsibility.** Each Permittee is jointly responsible for Permit compliance:
   a) related to portions of the MS4 where operational or storm water management program (SWMP) implementation authority has been transferred to all of the Permittees in accordance with an intergovernmental agreement or agreement between the Permittees;
   b) related to portions of the MS4 where Permittees jointly own or operate a portion of the MS4;
   c) related to the submission of reports or other documents required by Parts II and IV of this Permit; and
   d) Where this Permit requires the Permittees to take an action and a specific Permittee is not named.
3. **Intergovernmental Agreement.** The Permittees must maintain an intergovernmental agreement describing each organization's respective roles and responsibilities related to this Permit. Any previously signed agreement may be updated, as necessary, to comply with this requirement. An updated intergovernmental agreement must be completed no later than July 1, 2013. A copy of the updated intergovernmental agreement must be submitted to the Environmental Protection Agency (EPA) with the 1st Year Annual Report.

D. Limitations on Permit Coverage

1. **Non-Storm Water Discharges**. Permittees are not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:

   a) The non-storm water discharges are in compliance with a separate NPDES permit;

   b) The non-storm water discharges result from a spill and:

      (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to prevent and minimize the impact of such discharge; or

      (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to prevent and minimize the impact of such discharges;

   or

   c) The non-storm water discharges satisfy each of the following two conditions:

      (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents; street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities; and

      (ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States if it:

         1) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those

that are harmful to humans and animals from exposure, but not necessarily ingestion);

2) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);

3) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);

4) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;

5) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;

6) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;

7) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or

8) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters; or

9) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200. 09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.

2. **Discharges Threatening Water Quality.** Permittees are not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above the Idaho water quality standards.

3. **Snow Disposal to Receiving Waters**. Permittees are not authorized to push or dispose of snow plowed within the Permit area directly into waters of the United States, or directly into the MS4(s). Discharges from any Permittee's snow disposal and snow management practices are authorized under this Permit only when such sites and practices are designed, conducted, operated, and maintained to prevent and reduce pollutants in the discharges to the maximum

extent practicable so as to avoid excursions above the Idaho water quality standards.

4. **Storm Water Discharge Associated with Industrial and Construction Activity.** Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit.

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. **Reduce pollutants to the maximum extent practicable.** The Permittees must implement and enforce a SWMP designed to reduce the discharge of pollutants from their MS4 to the maximum extent practicable (MEP), and to protect water quality in receiving waters. The SWMP as defined in this Permit must include best management practices (BMPs), controls, system design, engineering methods, and other provisions appropriate to control and minimize the discharge of pollutants from the MS4s.

   a) **SWMP Elements**. The required SWMP control measures are outlined in Part II.SWMP assessment/monitoring requirements are described in Part IV. Each Permittee must use practices that are selected, implemented, maintained, and updated to ensure that storm water discharges do not cause or contribute to an exceedance of an applicable Idaho water quality standard.

   b) **SWMP Documentation.** Each Permittee must prepare written documentation of the SWMP as implemented within their jurisdiction. The SWMP documentation must be organized according to the program components in Parts II and IV of this Permit, and must provide a current narrative physical description of the Permittee's MS4, illustrative maps or graphics, and all related ordinances, policies and activities as implemented within their jurisdiction. Each Permittee's SWMP documentation must be submitted to EPA with the 1st Year Annual Report.

      (i) Each Permittee must provide an opportunity for public review and comment on their SWMP documentation, consistent with applicable state or local requirements and Part II.B.6 of this Permit.

      (ii) Each Permittee's SWMP documentation must be updated at least annually and submitted as part of each subsequent Annual Report. (The document format used for Annual Report(s) submitted to EPA by the Permittees' prior to the effective date of this Permit may be modified to meet this requirement.)

   c) **SWMP Information.** The SWMP must include an ongoing program for gathering, tracking, maintaining, and using information to set priorities, evaluate SWMP implementation and Permit compliance.

d) **SWMP Statistics**. Permittees must track the number of inspections, official enforcement actions and types of public education activities and outcomes as stipulated by the respective program component. This information must be included in the Annual Report.

2. **Shared Implementation with outside entities.** Implementation of one or more of the SWMP minimum control measures may be shared with or delegated to another entity other than the Permittee(s). A Permittee may rely on another entity only if:

   a) The other entity, in fact, implements the minimum control measure;

   b) The action, or component thereof , is at least as stringent as the corresponding Permit requirement; and

   c) The other entity agrees to implement the minimum control measure on the Permittee's behalf. A binding written acceptance of this obligation is required. Each Permittee must maintain and record this obligation as part of the SWMP documentation. If the other entity agrees to report on the minimum control measure, the Permittees must supply the other entity with the reporting requirements in Part IV.C of this Permit. The Permittees remain responsible for compliance with the Permit obligation if the other entity fails to implement the required minimum control measure.

3. **Modification of the SWMP**. Minor modifications to the SWMP may be made in accordance with Part II.E of this Permit.

4. **Subwatershed Planning.** No later than September 30, 2016, the Permittees must jointly complete at least two individual sub-watershed plans for areas served by the MS4s within the Permit area. For the purposes of this Permit, the terms "subwatershed" and "storm sewershed" are defined as in Part VII. For each plan document, the subwatershed planning area must drain to at least one of the water bodies listed in Table II.C.

   Selected subwatersheds must be identified in the 1st Year Annual Report. Two completed subwatershed plan documents must be submitted to EPA as part of the 4th Year Annual Report.

   a) The Permittees must actively engage stakeholders in the development of each plan, and must provide opportunities for public input, consistent with Part II.B.6.

   b) The Permittees may modify and update any existing watershed planning document(s) to address the requirements of this Part.

   c) Each subwatershed plan must describe the extent and nature of the existing storm sewershed, and identify priority aquatic resources and beneficial uses to be protected or restored within the subwatershed planning area. Each subwatershed plan must contain a prioritized list of potential locations or opportunities for protecting or restoring such resources or beneficial uses through storm water infiltration, evapotranspiration or rainfall

harvesting/reuse, or other site-based low impact development (LID) practices. See Parts II.B.2.a, and II.B.2.c.

d) Each subwatershed plan must include consideration and discussion of how the Permittees will provide incentives, or enforce requirements, through their respective Stormwater Management Programs to address the following principles:

(i) Minimize the amount of impervious surfaces (roads, parking lots, roofs) within each watershed, by minimizing the creation, extension and widening of roads and associated development.

(ii) Preserve, protect, create and restore ecologically sensitive areas that provide water quality benefits and serve critical watershed functions. These areas may include, but are not limited to; riparian corridors, headwaters, floodplains and wetlands.

(iii) Prevent or reduce thermal impacts to water bodies, including requiring vegetated buffers along waterways, and disconnecting discharges to surface waters from impervious surfaces such as parking lots.

(iv) Seek to avoid or prevent hydromodification of streams and other water bodies caused by development, including roads, highways, and bridges.

(v) Preserve and protect trees, and other vegetation with important evapotranspirative qualities.

(vi) Preserve and protect native soils, prevent topsoil stripping, and prevent compaction of soils.

B. Minimum Control Measures. The following minimum control measures must be accomplished through each Permittee's Storm Water Management Program:

1. **Construction Site Runoff Control Program.** The Permittees must implement a construction site runoff control program to reduce discharges of pollutants from public and private construction activity within its jurisdiction.

The Permittees' construction site management program must include the requirements described below:

a) **Ordinance and/or other regulatory mechanism**. To the extent allowable under local or state law, Permittees must adopt, implement, and enforce requirements for erosion controls, sediment controls, and materials management techniques to be employed and maintained at each construction project from initial clearing through final stabilization. Each Permittee must require construction site operators to maintain adequate and effective controls to reduce pollutants in storm water discharges from construction sites. The Permittees must use enforcement actions (such as, written warnings, stop work orders or fines) to ensure compliance.

No later than September 30, 2015, each Permittee must update their ordinances or other regulatory mechanisms, as necessary, to be consistent with this Permit and with the current version of the *NPDES General Permit for Storm Water Discharges from Construction Activities*, Permit #IDR12-0000 (NPDES Construction General Permit or CGP).

b) **Manuals Describing Construction Storm Water Management Controls and Specifications.** The Permittees must require construction site operators within their jurisdiction to use construction site management controls and specifications as defined within manuals adopted by the Permittees.

No later than September 30, 2015, the Permittees must update their respective manuals, as necessary, to include requirements for the proper installation and maintenance of erosion controls, sediment controls, and material containment/pollution prevention controls during all phases of construction activity. The manual(s) must include all acceptable control practices, selection and sizing criteria, illustrations, and design examples, as well as recommended operation and maintenance of each practice. At a minimum, the manual(s) must include requirements for erosion control, sediment control, and pollution prevention which complement and do not conflict with the current version of the CGP. If the manuals previously adopted by the individual Permittee do not meet these requirements, the Permittee may create supplemental provisions to include as part of the adopted manual in order to comply with this Permit.

c) **Plan Review and Approval.** The Permittees must review and approve preconstruction site plans from construction site operators within their jurisdictions. Permittees must ensure that the construction site operator is prohibited from commencing construction activity prior to receipt of written approval.

(i) The Permittees must not approve any erosion and sediment control (ESC) plan or Storm Water Pollution Prevention Plan (SWPPP) unless it contains appropriate site-specific construction site control measures meeting the Permittee's requirements as outlined in Part II.B.1.b.

(ii) Prior to the start of a construction project disturbing one or more acres, or disturbing less than one acre but is part of a larger common plan of development, the Permittees must advise the construction site operator(s) to seek or obtain necessary coverage under the NPDES Construction General Permit.

(iii) Permittees must use qualified individuals, knowledgeable in the technical review of ESC plans/SWPPPs, to conduct such reviews.

(iv) Permittees must document the review of each ESC plan and/or SWPPP using a checklist or similar process.

d) **Construction Site Inspections**. The Permittees must inspect construction sites occurring within their jurisdictions to ensure compliance with their

applicable requirements. The Permittees may establish an inspection prioritization system to identify the frequency and type of inspection based upon such factors as project type, total area of disturbance, location, and potential threat to water quality. If a prioritization system is used, the Permittee must include a description of the current inspection prioritization in the SWMP document required in Part II.A, and summarize the nature and number of inspections conducted during the previous reporting period in each Annual Report.

(i) Inspections of construction sites must include, but not be limited to:

- As applicable, a check for coverage under the Construction General Permit by reviewing any authorization letter or Notice of Intent (NOI) during initial inspections;
- Review the applicable ESC plan/SWPPP to determine if control measures have been installed, implemented, and maintained as approved;
- Assessment of compliance with the Permittees' ordinances/requirements related to storm water runoff, including the implementation and maintenance of required control measures;
- Assessment of the appropriateness of planned control measures and their effectiveness;
- Visual observation of non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
- Education or instruction related to on storm water pollution prevention practices, as needed or appropriate; and
- A written or electronic inspection report.

(ii) The Permittees must track the number of construction site inspections conducted throughout the reporting period, and verify that the sites are inspected at the minimum frequencies required by the inspection prioritization system. Construction site inspections must be tracked and reported with each Annual Report.

(iii) Based on site inspection findings, each Permittee must take all necessary follow-up actions (i.e., re-inspection, enforcement) to ensure compliance. Follow-up and enforcement actions must be tracked and reported with each Annual Report.

e) **Enforcement Response Policy for Construction Site Management Program**. No later than September 30, 2016, each Permittee must develop and implement a written escalating enforcement response policy (ERP) appropriate to their organization. Upon implementation of the policy in its jurisdiction, each Permittee must submit its completed ERP to EPA with the 4th Year Annual Report. The ERP for City of Boise, City of Garden City, and Ada County Highway District must address enforcement of construction site runoff controls for all currently regulated construction projects within their jurisdictions. The ERP for Idaho Transportation Department District 3, Drainage District 3, and Boise State University must address contractual enforcement of construction site runoff controls at construction sites within their jurisdictions. Each ERP must describe the Permittee's potential responses to violations with an appropriate educational or enforcement response. The ERP must address repeat violations through progressively stricter responses as needed to achieve compliance. Each ERP must describe how the Permittee will use the following types of enforcement response, as available, based on the type of violation:

(i) Verbal Warnings: Verbal warnings are primarily consultative in nature. At a minimum, verbal warnings must specify the nature of violation and required corrective action.

(ii) Written Notices: Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.

(iii) Escalated Enforcement Measures: The Permittees must have the legal ability to employ any combination of the enforcement actions below (or their functional equivalent):

- The ERP must indicate when the Permittees will initiate a Stop Work Order. Stop work orders must require that construction activities be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.
- The Permittees must also use other escalating measures provided under local or state legal authorities, such as assessing monetary penalties. The Permittees may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's bond, or directly billing the responsible party to pay for work and materials.

f) **Construction General Permit Violation Referrals.** For those construction projects which are subject to the NPDES Construction General Permit and do not respond to Permittee educational efforts, the Permittee may provide to EPA information regarding construction project operators which cannot demonstrate that they have appropriate NPDES Permit

coverage and/or site operators deemed by the Permittee as not complying with the NPDES Construction General Permit. Permittees may submit such information to the EPA NPDES Compliance Hotline in Seattle, Washington, by telephone, at (206) 553-1846, and include, at a minimum, the following information:

- Construction project location and description;
- Name and contact information of project owner/ operator;
- Estimated construction project disturbance size; and
- An account of information provided by the Permittee to the project owner/ operator regarding NPDES filing requirements.

(i) **Enforcement Tracking.** Permittees must track instances of non-compliance either in hard-copy files or electronically. The enforcement case documentation must include, at a minimum, the following:

- Name of owner/operator;
- Location of construction project;
- Description of violation;
- Required schedule for returning to compliance;
- Description of enforcement response used, including escalated responses if repeat violations occur;
- Accompanying documentation of enforcement response (e.g., notices of noncompliance, notices of violations, etc.); and
- Any referrals to different departments or agencies.

g) **Construction Program Education and Training.** Throughout the Permit term, the Permittees must ensure that all staff whose primary job duties are related to implementing the construction program (including permitting, plan review, construction site inspections, and enforcement) are trained to conduct such activities. The education program must also provide regular training opportunities for construction site operators. This training must include, at a minimum:

(i) *Erosion and Sediment Control/Storm Water Inspectors*:

- Initial training regarding proper control measure selection, installation and maintenance as well as administrative requirements such as inspection reporting/tracking and the implementation of the enforcement response policy; and

- Annual refresher training for existing inspection staff to update them on preferred BMPs, regulation changes, Permit updates, and policy or standards updates.

(ii) *Other Construction Inspectors*: Initial training on general storm water issues, basic control measure implementation information, and procedures for notifying the appropriate personnel of noncompliance.

(iii) *Plan Reviewers*:

- Initial training regarding control measure selection, design standards, review procedures;

- Annual training regarding new control measures, innovative approaches, Permit updates, regulation changes and policy or standard updates.

(iv) *Third-Party Inspectors and Plan Reviewers*. If the Permittee utilizes outside parties to either conduct inspections and or review plans, these outside staff must be trained per the requirements listed in Part II.B.1.f.i.-iii above.

(v) *Construction Operator Education*. At a minimum, the Permittees must educate construction site operators within the Permit area as follows:

- At least once per year, the Permittees must either provide information to all construction companies on existing training opportunities or develop new training for construction operators regarding appropriate selection, installation, and use of required construction site control measures at sites within the Permit area.

- The Permittees must require construction site operators to have at least one person on-site during construction that is appropriately trained in erosion and sediment control.

- The Permittees must require construction operators to attend training at least once every three years.

- The Permittees must provide appropriate information and outreach materials to all construction operators who may disturb land within their jurisdiction.

2. Storm Water Management for Areas of New Development and Redevelopment. At a minimum, the Permittees must implement and enforce a program to control storm water runoff from new development and redevelopment projects that result in land disturbance of 5,000 square feet or more, excluding individual one or two family dwelling development or redevelopment. This program must apply to private and public sector development, including roads and streets. The program implemented by the Permittees must ensure that permanent controls or practices are utilized at each new development and redevelopment site to protect water quality. The program must include, at a minimum, the elements described below:

a) **Ordinance or other regulatory mechanisms**. No later than the expiration date of this Permit, each Permittee must update its applicable ordinance or regulatory mechanism which requires the installation and long-term maintenance of permanent storm water management controls at new development and redevelopment projects. Each Permittee must update their ordinance/regulatory mechanism to the extent allowed by local and state law, consistent with the individual Permittee's respective legal authority. Permittees must submit their revised ordinance/regulatory mechanism as part of the 5th Year Annual Report.

(i) The ordinance/regulatory mechanism must include site design standards for all new and redevelopment that require, in combination or alone, storm water management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measureable precipitation. Runoff volume reduction can be achieved by canopy interception, soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infiltration, extended filtration, and/or any combination of such practices that will capture the first 0.6 inches of rainfall. An Underground Injection Control permit may be required when certain conditions are met. The ordinance or regulatory mechanism must require that the first 0.6 inches of rainfall be 100% managed with no discharge to surface waters, except when the Permittee chooses to implement the conditions of II.B.2.a.ii below.

(ii) For projects that cannot meet 100% infiltration/evapotranspiration/reuse requirements onsite, the Permittees' program may allow offsite mitigation within the same subwatershed, subject to siting restrictions established by the Permittee. The Permittee allowing this option must develop and apply criteria for determining the circumstances under which offsite mitigation may be allowed. A determination that the onsite retention requirement cannot be met must be based on multiple factors, including but not limited to technical feasibility or logistic practicality (e.g. lack of available space, high groundwater, groundwater contamination, poorly infiltrating soils, shallow bedrock, and/or a land use that is inconsistent with

capture and reuse or infiltration of storm water). Determinations may not be based solely on the difficulty and/or cost of implementing such measures. The Permittee(s) allowing this option must create an inventory of appropriate mitigation projects and develop appropriate institutional standards and management systems to value, estimate and track these situations. Using completed subwatershed plans or other mechanisms, the Permittee(s) must identify priority areas within subwatersheds in which off-site mitigation may be conducted.

(iii) The ordinance or regulatory mechanism must include the following water quality requirements:

- Projects with potential for excessive pollutant loading(s) must provide water quality treatment for associated pollutants before infiltration.
- Projects with potential for excessive pollutant loading(s) that cannot implement adequate preventive or water quality treatment measures to ensure compliance with Idaho surface water standards must properly convey storm water to a NPDES permitted wastewater treatment facility or via a licensed waste hauler to a permitted treatment and disposal facility.

(iv) The ordinance or other regulatory mechanism must include procedures for the Permittee's review and approval of permanent storm water management plans for new development and redevelopment projects consistent with Part II.B.1.d.

(v) The ordinance or other regulatory mechanism must include sanctions (including fines) to ensure compliance, as allowed under state or local law.

b) **Storm Water Design Criteria Manual.** No later than September 30, 2015, each Permittee must update as necessary their existing Storm Water Design Criteria Manual specifying acceptable permanent storm water management and control practices. The manual must contain design criteria for each practice. In lieu of updating a manual, a Permittee may adopt a manual created by another entity which complies with this section. The manual must include:

(i) Specifications and incentives for the use of site-based practices appropriate to local soils and hydrologic conditions;

(ii) A list of acceptable practices, including sizing criteria, performance criteria, design examples, and guidance on selection and location of practices; and

(iii) Specifications for proper long term operation and maintenance, including appropriate inspection interval and self-inspection checklists for responsible parties.

c) **Green Infrastructure/Low Impact Development (LID) Incentive Strategy and Pilot Projects**. No later than September 30, 2015, the Permittees must develop a strategy to provide incentives for the increased use of LID techniques in private and public sector development projects within each Permittee's jurisdiction. Permittees must comply with applicable State and local public notice requirements when developing this Strategy. Pursuant to Part IV.A.2.a, the Strategy must reference methods of evaluating at least three (3) Green Infrastructure/LID pilot projects as described below. Permittees must implement the Green Infrastructure/LID Incentive Strategy, and complete an effectiveness evaluation of at least three pilot projects, prior to the expiration date of this Permit.

(i) As part of the 3rd Year Annual Report, the Permittees must submit the written Green Infrastructure /LID Incentive Strategy; the Strategy must include a description of at least three selected pilot projects, and a narrative report on the progress to evaluate the effectiveness of each selected LID technique or practice included in the pilot project. Each pilot project must include an evaluation of the effectiveness of LID technique(s) or practice(s) used for on-site control of water quality and/or quantity. Each Pilot Project must involve at least one or more of the following characteristics:

- The project manages runoff from at least 3,000 square feet of impervious surface;
- The project involves transportation related location(s) (including parking lots);
- The drainage area of the project is greater than five acres in size; and/or
- The project involves mitigation of existing storm water discharges to one or more of the water bodies listed in Table II.C.

(ii) Consistent with Part IV.A.10, the Permittees must evaluate the performance of LID technique(s) or practice(s) in each pilot project, and include a progress report on overall strategy implementation in the 4th Annual Report. Final pilot project evaluations must be submitted in the 5th Year Annual Report. The Permittees must monitor, calculate or model changes in runoff quantities for each of the pilot project sites in the following manner:

- For retrofit projects, changes in runoff quantities shall be calculated as a percentage of 100% pervious surface before and after implementation of the LID technique(s) or practice(s).
- For new construction projects, changes in runoff quantities shall be calculated for development scenarios both with LID technique(s) or practice(s) and without LID technique(s) or practice(s).

- The Permittees must measure runoff flow rate and subsequently prepare runoff hydrographs to characterize peak runoff rates and volumes, discharge rates and volumes, and duration of discharge volumes. The evaluation must include quantification and description of each type of land cover contributing to surface runoff for each pilot project, including area, slope, vegetation type and condition for pervious surfaces, and the nature of impervious surfaces.
- The Permittees must use these runoff values to evaluate the overall effectiveness of various LID technique(s) or practice(s) and to develop recommendations for future adoption of LID technique(s) or practice(s) that address appropriate use, design, type, size, soil type and operation and maintenance practices.

(iii) **Riparian Zone Management and Outfall Disconnection.** No later than September 30, 2015, the Permittees must identify and prioritize riparian areas appropriate for Permittee acquisition and protection. Prior to the expiration date of this Permit, the Permittees must undertake and complete at least one project designed to reduce the flow of untreated urban storm water discharging through the MS4 system through the use of vegetated swales, storm water treatment wetlands and/or other appropriate techniques. The Permittees must submit the list of prioritized riparian protection areas, and a status report on the planning and implementation of the outfall disconnection project, as part of the 3rd Year Annual Report. Documentation of the completed outfall disconnection project must be included in the 5th Year Annual Report.

(iv) **Repair of Public Streets, Roads and Parking Lots.** When public streets, roads or parking lots are repaired (as defined in Part VII), the Permittees performing these repairs must evaluate the feasibility of incorporating runoff reduction techniques into the repair by using canopy interception, bioretention, soil amendments, evaporation, rainfall harvesting, engineered infiltration, rain gardens, infiltration trenches, extended filtration and/or evapotranspiration and/or any combination of the aforementioned practices. Where such practices are found to be technically feasible, the Permittee performing the repair must use such practices in the design and repair. These requirements apply only to projects whose design process is started after the effective date of this Permit. As part of the 5th Year Annual Report, the Permittees must list the locations of street, road and parking lot repair work completed since the effective date of the Permit that have incorporated such runoff reduction practices, and the receiving water body(s) benefitting from such practices. This documentation must include a general description of the project design, estimated total cost, and estimates of total flow

volume and pollutant reduction achieved compared to traditional design practices.

d) **Plan Review and Approval.** The Permittees must review and approve pre-construction plans for permanent storm water management. The Permittees must review plans for consistency with the ordinance/regulatory mechanism and Storm Water Design Criteria Manual required by this Part. The Permittees must ensure that the project operator is prohibited from commencing construction activity prior to receipt of written approval from the Permittee.

(i) The Permittees must not approve or recommend for approval any plans for permanent storm water controls that do not contain appropriate permanent storm water management practices that meet the minimum requirements specified in this Part.

(ii) Permittees must use qualified individuals, knowledgeable in the technical review of plans for permanent storm water controls to conduct such reviews.

(iii) Permittees must document the review of each plan using a checklist or similar process.

e) **Operation and Maintenance (O&M) of Permanent Storm Water Management Controls.**

(i) **Inventory and Tracking.** The Permittees must maintain a database tracking all new public and private sector permanent storm water controls. No later than January 30, 2018, all of the available data on existing permanent storm water controls known to the Permittees must be included in the inventory database. For the purposes of this Part, new permanent controls are those installed after February 1, 2013; existing permanent controls are those installed prior to February 1, 2013. The tracking must begin in the plan review stage with a database that incorporates geographic information system (GIS) information. The tracking system must also include, at a minimum: type and number of practices; O&M requirements, activity and schedule; responsible party; and self-inspection schedule.

(ii) **O&M Agreements.** Where parties other than the Permittees are responsible for operation and maintenance of permanent storm water controls, the Permittees must require a legally enforceable and transferable O&M agreement with the responsible party, or other mechanism, that assigns permanent responsibility for maintenance of structural or treatment control storm water management practices.

f) **Inspection and Enforcement of Permanent Storm Water Management Controls.** The Permittees must ensure proper long term operation and

maintenance of all permanent storm water management practices within the Permittees' respective jurisdiction. The Permittees must implement an inspection program, and define and prioritize new development and redevelopment sites for inspections of permanent storm water management controls. Factors used to prioritize sites must include, but not be limited to: size of new development or redevelopment area; sensitivity and/or impaired status of receiving water(s); and, history of non-compliance at the site during the construction phase.

(i) No later than September 30, 2017, all high priority locations must be inventoried and associated inspections must be scheduled to occur at least once annually. The inspections must determine whether storm water management or treatment practices have been properly installed (i.e., an "as built" verification). The inspections must evaluate the operation and maintenance of such practices, identify deficiencies and potential solutions, and assess potential impacts to receiving waters.

(ii) No later than September 30, 2017, the Permittees must develop checklists to be used by inspectors during these inspections, and must maintain records of all inspections conducted on new development and redevelopment sites.

(iii) No later than September 30, 2017, the Permittees must develop and implement an enforcement strategy similar to that required in Section II.B.1.e to maintain the integrity of permanent storm water management and treatment practices.

g) **Education and Training on Permanent Storm Water Controls**. No later than September 30, 2015, the Permittees must begin a training program for appropriate audiences regarding the selection, design, installation, operation and maintenance of permanent storm water controls. The training program and materials must be updated as necessary to include information on updated or revised storm water treatment standards, design manual specifications, Low Impact Development techniques or practices, and proper operation and maintenance requirements.

(i) No later than September 30, 2016, and annually thereafter, all persons responsible for reviewing plans for new development and redevelopment and/or inspecting storm water management practices and treatment controls must receive training sufficient to determine the adequacy of storm water management and treatment controls at proposed new development and redevelopment sites.

(ii) No later than September 30, 2016, and at least annually thereafter, Permittees must provide training to local audiences on the storm water management requirements described in this Part.

3. Industrial and Commercial Storm Water Discharge Management. The Permittees must implement a program to reduce to the MEP the discharge of pollutants from industrial and commercial operations within their jurisdiction. Throughout the Permit term, the Permittees must conduct educational and/or enforcement efforts to reduce the discharge of pollutants from those industrial and commercial locations which are considered to be significant contributors of phosphorus, bacteria, temperature, and/or sediment to receiving waters. At a minimum, the program must include the following elements:

a) **Inventory of Industrial and Commercial Facilities/Activities**. No later than September 30, 2016, the Permittees must update the inventory and map of facilities and activities discharging directly to their MS4s.

(i) At a minimum, the inventory must include information listing the watershed/receiving water body, facility name, address, nature of business or activity, and North American or Standard Industrial Classification code(s) that best reflect the facility's product or service;

(ii) The inventory must include the following types of facilities: municipal landfills (open and closed); Permittee-owned maintenance yards and facilities; hazardous waste recovery, treatment, storage and disposal facilities; facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023; all industrial sectors listed in 40 CFR §122.26(b)(14); vehicle or equipment wash systems; commercial animal facilities, including kennels, race tracks, show facilities, stables, or other similar commercial locations where improper management of domestic animal waste may contribute pollutants to receiving waters or to the MS4; urban agricultural activities; and other industrial or commercial facility that the Permittees determine is contributing a substantial pollutant loading to the MS4 and associated receiving waters.

(iii) The Permittees must collectively identify at least two specific industrial/commercial activities or sectors operating within the Permit area for which storm water discharges are not being adequately addressed through existing programs. No later than September 30, 2016, the Permittees must develop best management practices for each activity, and educate the selected industrial/commercial audiences regarding these performance expectations. Example activities for consideration include, but are not limited to: landscaping businesses; wholesale or retail agricultural and construction supply businesses; urban agricultural activities; power washers; commercial animal facilities; commercial car/truck washing operations; and automobile repair shops.

b) **Inspection of Industrial and Commercial Facilities/Activities**. The Permittees must work cooperatively throughout the Permit term to prioritize

and inspect selected industrial and commercial facilities/activities which discharge to receiving waters or to the MS4. No later than September 30, 2016, any existing agreements between the Permittees to accomplish such inspections must be updated as necessary to comply with this permit. At a minimum, the industrial and commercial facility inspection program must include:

(i) Priorities and procedures for inspections, including inspector training, and compliance assistance or education materials to inform targeted facility/activity operators of applicable requirements;

(ii) Provisions to record observations of a facility or activity;

(iii) Procedures to report findings to the inspected facility or activity, and to follow-up with the facility/activity operator as necessary;

(iv) A monitoring (or self monitoring) program for facilities that assesses the type and quantity of pollutants discharging to the MS4s;

(v) Procedures to exercise legal authorities to ensure compliance with applicable local storm water ordinances.

c) **Maintain Industrial and Commercial Facility/Activity Inventory**. The industrial and commercial facility/activity inventory must be updated at least annually. The updated inventory and a summary of the compliance assistance and inspection activities conducted, as well as any follow-up actions, must be submitted to EPA with each Annual Report.

4. Storm Water Infrastructure and Street Management. The Permittees must maintain their MS4 and related facilities to reduce the discharge of pollutants from the MS4 to the MEP. All Permittee-owned and operated facilities must be properly operated and maintained. This maintenance requirement includes, but is not limited to, structural storm water treatment controls, storm sewer systems, streets, roads, parking lots, snow disposal sites, waste facilities, and street maintenance and material storage facilities. The program must include the following:

a) **Storm Sewer System Inventory and Mapping**. No later than January 30, 2018, the Permittees must update current records to develop a comprehensive inventory and map of the MS4s and associated outfall locations. The inventory must identify all areas over which each Permittee has responsibility. The inventory must include:

(i) the location of all inlets, catch basins and outfalls owned/operated by the Permittee;

(ii) the location of all MS4 collection system pipes (laterals, mains, etc.) owned/operated by the Permittee, including locations where the MS4 is physically interconnected to the MS4 of another operator ;

(iii) the location of all structural flood control devices, if different from the characteristics listed above;

(iv) the names and locations of receiving waters of the U.S. that receive discharges from the outfalls;

(v) the location of all existing structural storm water treatment controls;

(vi) identification of subwatersheds, associated land uses, and approximate acreage draining into each MS4 outfall; and

(vii) the location of Permittee-owned vehicle maintenance facilities, material storage facilities, maintenance yards, and snow disposal sites; Permittee-owned or operated parking lots and roadways.

A summary description of the Permittees' storm sewer system inventory and a map must be submitted to EPA as part of the reapplication package required by Part VI.B

b) **Catch Basin and Inlet Cleaning.** No later than September 30, 2016, the Permittees must initiate an inspection program to inspect all Permittee-owned or operated catch basins and inlets at least every two years and take appropriate maintenance action based on those inspections. Inspection records must be maintained and summarized in each Annual Report.

c) **Street and Road Maintenance.** No later than September 30, 2015, the Permittees responsible for road and street maintenance must update any standard operating procedures for storm water controls to ensure the use of BMPs that, when applied to the Permittee's activity or facility, will protect water quality, and reduce the discharge of pollutants to the MEP. The operating procedures must contain, for each activity or facility, inspection and maintenance schedules specific to the activity, and appropriate pollution prevention/good housekeeping procedures for all of the following types of facilities and/or activities listed below. Water conservation measures should be considered for all landscaped areas.

(i) **Streets, roads, and parking lots**. The procedures must address, but are not limited to: road deicing, anti-icing, and snow removal practices; snow disposal areas; street/road material (e.g. salt, sand, or other chemical) storage areas; maintenance of green infrastructure/low impact development practices; and BMPs to reduce road and parking lot debris and other pollutants from entering the MS4. Within four years of the effective date of this permit, the Permittees must implement all of the pollution prevention/good housekeeping practices established in the SOPs for all streets, roads, highways, and parking lots with more than 3,000 square feet of impervious surface that are owned, operated, or maintained by the Permittees.

(ii) **Inventory of Street Maintenance Materials.** Throughout the Permit term, all Permittees with street maintenance

responsibilities must maintain an inventory of street /road maintenance materials, including use of sand and salt, and document the inventory in the corresponding Annual Reports.

(iii) **Manage Sand with Salt and Salt Storage Areas.** No later than September 30, 2017, the Permittees must address any sand, salt, or sand with salt material stockpiles at each of their materials storage locations to prevent pollutants in stormwater runoff from discharging to the MS4 or into any receiving waterbody. Examples how the Permittee may choose to address runoff from their material storage areas include, but are not limited to: building covered storage areas; fully containing the material stockpile area in a manner that prevents runoff from discharging to the MS4 or a receiving waterbody; relocating and/or otherwise consolidating material storage piles to alternative locations which prevents discharges to the MS4 or a receiving waterbody. The Permittees must identify their material storage locations in the SWMP documentation submitted to EPA with the 1st year Annual Report and reference the average quantity of material stored at each location in the inventory required in Part II.B.4.c.ii. Permittees must document in the 5th Year Annual Report how their material stockpiles have been addressed to prevent runoff from discharging to the MS4 or a receiving waterbody.

d) **Street, Road and Parking Lot Sweeping**. Each Permittee with street, road, and/or public parking lot maintenance responsibilities must update their respective sweepings management plans no later than September 30, 2015. Each updated plan must designate all streets, roads, and/or public parking lots which are owned, operated or maintained by that Permittee to fit within one of the following categories for sweeping frequency based on land use, traffic volumes or other factors:

- Residential – Streets and road segments that include, but are not limited to, light traffic zones and residential zones.
- Arterial and all other – Streets and road segments with high traffic volumes serving commercial or industrial districts.
- Public Parking Lots – large lots serving schools and cultural facilities, plazas, sports and event venues or similar facilities.

(i) No later than September 30, 2014, each Permittee with street, road, and/or public parking lot maintenance responsibilities must inventory and map all of their designated streets, roads, and public parking lots for sweeping frequency. The resulting inventory and map must be submitted as part of the 2nd Year Annual Report.

(ii) No later than September 30, 2015, Permittees with street, road, and/or public parking lot maintenance responsibilities must

sweep all streets, roads, and public parking lots that are owned, operated or maintained by that Permittee according to the following schedule:

Table II.B-2

Roadway Type	Sweeping Schedule			
	Two Times Per Month	**Every Six Weeks**	**Four Times Per Year**	**One Time Per Year**
Downtown Areas of Boise and Garden City	**X**			
Arterial and Collector Roadways (non-downtown)		**X**		
Residential Roadways			**X**	
Paved Alleys and Public Parking Lots				**X**

(iii) If a Permittee's existing overall street/road/parking lot sweeping program provides equivalent or greater street sweeping frequency to the requirements above, the Permittee must continue to implement its existing street/road/parking lot sweeping program.

(iv) For areas where sweeping is technically infeasible, the Permittees with street, road, and/or public parking lot maintenance responsibilities must document in the 1st Year Annual Report each area and indicate why sweeping is infeasible. The Permittee must document what alternative sweeping schedule will be used, or how the Permittee will increase implementation of other trash/litter control procedures to minimize pollutant discharges to the MS4 and to receiving waters.

(v) The Permittees with street, road, and/or public parking lot maintenance responsibilities must estimate the effectiveness of their street sweeping activities to minimize pollutant discharges to the MS4 and receiving waters, and document the following in each Annual Report:

- Identify any significant changes to the designated road/street/parking lot inventory and map, and the basis for those changes;
- Report annually on types of sweepers used, swept curb and/or lane miles, dates of sweeping by general location and frequency category, volume or weight of materials removed and a representative sample of the particle size distribution of swept material;
- Report annually on any public outreach efforts or other means to address excess leaves and other material as well as areas that are infeasible to sweep.

e) **Implement appropriate requirements for pesticide, herbicide, and fertilizer applications**. Permittees must continue to implement practices to reduce the discharge of pollutants to the MS4 associated with the application, storage and disposal of pesticides, herbicides and fertilizers from municipal areas and activities. Municipal areas and activities include, at a minimum, municipal facilities, public right-of-ways, parks, recreational facilities, golf courses, and landscaped areas. All employees or contractors of the Permittees applying restricted use pesticides must be registered as certified applicators.

f) **Develop and implement Storm Water Pollution Prevention Plans.** No later than September 30, 2015, the Permittees must develop and implement SWPPPs for all Permittee-owned material storage facilities, and maintenance yards located within the Permit area and identified in the inventory required in Parts II.B.3.a and II.B.4.a.viii. Permittee-owned facilities discharging storm water associated with industrial activity as defined in 40 CFR 122.26(b)(14) must obtain separate NPDES permit coverage as required in Part I.D.4 of this permit.

g) **Storm Water Management.** Each Permittee must ensure that any storm water management projects it undertakes after the effective date of this Permit are designed and implemented to prevent adverse impacts on water quality.

(i) Permittees must evaluate the feasibility of retrofitting existing storm water control devices to provide additional pollutant removal from collected storm water.

(ii) No later than the expiration date of this Permit, Permittees must identify and define all locations where such retrofit project opportunities are feasible, identify appropriate funding sources, and outline project timelines or schedule(s) for retrofit projects designed to better control the discharge of pollutants of concern to the Boise River and its tributaries.

h) **Litter Control.** Throughout the Permit term, each Permittee must continue to implement effective methods to reduce litter within their jurisdiction. Permittees must work with others as appropriate to control litter on a

regular basis and after major public events to reduce the discharge of pollutants to receiving waters.

i) **Training.** The Permittees must provide regular training to appropriate Permittee staff on all operations and maintenance procedures designed to prevent pollutants from entering the MS4 and receiving waters. Appropriate Permittee staff must receive training no later than September 30, 2015, and annually thereafter.

5. Illicit Discharge Management. An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.D. of this permit. The Permittees must continue to implement their illicit discharge management program to reduce to the MEP the unauthorized and illegal discharge of pollutants to the MS4. The program must include:

a) **Ordinance or other regulatory mechanisms.** Upon the effective date of this Permit, the Permittees must effectively prohibit non-storm water discharges to the MS4 (except those identified in Part 1.D of this permit) through enforcement of relevant ordinances or other regulatory mechanisms. Such ordinances/regulatory mechanisms must be updated prior to the expiration date of this Permit as necessary to provide adequate controls. To be considered adequate, an ordinance or regulatory mechanism must:

(i) Authorize the Permittee to prohibit, at a minimum, the following discharges to the MS4, unless otherwise authorized in Part 1.D:

- Sewage;
- Discharges of wash water resulting from the hosing or cleaning of gas stations, auto repair garages, or other types of automotive services facilities;
- Discharges resulting from the cleaning, repair, or maintenance of any type of equipment, machinery, or facility, including motor vehicles, cement-related equipment, and port-a-potty servicing, etc.;
- Discharges of wash water from mobile operations, such as mobile automobile or truck washing, steam cleaning, power washing, and carpet cleaning, etc.;
- Discharges of wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas - including parking lots, streets, sidewalks, driveways, patios, plazas, work yards and outdoor eating or drinking areas, etc. - where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed);
- Discharges of runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials;

- Discharges of pool or fountain water containing chlorine, biocides, or other chemicals; discharges of pool or fountain filter backwash water;
- Discharges of sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and
- Discharges of food-related wastes (grease, fish processing, and restaurant kitchen mat and trash bin wash water, etc.).

(ii) Prohibit and eliminate illicit connections to the MS4;

(iii) Control the discharge of spills, and prohibit dumping or disposal of materials other than storm water into the MS4.

b) **Illicit Discharge Complaint Reporting and Response Program.** At a minimum, Permittees must respond to reports of illicit discharges from the public in the following manner:

(i) **Complaint/ReportingHotline.** The Permittees must maintain the dedicated telephone number and email address, or other publicly available and accessible means in addition to the website required in Part II.B.6, for use by the public to report illicit discharges. This complaint hotline must be answered by trained staff during normal business hours. During non-business hours, a system must be in place to record incoming calls to the hotline and a system must be in place to guarantee timely response. The telephone number must be printed on appropriate education, training, and public participation materials produced under Part II.B.6, and clearly listed in the local telephone book as appropriate.

(ii) **Response to Complaints/Reports.** The Permittees must respond to all complaints or reports of illicit discharges as soon as possible, but no later than within two working days.

(iii) **Maintain log of complaints/reports received and actions taken.** The Permittees must maintain a record documenting all complaints or reports of illicit discharges and responses taken by the Permittees.

c) **Illicit Discharge Mapping.** No later than September 30, 2014, the Permittees must develop a map of reported and documented illicit discharges or illicit connections to identify priority areas. The map must identify, at a minimum, the location, type and relative quantity or severity of the known, recurrent or ongoing non-storm water discharges to the MS4. This map must be updated annually and used to target the specific outfall locations for that field screening season.

d) **Dry Weather Outfall Screening Program.** Permittees must implement, and update as necessary, a dry weather analytical and field screening monitoring program. This dry weather outfall screening program must emphasize frequent, geographically widespread monitoring to detect illicit discharges and illegal connections, and to reinvestigate potentially

problematic outfalls. At a minimum, the procedures must be based on the following guidelines and criteria:

(i) **Outfall Identification.** The Permittees must update as necessary the storm water outfall identification and screening plan, describing the reconnaissance activities that must be performed and information used to prioritize targeted outfalls and associated land uses.. The plan must discuss how chemical and microbiological analysis will be conducted on any flows identified during dry weather screening, including field screening methodologies and associated trigger thresholds to be used for determining follow-up action.

(ii) **Monitoring Illicit Discharges.** No later than September 30, 2015, dry weather analytical and field screening monitoring must be conducted at least once annually (or more often if the Permittees deem necessary). One third of the outfalls to be screened annually must be conducted within the June 1 and September 30th timeframe.

- Upon the effective date of the Permit, the Permittees must conduct visual dry weather screening of at least 20% of their total outfalls per year.
- The outfalls must be geographically dispersed across the MS4 and must represent all major land uses in the Permit area. In addition, the Permittees must ensure that dry weather screening includes, but is not limited to, screening of 20% outfalls discharging to impaired waters listed in Table II.C.
- When flows during dry weather are identified the Permittees must collect grab samples of the discharge for in-field analysis of the following indicator constituents: pH; total chlorine; detergents as surfactants; total copper; total phenols; *E. coli*; total phosphorus; turbidity; temperature; and suspended solids concentrations (to be measured in mg/L).
- Photos may be used to document conditions.
- Results of field sampling must be compared to established trigger threshold levels and/or existing state water quality standards. If the outfall is dry (no flowing or ponded runoff), the Permittees must make and record all applicable visual observations.
- All dry weather flows previously identified or documented by the Permittees to be associated with irrigation flows or ground water seepage must be sampled to assess pollutant loading associated with such flows. The results must be evaluated to identify feasible actions necessary to eliminate such flows and ensure compliance with Part I.D of this Permit. If field sample

results of such irrigation or groundwater seepage comply with Part I.D of this permit, annual sampling of that dry weather flow at that outfall is no longer required. Permittees must document in the SWMP document the specific location(s) of outfalls associated with these results as well as the Permittee's rationale for the conclusion to discontinue future dry weather screening at that location..

(iii) **Maintain Records of Dry Weather Screening.** The Permittees must keep detailed records of the dry weather screening with the following information at a minimum: time since last rain event; quantity of last rain event; site description (e.g., conveyance type, dominant watershed land uses); flow estimation (e.g., width of water surface, approximate depth of water, approximate flow velocity, flow rate); visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology); results of any in field sampling; and recommendations for follow-up actions to address identified problems, and documentation of completed follow-up actions.

e) **Follow-up.** The Permittees must investigate recurring illicit discharges identified as a result of complaints or as a result of dry weather screening inspections and sampling within fifteen (15) days of its detection to determine the source. Permittees must take appropriate action to address the source of the ongoing illicit discharge within 45 days of its detection.

f) **Prevent and Respond to Spills to the MS4.** Throughout the Permit term, the Permittees must coordinate appropriate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies to ensure maximum water quality protection at all times. The Permittees must respond to, contain and clean up all sewage and other spills that may discharge into the MS4 from any source (including private laterals and failing septic systems).

g) **Facilitate Disposal of Used Oil and Toxic Materials.** The Permittees must continue to coordinate with appropriate agencies to ensure the proper management and disposal or recycling of used oil, vehicle fluids, toxic materials, and other household hazardous wastes by their employees and the public. Such a program must include educational activities, public information activities, and establishment of collection sites operated by the Permittees or other entity. The program must be implemented throughout the Permit term.

h) **Training.** No later than September 30, 2014, and annually thereafter, the Permittees must develop and provide training to staff on identifying and eliminating illicit discharges, spill, and illicit connections to the MS4. At a minimum, the Permittee's construction inspectors, maintenance field staff, and code compliance officers must be sufficiently trained to respond to illicit discharges and spills to the MS4.

6. **Education, Outreach and Public Involvement.**

a) **Comply with Applicable Requirements.** The Permittees must comply with applicable State and local public notice requirements when implementing their SWMP public involvement activities.

b) **Implement an Ongoing Education Outreach and Involvement Program.** The Permittees must conduct, or contract with other entities to conduct, an ongoing joint education, outreach and public involvement program aimed at residents, businesses, industries, elected officials, policy makers, and Permittee planning staff /other employees.

The goal of the education and outreach program is to reduce or eliminate behaviors and practices that cause or contribute to adverse storm water impacts. The goal of the public involvement program is to engage interested stakeholders in the development and implementation of the Permittees' SWMP activities to the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law.

The Permittees' joint education and public involvement program must be designed to improve each target audience's understanding of the selected storm water issues, engage stakeholders, and help target audiences understand what they can do to positively impact water quality by preventing pollutants from entering the MS4.

(i) No later than September 30, 2014, the Permittees must implement or participate in an education, outreach and public involvement program using a variety of methods to target each of the audiences and at least one or more of the topics listed below:

1) General Public

- Watershed characteristics and subwatershed planning efforts as required in Part II.A.4;
- General impacts of storm water flows into surface water;
- Impacts from impervious surfaces;
- Source control best management practices and environmental stewardship, actions and opportunities for pet waste control/disposal, vehicle maintenance, landscaping and vegetative buffers;
- Water wise landscaping, water conservation, water efficiency.

2) General public and businesses, including home based and mobile businesses

- Best management practices for use and storage of automotive chemicals, hazardous cleaning supplies, vehicle wash soaps and other hazardous materials;

- Proper use and application of pesticides, herbicides and fertilizers;
- Impacts of illicit discharges and how to report them;
- Water wise landscaping, water conservation, water efficiency.

3) Homeowners, homeowner's associations, landscapers, and property managers
   - Yard care techniques protective of water quality, such as composting;
   - Best management practices for use and storage of pesticides, herbicides, and fertilizers;
   - Litter and trash control and recycling programs;
   - Best management practices for power washing, carpet cleaning and auto repair and maintenance;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
4) Engineers, contractors, developers, review staff, and land use planners
   - Technical standards for storm water site plans;
   - Low Impact Development techniques, including site design, pervious paving, retention of mature trees and other vegetation;
   - Storm water treatment and flow/volume control practices;
   - Water wise landscaping, water conservation, water efficiency.
5) Urban farmers and managers of public and private community gardens
   - Water wise landscaping, water conservation, and water efficiency.

(ii) The Permittees must assess, or participate in an effort to assess understanding and adoption of behaviors by the target audiences.

The resulting assessments must be used to direct storm water education and outreach resources most effectively.

(iii) The Permittees must track and maintain records of public education, outreach and public involvement activities.

c) **Targeted Education and Training.** For the specific topics identified in the Permit sections listed below, the Permittees must develop and implement, or contract with other entities to implement, targeted training programs to educate appropriate Permittee staff or other audiences within their jurisdiction. Where joint, cooperative education efforts to address these topics are not feasible, the individual Permitttee must ensure that the necessary education and training occurs for the following topics:

(i) II.B.1.f - Construction Storm Water Management Training for construction site operators and Permittee staff;

(ii) II.B.2.g – Permanent Storm Water Control Training for project operators and Permittee staff;

(iii) II.B.4.i– Storm Water Infrastructure and Street Management/ Maintenance training for the Permittee staff; and

(iv) II.B.5.h – Illicit Discharge Management Training for Permittee staff.

d) **Storm Water Website.** The Permittees must maintain and promote at least one publicly-accessible website that identifies each Permittee's SWMP activities and seeks to educate the audiences listed in Part II.B.6.b.i. The website(s) must describe and provide relevant information regarding the activities of all Permittees. The website must be updated no later than February 1, 2014, and updated at least quarterly thereafter as new material is available. The website must incorporate the following features:

(i) All reports, plans, or documents generated by each Permittee in compliance with this Permit must be posted on the website in draft form when input from the public is being solicited, and in final form when the document is completed.

(ii) Information and/or links to key sites that provide education, training, licensing, and permitting related to construction and post-construction storm water management controls and requirements for each jurisdiction. The website must include links to all applicable ordinances, policies and/or guidance documents related to the Permittees' construction and post-construction stormwater management control programs.

(iii) Information and/or links to appropriate controls for industrial and commercial activities,

(iv) Information and/or links to assist the public to report illicit connections and illegal dumping activity;

(v) Appropriate Permittee contact information, including phone numbers for relevant staff and telephone hotline, mailing addresses, and electronic mail addresses.

C. Discharges to Water Quality Impaired Receiving Waters.

1. The Permittees must conduct a storm water discharge monitoring program as required in Part IV.
2. For the purposes of this Permit and as listed in Table II.C, the Clean Water Act §303 (d) listed water bodies are those cited in the IDEQ 2010 Integrated Report including, but not limited to the Lower Boise River, and its associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this Permit are: total phosphorus, sediment, temperature, and *E. coli*.
3. Each Permittees' SWMP documentation must include a description of how the activities of each minimum control measure in Part II.B are implemented by the Permittee to control the discharge of pollutants of concern and ensure that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the Permittee evaluates and measures the effectiveness of the SWMP to control the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the Permittee must provide interim updates on progress to date. Consistent with Part II.A.1.b, each Permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the 1st Year Annual Report required in Part IV.C, and must update its description annually in subsequent Annual Reports.

Table II.C

Clean Water Act §303 (d) listed Water Bodies and Pollutants of Concern

Receiving Water Body Assessment Unit/ Description	Pollutants of Concern Causing Impairment
ID17050114SW011a_06 ***Boise River – Diversion Dam to River Mile 50***	Temperature
ID17050114SW005_06 ***Boise River – River Mile 50 to Star Bridge***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06a ***Boise River – Star to Middleton***	Temperature, Sediment, *E. coli.*
ID17050114SW005_06b ***Boise River- Middleton to Indian Creek***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW001_06 ***Boise River- Indian Creek to the mouth***	Temperature, Total phosphorus, Sediment, *E. coli.*
ID17050114SW008_03 ***Tenmile Creek - 3rd order below Blacks Creek Reservoir***	Sediment, *E. coli.*
ID17050114SW010_02 ***Fivemile Creek - 1st & 2nd order tributaries***	*E. coli.*
ID17050114SW010_03 ***Fivemile Creek - 3rd order-tributaries***	Sediment, *E. coli.*

D. Reviewing and Updating the SWMP.

1. Permittees must annually review their SWMP actions and activities for compliance with this Permit as part of the preparation of the Annual Report required under Part IV.C.2.

2. Permittees may request changes to any SWMP action or activity specified in this Permit in accordance with the following procedures:
   a) Changes to delete or replace an action or activity specifically identified in this Permit with an alternate action or activity may be requested by the Permittees at any time. Modification requests to EPA must include:
      (i) An analysis of why the original action or activity is ineffective, infeasible, or cost prohibitive;
      (ii) Expectations on the effectiveness of the replacement action or activity; and
      (iii) An analysis of why the replacement action or activity is expected to better achieve the Permit requirements.
   b) Change requests must be made in writing and signed by the Permittees in accordance with Part VI.E.
   c) Documentation of any of the actions or activities required by this Permit must be submitted to EPA upon request.
   d) EPA may review Annual Reports or other such documentation and subsequently notify the Permittees that changes to the SWMP actions and activities are necessary to:
      (i) Address discharges from the MS4 that are causing or contributing to water quality impacts;
      (ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or
      (iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.
   e) If EPA notifies the Permittees that changes are necessary pursuant to Parts II.D.2.a or II.D.2.d, the notification will offer the Permittees an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the Permittees must implement any required changes according to the schedule set by EPA.

4. Any modifications to this Permit will be accomplished according to Part VI.A of this Permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The Permittees must implement the actions and activities of the SWMP in all new areas added or transferred to the Permittee's MS4 (or for which a Permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The Permittees must continue to provide adequate finances, staff, equipment and other support capabilities to implement their SWMP actions and activities outlined in this permit. The Permittees must report on total costs associated with SWMP implementation over the prior 12 month reporting period in each Annual Report. Permittees are encouraged to consider establishing consistent funding sources for continued program implementation.

G. Legal Authority. To the extent allowable pursuant to the respective authority granted individual Permittees under Idaho law, each Permittee must operate to, at a minimum:

- Prohibit and eliminate, through statute, ordinance, policy, permit, contract, court or administrative order or other similar means, the contribution of pollutants to the MS4 by illicit connections and discharges to the MS4. Illicit connections include pipes, drains, open channels, or other conveyances that have the potential to allow an illicit discharge to enter the MS4. Illicit discharges include all non-storm water discharges not otherwise authorized under Part I.D. of this Permit;
- Control through statute, ordinance, policy, permit, contract, court or administrative order, or other similar means, the discharge to the MS4 of spills, dumping or disposal of materials other than storm water;
- Control through interagency agreements among the Permittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;
- Require compliance with conditions in statutes, ordinances, policy, permits, contracts, or court or administrative orders; and
- Carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions including the prohibition on illicit discharges to the MS4.

No later than January 30, 2014, each Permittee must review and revise its relevant ordinances or other regulatory mechanisms, (or adopt new ordinances or regulatory mechanisms that provide it with adequate legal authority as allowed and authorized pursuant to applicable Idaho law), to control pollutant discharges into and from its MS4 and to meet the requirements of this permit. As part of the SWMP documentation that accompanies the 1st Year Annual Report, each Permittee must summarize all of its unique legal authorities which satisfy the five criteria listed above.

III. Schedule for Implementation and Required Submissions

The Permittees must complete SWMP actions, and/or submit documentation, to EPA and IDEQ as summarized below. Unless otherwise noted, Annual Reports must include the interim or completed status of required SWMP activities occurring during the corresponding reporting period as specified in Part IV.C.3, and include program summary statistics, copies of interim or final documents, and/or other supporting information.

Table III. Schedule for Implementation and Required Submissions

Permit Part	Item/Action	Due Date
I.C.3	Update intergovernmental agreement no later than July 1, 2013.	Submit updated intergovernmental agreement with the 1st Year Annual Report.
II.A.1.b, II.C.3	SWMP documentation	Submit SWMP documentation with the 1st Year Annual Report. Include updated documentation in each subsequent Annual Report.
II.A.4	Complete two subwatershed planning documents	Identify subwatersheds in 1st Year Annual Report; Submit two completed planning documents with the 4rd Year Annual Report.
II.B.1.a	Update construction runoff control ordinances/ regulatory mechanisms, if necessary	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report.
II.B.1.b	Update Construction Stormwater Management Manual(s)	September 30, 2015; submit any updated documents with 3rd Year Annual Report.
II.B.1.e	Develop & Implement Enforcement Response Policy (ERP)	September 30, 2016; submit final ERPs w/ 4th Year Annual Report
II.B.2.a	Update ordinance or regulatory mechanism requiring long term onsite stormwater management controls	January 30, 2018; submit ordinance or regulatory mechanism with 5th Year Annual Report.
II.B.2.b	Update Stormwater Design Criteria Manual(s)	September 30, 2015; submit any updated ordinances etc w/ 3rd Year Annual Report
II.B.2.c	Develop & Implement Green Infrastructure/Low Impact Development (LID) Incentive Strategy;	September 30, 2015;
II.B.2.c.i	Evaluate Effectiveness of LID Practices via three Pilot Projects;	Submit strategy document, identify 3 pilot projects in the 3rd Year Annual Report.
II.B.2.c.ii, IV.A.10	Identify recommendations for specific LID practices to be adopted within the Permit area	Progress report on strategy implementation/ Pilot Project evaluations w/4rd Year Annual Report. Submit final evaluations & recommendations with the 5th Year Annual Report.
II.B.2.c.iii	Develop Priority Riparian Area List	September 30, 2015; Submit priority area list with the 3rd Year Annual Report.
II.B.2.c.iii	Complete Outfall Disconnection Project	Document progress on outfall disconnection project w/3rd Year Annual Report. Complete outfall disconnection project by January 30, 2018; document completed project in 5th Year Annual Report.

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.2.c.iv	Consider/install stormwater runoff reduction techniques for streets, roads & parking lot repair work entering design phase after February 1, 2013 where feasible	Document all locations of street/road/parking lot repair projects where runoff reduction techniques were installed w/5th Year Annual Report.
II.B.2.e.i	O&M Database of new permanent stormwater controls; Incorporate all existing controls into database	Include new controls beginning February 1, 2013; Existing controls, no later than January 30, 2018.
II.B.2.f.i	Identify high priority locations; annual inspections	September 30, 2017
II.B.2.f.ii	Develop inspection checklists	September 30, 2017
II.B.2.f.iii	Enforcement Response Policy for SW controls	September 30, 2017
II.B.2.g	Conduct Education/Training on Permanent SW Controls	September 30, 2015; staff training & training for local audiences, September 30, 2016.
II.B.3.a	Inventory Industrial & Commercial facilities/activities	September 30, 2016
II.B.3.a.iii	Identify two specific activities, develop BMPs, and begin compliance assistance education program	September 30, 2016
II.B.3.b	Update Permittee agreements; inspect selected industrial & commercial facilities/activities	September 30, 2016
II.B.3.c	Document industrial & commercial inspection and compliance assistance activities	Annually
II.B.4.a	Update MS4 system inventory & map	No later than January 30, 2018; include w/5th Year Annual Report
II.B.4.b	Inspect of catch basins at least every two years	September 30, 2016
II.B.4.c	Update SOPs for Street & Road Maintenance	September 30, 2015
II.B.4.c.iii	Cover storage facilities for sand/salt storage areas	September 30, 2017; Identify locations in SWMP w/1st year Annual Report; Final documentation w/5th Year Annual Report
II.B.4.d	Update Street/Road/Parking Lot Sweeping Plans	September 30, 2015
II.B.4.d.i	Inventory/map designated areas	September 30, 2014; submit w/2st Year Annual Report
II.B.4.d.ii	Sweep according to schedule	September 30, 2015
II.B.4.d.iv,	Identify infeasible sweeping areas, alternative schedule or other program	Document in 1st Year Annual Report
II.B.4.d.v	Estimate sweeping effectiveness	Document in each Annual Report
II.B.4.f	Develop facility& maintenance yards SWPPPs	September 30, 2015
II.B.4.i	Train Permittee staff	September 30, 2016; annually thereafter
II.B.4.g	Evaluate the feasibility of retrofitting existing control devices	January 30, 2018; submit evaluation with 5th Year Annual Report

Table III. Schedule for Implementation and Required Submissions, continued

Permit Part	Item/Action	Due Date
II.B.5.c	Inventory/Map Illicit Discharge Reports	September 30, 2014, update annually
II.B.5.d.ii, IV.A.11	Conduct dry weather outfall screening; update screening plan; inspect 20% of outfalls per year	September 30, 2015; inspect 20% annual ly
II.B.6.b	Conduct public education & assess understanding to specific audiences	September 30, 2014; ongoing
II.B.6.d	Maintain, Promote, and Update Storm water Website	September 30, 2014, quarterly thereafter
II.C.3, II.A.1.b	Identify how Permittee controls are implemented to reduce discharge of pollutants of concern, measure SWMP effectiveness	Include discussion in SWMP documentation submitted with 1st Year Annual Report
II.E	Implement SWMP in all geographic areas newly added or annexed by Permittee	No later than one year from date new areas are added to Permittee's jurisdiction
II.F	Report SWMP implementation costs for the corresponding 12 month reporting period	Within each Annual Report
II.G	Review & Summarize legal authorities or regulatory mechanisms used by Permittee to implement & enforce SWMP & Permit requirements	No later than January 30, 2014, summarize legal authorities within the required SWMP documentation submitted with 1st Annual Report
IV.A.1	Assess & Document Permit Compliance	Annually; submit with Annual Reports
IV.A.2	Develop & Complete Stormwater Monitoring & Evaluation Plan	September 30, 2014; Submit Completed Plan with 2nd Year Annual Report
IV.A.7.a	Update *Boise NPDES Municipal SW Monitoring Plan*	September 30, 2015
IV.A.7.b	Monitor Five Representative Outfalls During Wet Weather; sample three times per year thereafter	No later than September 30, 2014
IV.A.8	If Applicable: update SW Monitoring & Evaluation Plan to include WQ Monitoring and/or Fish Tissue Sampling	If applicable: Update SW Monitoring & Evaluation Plan by September 30, 2014 to include WQ Monitoring and/or Fish Tissue Sampling; submit with 2nd Year Annual Report
IV.A.9	Evaluate Effectiveness of 2 Structural Control Techniques Currently Required by the Permittees	Begin evaluations no later than September 30, 2015; document in Annual Report(s)
IV.C.1	Submit Stormwater Outfall Discharge Data	2nd Year Annual Report, annually thereafter
IV.C.2	Submit WQ Monitoring or Fish Tissue Sampling Data Report (if applicable)	2nd Year Annual Report, annually thereafter
IV.C.3	Submit Annual Reports	1st Year Annual Report due January 30, 2014; all subsequent Annual Reports are due annually no later than January 30th; See Table IV.C.
VI.B	Submit Permit Renewal Application	No later than 180 days prior to Permit Expiration Date; see cover page. Alternatively, Renewal Application may be submitted as part of the 4th Year Annual Report.

IV. Monitoring, Recordkeeping and Reporting Requirements.

A. Monitoring

1. **Assess Permit Compliance.** At least once per year, each Permittee must individually evaluate their respective organization's compliance with these Permit conditions, and progress toward implementing each of the control measures defined in Part II. The compliance evaluation must be documented in each Annual Report required in Part IV.C.2.

2. **Stormwater Monitoring and Evaluation Program Plan and Objectives.** The Permittees must conduct a wet weather monitoring and evaluation program, or contract with another entity to implement such a program. This stormwater monitoring and evaluation program must be designed to characterize the quality of storm water discharges from the MS4, and to evaluate overall effectiveness of selected storm water management practices.

   a) No later than September 30, 2014, the Permittees must develop a stormwater monitoring and evaluation plan that includes the quality assurance requirements, outfall monitoring, in-stream and/or fish tissue monitoring (as appropriate), evaluation of permanent storm water controls and evaluation of LID pilot project effectiveness as described later in this Part. In general, the Permittees must develop and conduct a stormwater monitoring and evaluation program to:

      (i) Broadly estimate reductions in annual pollutant loads of sediment, bacteria, phosphorus and temperature discharged to impaired receiving waters from the MS4s, occurring as a result of the implementation of SWMP activities;

      (ii) Assess the effectiveness and adequacy of the permanent storm water controls and LID techniques or controls selected for evaluation by the Permittees and which are intended to reduce the total volume of storm water discharging from impervious surfaces and/or improve overall pollutant reduction in stormwater discharges; and

      (iii) Identify and prioritize those portions of each Permittee's MS4 where additional controls can be accomplished to further reduce total volume of storm water discharged and/or reduce pollutants in storm water discharges to waters of the U.S.

   b) The final, updated stormwater monitoring and evaluation plan must be submitted to EPA with the 2nd Year Annual Report.

3. **Representative Sampling.** Samples and measurements must be representative of the nature of the monitored discharge or activity.

4. **Analytical Methods.** Sample collection, preservation, and analysis must be conducted according to sufficiently sensitive methods/test procedures approved under 40 CFR Part 136, unless otherwise approved by EPA. Where an approved 40 CFR Part 136 method does not exist, and other test procedures

have not been specified, any available method may be used after approval from EPA.

5. **Quality Assurance Requirements.** The Permittees must develop or update a quality assurance plan (QAP) for all analytical monitoring conducted in accordance with this Part. The QAP must be developed concurrently as part of the stormwater monitoring and evaluation plan. The Permittees must submit the QAP as part of the stormwater monitoring and evaluation plan to EPA and IDEQ in the 2nd Year Annual Report. Any existing QAP may be modified for the requirements under this section.

   a) The QAP must be designed to assist in the collection and analysis of storm water discharges in support of this Permit and in explaining data anomalies when they occur.

   b) Throughout all sample collection, analysis and evaluation activities, Permittees must use the EPA-approved QA/QC and chain-of-custody procedures described in the most current version of the following documents:

      (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at: http://www.epa.gov/quality/qs-docs/r5-final.pdf;

      (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at: http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf ;

      (iii) *Urban Storm BMP Performance Monitoring*, (EPA-821-B-02-001, April 2002). A copy of this document can be found electronically at: http://www.epa.gov/npdes/pubs/montcomplete.pdf

   The QAP should be prepared in the format specified in these documents.

   c) At a minimum, the QAP must include the following:

      (i) Organization chart reflecting responsibilities of key Permittee staff;

      (ii) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample representativeness and completeness, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;

      (iii) Data quality objectives;

(iv) Map(s) and associated documentation reflecting the location of each sampling point and physical description including street address or latitude/longitude;

(v) Qualification and training of personnel;

(vi) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the Permittees;

(vii) Data management;

(viii) Data review, validation and verification; and

(ix) Data reconciliation.

d) The Permittees must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP. The amended QAP must be submitted to EPA as part of the next Annual Report.

e) Copies of any current QAP must be maintained by the Permittees and made available to EPA and/or IDEQ upon request.

6. **Additional Monitoring by Permittees.** If the Permittees monitor more frequently, or in more locations, than required by this Permit, the results of any such additional monitoring must be included and summarized with other data submitted to EPA and IDEQ as required in Part IV.C.

7. **Storm Water Outfall Monitoring**

a) No later than September 30, 2015, the Permittees must update the existing *Boise NPDES Municipal Storm Water Permit Monitoring Plan* to be consistent with the monitoring and evaluation program objectives and plan as described in Part IV.A.2. At a minimum, the plan must describe five outfall sample locations, and any additional or alternative locations, as defined by the Permittees. The outfalls selected by the Permittees to be monitored must be identified as representative of all major land uses occurring within the Permit area.

b) No later than September 30, 2014, the Permittees must begin monitoring discharges from the identified five storm water outfalls during wet weather events at least three times per year. The specific minimum monitoring requirements are outlined in Table IV.A, but may be augmented based on the Permittees' updated stormwater monitoring and evaluation plan required by Part IV.A.2. The Permittees must include any additional parameters to be sampled in an updated Table IV.A within the final updated stormwater monitoring and evaluation plan submitted to EPA with the 2nd Annual Report.

Table IV.A – Outfall Monitoring Requirements[1, 2]
PARAMETER SAMPLING
Ammonia
Total Kjeldahl Nitrogen (TKN) (mg/l)
Nitrate + Nitrite
Total Phosphorus (mg/l)
Dissolved Orthophosphate (mg/l)
E. coli
Biological Oxygen Demand (BOD5) (mg/l)
Chemical Oxygen Demand (COD) (mg/l)
Total Suspended Solids (TSS) (mg/l)
Total Dissolved Solids (TDS) (mg/l)
Dissolved Oxygen
Turbidity (NTU)
Temperature
pH (S.U)
Flow/Discharge, Volume, in cubic feet
Arsenic – Total
Cadmium- Total and Dissolved
Copper – Dissolved
Lead – Total and Dissolved
Mercury – Total
Zinc – Dissolved
Hardness (as CaCO3) (mg/l)

[1] Five or more outfall locations will be identified in the Permittees' updated stormwater monitoring and evaluation plan

[2] A minimum of ***three (3) samples*** must be collected during wet weather storm events in each reporting year, assuming the presence of storm events sufficient to produce a discharge.

8. **Water Quality Monitoring and/or Fish Tissue Sampling**. At the Permittees' option and to augment the storm water discharge data collection required in Part IV.A.7 above, one or more of the Permittees may conduct, or contract with others to conduct, water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed.

   a) If the Permittees elect to conduct in-stream water quality monitoring and/or fish tissue sampling within the Lower Boise River Watershed, the Permittees must revise the stormwater monitoring and evaluation plan and QAP to describe the monitoring and/or sampling effort(s) per Part IV.A.2 and IV.A.5, no later September 30, 2014.

   b) The documentation of the Permittees' intended in-stream water quality monitoring and/or fish tissue sampling activities must be included in the final updated stormwater monitoring and evaluation plan submitted with the 2nd Year Annual Report as required in Part IV.A.2.b.

   c) The Permittees are encouraged to engage in cooperative efforts with other organizations to collect reliable methylmercury fish tissue data within a specific geographic area of the Lower Boise River Watershed. The objective of the cooperative effort is to determine if fish tissue concentrations of methylmercury in the Lower Boise River are compliant with Idaho's methylmercury fish tissue criterion of 0.3 mg/kg.

      (i) In particular, the Permittees are encouraged to cooperate with other organizations to collect data through implementation of the Methylmercury Fish Tissue Sampling requirements specified in NPDES Permits # ID-002044-3 and ID-002398-1 as issued to the City of Boise. Beginning with the 2nd Year Annual Report, the Permittees' may (individually or collectively) submit documentation in each Annual Report which describes their specific involvement over the prior reporting period, and may reference fish tissue sampling plans and data reports as developed or published by others through the cooperative watershed effort.

9. **Evaluate the Effectiveness of Required Structural Controls**. Within two years of the effective date of this Permit, the Permittees must select and begin to evaluate at least two different types of permanent structural storm water management controls currently mandated by the Permittees at new development or redevelopment sites. For each selected control, this evaluation must determine whether the control is effectively treating or preventing the discharge of one or more of the pollutants of concern into waterbodies listed in Table II.C. The results of this evaluation, and any recommendations for improved treatment performance, must be submitted to EPA in subsequent Annual Reports as the evaluation projects are implemented and completed.

10. **Evaluate the Effectiveness of Green Infrastructure/Low Impact Development Pilot Projects**. The Permittees must evaluate the performance and effectiveness of the three pilot projects required in Part II.B.2.c of this Permit, or contract with another entity to conduct such evaluations. An evaluation summary of the LID technique or control and any recommendations

of improved treatment performance must be submitted in subsequent Annual Reports as the evaluation projects are implemented and completed.

11. **Dry Weather Discharge Screening.** The Permittees must implement a dry weather screening program, or contract with another entity to implement such a program, as required in Part II.B.5.d.

B. Recordkeeping

1. **Retention of Records.** The Permittees must retain records and copies of all information (e.g., all monitoring, calibration, and maintenance records; all original strip chart recordings for any continuous monitoring instrumentation; copies of all reports required by this Permit; storm water discharge monitoring reports; a copy of the NPDES permit; and records of all data or information used in the development and implementation of the SWMP and to complete the application for this Permit;) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this Permit, whichever is longer. This period may be extended at the request of the EPA at any time.
2. **Availability of Records.** The Permittees must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. At a minimum, the Permittees must retain all records comprising the SWMP required by this Permit (including a copy of the Permit language and all Annual Reports) in a location and format that are accessible to EPA and IDEQ. The Permittees must make all records described above available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The Permittees may charge the public a reasonable fee for copying requests.

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Beginning with the 2nd Year Annual Report, and in subsequent Annual Reports, all storm water discharge monitoring data collected to date must be submitted as part of the Annual Report. At a minimum, this Storm Water Discharge Monitoring Report must include:
   a) Dates of sample collection and analyses;
   b) Results of sample analyses;
   c) Location of sample collection. and
   d) Summary discussion and interpretation of the data collected, including a discussion of quality assurance issues and comparison to previously collected information, as appropriate.
2. **Water Quality Monitoring and/or Fish Tissue Sampling Report(s).** If the Permittees elect to conduct water quality monitoring and/or fish tissue sampling as specified in Part IV.A.8, all relevant monitoring data collected to date must

be submitted as part of each Annual Report beginning with the 2nd Year Annual Report. Summary data reports as prepared by other organizations with whom the Permittee(s) cooperate may be submitted to fulfill this requirement. At a minimum, this Water Quality Monitoring and/or Fish Tissue Sampling Report must include:

a) Dates of sample collection and analyses;

b) Results of sample analyses;

c) Locations of sample collection; and

d) Summary discussion and interpretation of the data collected, including discussion of quality assurance issues and comparison to previously collected information, as appropriate.

3. **Annual Report.**

a) No later than January 30th of each year beginning in 2014, and annually thereafter, each Permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the 1st Year Annual Report will be from February 1, 2013, through September 30, 2013. Reporting periods for subsequent Annual Reports are specified in Table IV.C. Copies of all Annual Reports, including each Permittee's SWMP documentation, must be available to the public, through a Permittee-maintained website, and/or through other easily accessible means.

Table IV.C - Annual Report Deadlines

Annual Report	Reporting Period	Due Date
1st Year Annual Report	February 1, 2013–September 30, 2013	January 30, 2014
2nd Year Annual Report	October 1, 2013-September 30, 2014	January 30, 2015
3rd Year Annual Report	October 1, 2014-September 30, 2015	January 30, 2016
4th Year Annual Report	October 1, 2015-September 30, 2016	January 30, 2017
5th Year Annual Report	October 1, 2016-December 31, 2017	January 30, 2018

b) Preparation and submittal of the Annual Reports must be coordinated by Ada County Highway District. Each Permittee is responsible for content of their organization's SWMP documentation and Annual Report(s) relating to SWMP implementation for portions of the MS4s for which they are responsible.

c) The following information must be submitted in each Annual Report:

(i) A updated and current document describing the SWMP as implemented by the specific Permittee, in accordance with Part II.A.1.b;

(ii) A narrative assessment of the Permittee's compliance with this Permit, describing the status of implementing the control measures in Parts II and IV. The status of each control measure must be addressed, even if activity has previously been completed, has not yet been implemented, does not apply to the Permittee's jurisdiction or operation, or is conducted on the Permittee's behalf by another entity;

(iii) Discussion of any information collected and analyzed during the reporting period, including but not limited to storm water monitoring data not included with the Storm Water Discharge Monitoring Report; dry weather monitoring results; Green Infrastructure/LID pilot project evaluation results, structural control evaluation results, and any other information collected or used by the Permittee(s) to assess the success of the SWMP controls at improving receiving water quality to the maximum extent practicable;

(iv) A summary of the number and nature of public education programs; the number and nature of complaints received by the Permittee(s), and follow-up actions taken; and the number and nature of inspections, formal enforcement actions, or other similar activities as performed by the Permittee(s) during the reporting period;

(v) Electronic copies of new or updated education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as required by this Permit during the reporting period;

(vi) A description and schedule of the Permittee's implementation of additional controls or practices deemed necessary by the Permittee, based on monitoring or other information, to ensure compliance with applicable water quality standards;

(vii) Notice if the Permittee is relying on another entity to satisfy any of the Permit obligations, if applicable; and

(viii) Annual expenditures for the reporting period, and estimated budget for the reporting period following each Annual Report.

d) If, after the effective date of this Permit, EPA provides the Permittees with an alternative Annual Report format, the Permittees may use the alternative format in lieu of the required elements of Part IV.C.3.c.

D. Addresses

Reports and other documents required by this Permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
Attn: Water Program Manager
1410 North Hilton
Boise, ID 83854

EPA: United States Environmental Protection Agency
Attention: Storm Water MS4 Compliance Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

Any documents and/or submittals requiring formal EPA approval must also be submitted to the following address:

United States Environmental Protection Agency
Attention: Storm Water MS4 Permit Program
NPDES Permits Unit
1200 6th Avenue, Suite 900 (OWW-130)
Seattle, WA 98101

V. Compliance Responsibilities.

A. Duty to Comply. The Permittees must comply with all conditions of this Permit. Any Permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for Permit termination, revocation and reissuance, or modification, or for denial of a Permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $37,500 per day for each violation).

2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19

and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently $16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $177,500).

3. Criminal Penalties

a) **Negligent Violations**. The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

b) **Knowing Violations**. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than six years, or both.

c) **Knowing Endangerment**. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.

d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Permit shall, upon conviction, be

punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this Permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the Permittees in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this Permit.

D. Duty to Mitigate. The Permittees must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this Permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The Permittees must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittees to achieve compliance with the conditions of this Permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the Permittees only when the operation is necessary to achieve compliance with the conditions of the Permit.

F. Toxic Pollutants. The Permittees must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the Permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The Permittee(s) must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b); or

2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the Permit.

H. Anticipated Noncompliance. The Permittee(s) must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this Permit.

I. Twenty-four Hour Notice of Noncompliance Reporting

1. The Permittee(s) must report the following occurrences of noncompliance by telephone within 24 hours from the time the Permittee(s) becomes aware of the circumstances:

a) any noncompliance that may endanger health or the environment;

b) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part IV.F., "Bypass of Treatment Facilities");

c) any upset that exceeds any effluent limitation in the permit (See Part IV.G., "Upset Conditions"); or

d) any overflow prior to the stormwater treatment facility over which the Permittee(s) has ownership or has operational control. An overflow is any spill, release or diversion of municipal sewage including:

(1) an overflow that results in a discharge to waters of the United States; and

(2) an overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral) that does not reach waters of the United States.

2. The Permittee(s) must also provide a written submission within five days of the time that the Permittee(s) becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

a) a description of the noncompliance and its cause;

b) the period of noncompliance, including exact dates and times;

c) the estimated time noncompliance is expected to continue if it has not been corrected; and

d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

e) if the noncompliance involves an overflow, the written submission must contain:

(1) The location of the overflow;

(2) The receiving water (if there is one);

(3) An estimate of the volume of the overflow;

(4) A description of the sewer system component from which the release occurred (e.g., manhole, constructed overflow pipe, crack in pipe);

(5) The estimated date and time when the overflow began and stopped or will be stopped;

(6) The cause or suspected cause of the overflow;

(7) Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the overflow and a schedule of major milestones for those steps;

(8) An estimate of the number of persons who came into contact with wastewater from the overflow; and

(9) Steps taken or planned to mitigate the impact(s) of the overflow and a schedule of major milestones for those steps.

3. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, (206) 553-1846.

4. Reports must be submitted to the addresses in Part IV.D ("Addresses").

J. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The Permittee(s) may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this Part.

2. Notice.

a) **Anticipated bypass**. If the Permittee(s) knows in advance of the need for a bypass, it must submit prior written notice, if possible at least 10 days before the date of the bypass.

b) **Unanticipated bypass.** The Permittee(s) must submit notice of an unanticipated bypass as required under Part III.G ("Twenty-four Hour Notice of Noncompliance Reporting").

3. Prohibition of bypass.

a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement may take enforcement action against the Permittee(s) for a bypass, unless:

(1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

(3) The Permittee(s) submitted notices as required under paragraph 2 of this Part.

b) The Director of the Office of Compliance and Enforcement may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 3.a. of this Part.

K. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the Permittee(s) meets the requirements of paragraph 2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the Permittee(s) must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

a) An upset occurred and that the Permittee(s) can identify the cause(s) of the upset;

b) The permitted facility was at the time being properly operated;

c) The Permittee(s) submitted notice of the upset as required under Part V.I, "*Twenty-four Hour Notice of Noncompliance Reporting*;" and

d) The Permittee(s) complied with any remedial measures required under Part V.D, "*Duty to Mitigate.*"

3. Burden of proof. In any enforcement proceeding, the Permittee(s) seeking to establish the occurrence of an upset has the burden of proof.

VI. General Provisions

A. Permit Actions.

1. This Permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR **§§** 122.62, 122.64, or 124.5. The filing of a request by the Permittee(s) for a Permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any Permit condition.

2. Permit coverage may be terminated, in accordance with the provisions of 40 CFR §§122.64 and 124.5, for a single Permittee without terminating coverage for the other Permittees subject to this Permit.

B. Duty to Reapply. If the Permittees intend to continue an activity regulated by this Permit after the expiration date of this Permit, the Permittees must apply for and obtain a

new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the Permittees must submit a new application at least 180 days before the expiration date of this Permit, or alternatively in conjunction with the 4th Year Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f), which includes: name and mailing address(es) of the Permittees(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal Permittees(s). In addition, the Permittees must identify any previously unidentified water bodies that receive discharges from the MS4(s); a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program as implemented by the Permittees. The re-application package may incorporate by reference the 4th Year Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The Permittees must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Permit, or to determine compliance with this Permit. The Permittees must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this Permit.

D. Other Information. When the Permittees become aware that it failed to submit any relevant facts in a Permit application, or that it submitted incorrect information in a Permit application or any report to the Director or IDEQ, the Permittees must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All Permit applications must be signed as follows:
   a) For a corporation: by a responsible corporate officer.
   b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
   c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.

2. All reports required by the Permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
   a) The authorization is made in writing by a person described above;
   b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or

position having overall responsibility for environmental matters for the organization; and

c) The written authorization is submitted to the Director and IDEQ.

3. **Changes to Authorization.** If an authorization under Part VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part VI.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.

4. **Certification.** Any person signing a document under this Part must make the following certification:

> "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this Permit may be claimed as confidential by the Permittees. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the Permittees. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The Permittees must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the Permittees' premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring Permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this Permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This Permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the Permit to change the name of the Permittees and incorporate such other requirements as may be necessary under the Act. (See 40 CFR 122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this Permit releases the Permittees from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability Nothing in this Permit shall be constructed to preclude the institution of any legal action or relieve the Permittees from any responsibilities, liabilities, or penalties to which the Permittees is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability The provisions of this Permit are severable, and if any provision of this permit, or the application of any provision of this Permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this Permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this Permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

"Administrator" means the Administrator of the EPA, or an authorized representative.

"Animal facility" see "commercial animal facility."

"Annual Report" means the periodic self –assessment submitted by the Permittee(s) to document incremental progress towards meeting the storm water management requirements and implementation schedules as required by this Permit. See Part IV.C.

"Best Management Practices (BMPs)" means 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 runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. See 40 CFR § 122.2. BMP refers to operational activities, physical controls or educational measures that are applied to reduce the discharge of pollutants and minimize potential impacts upon receiving waters, and accordingly, refers to both structural and nonstructural practices that have direct impacts on the release, transport, or discharge of pollutants. See also "storm water control measure (SCM)."

"Bioretention" is the water quality and water quantity storm water management practice using the chemical, biological and physical properties of plants, microbes and soils for the removal of pollution from storm water runoff.

"Canopy Interception**"** is the interception of precipitation, by leaves and branches of trees and vegetation that does not reach the soil.

"CGP" and "Construction General Permit" means the current available version of EPA's *NPDES General Permit for Storm Water Discharges for Construction Activities in Idaho*, Permit No. IDR12-0000. EPA's CGP is posted on EPA's website at *www.epa.gov/npdes/stormwater/cgp*.

"Commercial Animal Facility" as used in this Permit, means a business that boards, breeds, or grooms animals including but not limited to dogs, cats, rabbits or horses.

"Common Plan of Development**"** is a contiguous construction project or projects where multiple separate and distinct construction activities may be taking place at different times on different schedules but under one plan. The "plan" is broadly defined as any announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot; included in this definition are most subdivisions and industrial parks.

"Construction activity" includes, but is not limited to, clearing, grading, excavation, and other site preparation work related to the construction of residential buildings and non-residential buildings, and heavy construction (e.g., highways, streets, bridges, tunnels, pipelines, transmission lines and industrial non-building structures).

"Control Measure" as used in this Permit, refers to any action, activity, Best Management Practice or other method used to prevent or reduce the discharge of pollutants in stormwater to waters of the United States.

"CWA" or "The Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

"Director" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Discharge" when used without a qualifier, refers to "discharge of a pollutant" as defined at 40 CFR §122.2.

"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 channelled 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."

"Discharge of Storm Water Associated with Construction Activity" as used in this Permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located, and which are required to be managed under an NPDES permit. See the regulatory definitions of storm water discharge associated with large and small construction activity at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15), respectively

"Discharge of Storm Water Associated with Industrial Activity" as used in this Permit, refers to the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant included in the regulatory definition of storm water discharge associated with industrial activity at 40 CFR §122.26(b)(14).

"Discharge-related Activities" include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

"Disconnect" for the purposes of this permit, means the change from a direct discharge into receiving waters to one in which the discharged water flows across a vegetated surface, through a constructed water or wetlands feature, through a vegetated swale, or other attenuation or infiltration device before reaching the receiving water.

"Engineered Infiltration" is an underground device or system designed to accept storm water and slowly exfiltrates it into the underlying soil. This device or system is designed based on soil tests that define the infiltration rate.

"Erosion" means the process of carrying away soil particles by the action of water.

"Evaporation" means rainfall that is changed or converted into a vapor.

"Evapotranspiration" means the sum of evaporation and transpiration of water from the earth's surface to the atmosphere. It includes evaporation of liquid or solid water plus the transpiration from plants.

"Extended Filtration" is a structural storm water device which filters storm water runoff through a soil media and collects it in an underdrain which slowly releases it after the storm is over.

"EPA" means the Environmental Protection Agency Regional Administrator, the EPA Director of the Office of Water and Watersheds, or an authorized representative.

"Entity" means a governmental body, or a public or private organization.

"Existing Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis and that were installed prior to the effective date of this Permit.

"Facility or Activity" generally means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

"Fish Tissue Sampling" see "Methylmercury Fish Tissue Sampling"

"Green infrastructure" means runoff management approaches and technologies that utilize, enhance and/or mimic the natural hydrologic cycle processes of infiltration, evapotranspiration and reuse.

"Hydromodification" means changes to the storm water runoff characteristics of a watershed caused by changes in land use.

"IDEQ" means the Idaho Department of Environmental Quality or its authorized representative.

"Illicit Connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit Discharge" is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES Permit for discharges from the MS4) and discharges resulting from fire fighting activities.

"Impaired Water" (or "Water Quality Impaired Water") for purposes of this Permit means any water body identified by the State of Idaho or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards. Impaired waters include both waters with approved or established Total Maximum Daily Loads (TMDLs), and those for which a TMDL has not yet been approved or established.

"Industrial Activity" as used in this Permit refers to the eleven categories of industrial activities included in the definition of discharges of "storm water associated with industrial activity" at 40 CFR §122.26(b)(14).

"Industrial Storm Water" as used in this Permit refers to storm water runoff associated with the definition of "discharges of storm water associated with industrial activity".

"Infiltration" is the process by which storm water penetrates into soil.

"Low Impact Development" or "LID" means storm water management and land development techniques, controls and strategies applied at the parcel and subdivision scale that emphasize conservation and use of on-site natural features integrated with engineered, small scale hydrologic controls to more closely mimic pre-development hydrologic functions.

"Major outfall" is defined in 40 CFR §122.26(b)(5) and in general, means a municipal storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more.

"MEP" or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by Section 402(p) of the Clean Water Act, 33 U.S.C §1342(p).

"Measurable Goal" means a quantitative measure of progress in implementing a component of a storm water management program.

"Methylmercury Fish Tissue Sampling" and "Methylmercury Fish Tissue Sampling Requirements" means the IDEQ-recommended cooperative data collection effort for the Lower Boise River Watershed. In particular, Methylmercury Fish Tissue Sampling requirements are otherwise specified in NPDES Permits # ID-002044-3 and ID-002398-1, as issued by EPA to the City of Boise and available online at http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319

"Minimize" means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry or municipal practices.

"MS4" means "municipal separate storm sewer system," and is used to refer to either a Large, Medium, or Small Municipal Separate Storm Sewer System as defined in 40 CFR 122.26(b). The term, as used within the context of this Permit, refers to those portions of the municipal separate storm sewer systems within the corporate limits of the City of Boise and City of Garden City that are owned and/or operated by the Permittees, namely: Ada County Highway District, Boise State University, City of Boise, City of Garden City, Drainage District #3 and/or the Idaho Transportation Department District #3.

"Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

"Municipal Separate Storm Sewer" is defined in 40 CFR §122.26(b) and 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.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an 'approved program.'

"New Permanent Controls," in the context of this Permit, means post- construction or permanent storm water management controls designed to treat or control runoff on a permanent basis that are installed after the effective date of this permit.

"Outfall" is defined at 40 CFR §122.26(b)(9) means a point source (see definition below) at the point where a municipal separate storm sewer discharges to waters of the United States, and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

"Owner or operator" means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

"Permanent storm water management controls" see "post-construction storm water management controls."

"Permitting Authority" means the U.S. Environmental Protection Agency (EPA)

"Point Source" is defined at 40 CFR §122.2 and means 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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

"Pollutant(s) of concern" includes any pollutant identified by IDEQ as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this Permit. See Table II.C.

"Post- construction storm water management controls" or "permanent storm water management controls" means those controls designed to treat or control runoff on a permanent basis once construction is complete. See also "new permanent controls" and "existing permanent controls."

"QA/QC" means quality assurance/quality control.

"QAP" means Quality Assurance Plan.

"Rainfall and Rainwater Harvesting" is the collection, conveyance, and storage of rainwater. The scope, method, technologies, system complexity, purpose, and end uses vary from rain barrels for garden irrigation in urban areas, to large-scale collection of rainwater for all domestic uses.

"Redevelopment" for the purposes of this Permit, means the alteration, renewal or restoration of any developed land or property that results in land disturbance of 5,000 square feet or more, and that has one of the following characteristics: land that currently has an existing structure, such as buildings or houses; or land that is currently covered with an impervious surface, such as a parking lot or roof; or land that is currently degraded and is covered with sand, gravel, stones, or other non-vegetative covering.

"Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

"Repair of Public Streets, Roads and Parking Lots" means repair work on Permittee-owned or Permittee-managed streets and parking lots that involves land disturbance, including asphalt removal or regrading of 5,000 square feet or more. This definition excludes the following activities: pot hole and square cut patching; overlaying existing asphalt or concrete pacing with asphalt or concrete without expanding the area of coverage; shoulder grading; reshaping or regrading drainage ditches; crack or chip sealing; and vegetative maintenance.

"Runoff Reduction Techniques" means the collective assortment of storm water practices that reduce the volume of storm water from discharging off site.

"Storm Sewershed" means, for the purposes of this Permit, all the land area that is drained by a network of municipal separate storm sewer system conveyances to a single point of discharge into a water of the United States.

"Significant contributors of pollutants" means any discharge that causes or could cause or contribute to a violation of surface water quality standards.

"Small Construction Activity" – is defined at 40 CFR §122.26(b)(15) and incorporated here by reference. A small construction activity includes clearing, grading, and excavating resulting in a land disturbance that will disturb equal to or greater than one (1) acre and less than five (5) acres of land or will disturb less than one (1) acre of total land area but is part of a larger common plan of development or sale that will ultimately disturb equal to or greater than one (1) acre and less than five (5) acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the site.
"Snow management" means the plowing, relocation and collection of snow.

"Soil amendments" are components added to in situ or native soils to increase the spacing between soil particles so that the soil can absorb and hold more moisture. The amendment of soils changes

various other physical, chemical and biological characteristics so that the soils become more effective in maintaining water quality.

"Source control" storm water management means practices that control storm water *before* pollutants have been introduced into storm water

"Storm event" or "measurable storm event" for the purposes of this Permit means a precipitation event that results in an actual discharge from the outfall and which follows the preceding measurable storm event by at least 48 hours (2 days).

"Storm water" and "storm water runoff" as used in this Permit means storm water runoff, snow melt runoff, and surface runoff and drainage, and is defined at 40 CFR §122.26(b)(13). "Storm water" means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed infiltration facility.

"Storm Water Control Measure" (SCM) or "storm water control device," means physical, structural, and/or managerial measures that, when used singly or in combination, reduce the downstream quality and quantity impacts of storm water. Also, SCM means a permit condition used in place of or in conjunction with effluent limitations to prevent or control the discharge of pollutants. This may include a schedule of activities, prohibition of practices, maintenance procedures, or other management practices. SCMs may include, but are not limited to, treatment requirements; operating procedures; practices to control plant site runoff, spillage, leaks, sludge, or waste disposal; or drainage from raw material storage. See "best management practices (BMPs)."

"Storm Water Facility" means a constructed component of a storm water drainage system, designed or constructed to perform a particular function or multiple functions. Storm water facilities include, but are not limited to, pipes, swales, ditches, culverts, street gutters, detention basins, retention basins, constructed wetlands, infiltration devices, catch basins, oil/water separators, sediment basins, and modular pavement.

"Storm Water Management Practice" or "Storm Water Management Control" means practices that manage storm water, including structural and vegetative components of a storm water system.

"Storm Water Management Project" means a project that takes into account the effects on the water quality of the receiving waters and whether a structural storm water control device can be retrofitted to control water quality.

"Storm Water Management Program (SWMP)" refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system. For the purposes of this Permit, the SWMP consists of the actions and activities conducted by the Permittees as required by this Permit and described in the Permittees' SWMP documentation. A "SWMP document" is the written summary describing the unique and/or cooperative means by which an individual Permittee or entity implements the specific storm water management controls Permittee within their jurisdiction.

"Storm Water Pollution Prevention Plan (SWPPP)" means a site specific plan designed to describe the control of soil, raw materials, or other substances to prevent pollutants in storm water runoff; a SWPPP is generally developed for a construction site, or an industrial facility. For the purposes of this permit, a SWPPP means a written document that identifies potential sources of pollution, describes practices to reduce pollutants in storm water discharges from the site, and identifies procedures or controls that the operator will implement to reduce impacts to water quality and comply with applicable Permit requirements.

"Structural flood control device" means a device designed and installed for the purpose of storm drainage during storm events.

"Subwatershed" for the purposes of this Permit means a smaller geographic section of a larger watershed unit with a drainage area between 2 to 15 square miles and whose boundaries include all the land area draining to a point where two second order streams combine to form a third order stream. A subwatershed may be located entirely within the same political jurisdiction.

"TMDL" means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

"Treatment control" storm water management means practices that 'treat' storm water after pollutants have been incorporated into the storm water.

"Urban Agriculture" and "Urban Agricultural Activities" means the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities. For the purposes of this Permit, the term includes activities allowed and/or acknowledged by the Permittees through a local comprehensive plan ordinance, or other regulatory mechanism. For example, see: *Blueprint Boise* online at *http://www.cityofboise.org/BluePrintBoise/pdf/Blueprint%20Boise/0_Blueprint_All.pdf,* and/or *City of Boise Urban Agriculture ordinance amendment, ZOA11-00006.*

"Waters of the United States," as defined in 40 CFR 122.2, means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate "wetlands";

3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

   a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
   b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1 through 6 of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

"Watershed" is defined as all the land area that is drained by a waterbody and its tributaries.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

EXHIBIT 4

Washington, D.C. – District of Columbia MS4 Permit

(Permit No. DC0000221)

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NPDES Permit No. DC0000221

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

is authorized to discharge from all portions of the municipal separate storm sewer system owned and operated by the District of Columbia to receiving waters named:

Potomac River, Anacostia River, Rock Creek and stream segments tributary to each such water body

in accordance with the Stormwater Management Program(s) dated February 19, 2009, subsequent updates, and related reports, strategies, effluent limitations, monitoring requirements and other conditions set forth in Parts I through IX herein.

The effective issuance date of this permit is: October 7, 2011.

This permit and the authorization to discharge shall expire at midnight, on: October 7, 2016.

Signed this 30th day of September, 2011.

Jon M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency
Region III

PERMIT FOR THE DISTRICT OF COLUMBIA
MUNICIPAL SEPARATE STORM SEWER SYSTEM

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1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

1.1 Permit Area

This permit covers all areas within the jurisdictional boundary of the District of Columbia served by, or otherwise contributing to discharges from, the Municipal Separate Storm Sewer System (MS4) owned or operated by the District of Columbia. This permit also covers all areas served by or contributing to discharges from MS4s owned or operated by other entities within the jurisdictional boundaries of the District of Columbia unless those areas have separate NPDES MS4 permit coverage or are specifically excluded herein from authorization under the District's stormwater program. Hereinafter these areas collectively are referred to as "MS4 Permit Area".

1.2 Authorized Discharges

This permit authorizes all stormwater point source discharges to waters of the United States from the District of Columbia's MS4 that comply with the requirements of this permit. This permit also authorizes the discharge of stormwater commingled with flows contributed by process wastewater, non-process wastewater, or stormwater associated with industrial activity provided such discharges are authorized under separate NPDES permits.

This permit authorizes the following non-stormwater discharges to the MS4 when appropriate stormwater activities and controls required through this permit have been applied and which are: (1) discharges resulting from clear water flows, roof drainage, dechlorinated water line flushing, landscape irrigation, ornamental fountains, diverted stream flows, rising ground waters, uncontaminated ground water infiltration to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation waters, springs, footing drains, lawn watering, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, wash water, fire fighting activities, and similar types of activities; and (2) which are managed so that water quality is not further impaired and that the requirements of the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and EPA regulations are met.

1.3 Limitations to Coverage

1.3.1 Non-stormwater Discharges

The permittee, as defined herein, shall effectively prohibit non-stormwater discharges into the MS4, except to the extent such discharges are regulated with an NPDES permit.

1.3.2 Waivers and Exemptions

This permit does not authorize the discharge of any pollutant from the MS4 which arises from or is based on any existing waivers and exemptions that may otherwise apply and are not consistent with the Federal Clean Water Act and other pertinent guidance, policies, and regulations. This narrative prohibition on the applicability of such waivers and exemptions extends to any activity that would otherwise be authorized under District law, regulations or

ordinance but which impedes the reduction or control of pollutants through the use of stormwater control measures and/or prevents compliance with the narrative /numeric effluent limits of this permit. Any such discharge not otherwise authorized may constitute a violation of this permit.

1.4 Discharge Limitations

The permittee must manage, implement and enforce a stormwater management program (SWMP) in accordance with the Clean Water Act and corresponding stormwater NPDES regulations, 40 C.F.R. Part 122, to meet the following requirements:

1.4.1. Effectively prohibit pollutants in stormwater discharges or other unauthorized discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS);

1.4.2. Attain applicable wasteload allocations (WLAs) for each established or approved Total Maximum Daily Load (TMDL) for each receiving water body, consistent with 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(k)(2) and (3); and

1.4.3. Comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit.

Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.

2. LEGAL AUTHORITY, RESOURCES AND STORMWATER PROGRAM ADMINSTRATION

2.1 Legal Authority

2.1.1 The permittee shall use its existing legal authority to control discharges to and from the Municipal Separate Storm Sewer System in order to prevent or reduce the discharge of pollutants to achieve water quality objectives, including but not limited to applicable water quality standards. To the extent deficiencies can be addressed through regulation or other Executive Branch action, the permittee shall remedy such deficiencies within 120 days. Deficiencies that can only be addressed through legislative action shall be remedied within 2 years of the effective date of this permit, except where otherwise stipulated, in accordance with the District's legislative process. Any changes to or deficiencies in the legal authority shall be explained in each Annual Report.

2.1.2 No later than 18 months following the effective date of this permit, the District shall update and implement Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution) ("updated DC Stormwater Regulations"), to address the control of stormwater throughout the MS4 Permit Area. Such regulations shall be consistent with this

permit, and shall be at least as protective of water quality as the federal Clean Water Act and its implementing regulations require.

2.1.3 The permittee shall ensure that the above legal authority in no way restricts its ability to enter into inter-jurisdictional agreements with other District agencies and/or other jurisdictions affected through this permit.

2.1.4 Review and revise, where applicable, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the following standards: (1) standards resulting from issuance of District stormwater regulations required by Section 2.1, paragraph 1 herein; and (2) performance standards required by this permit.

2.2 Fiscal Resources

The permittee, including all agencies and departments of the District as specified in section 2.3 below, shall provide adequate finances, staff, equipment and support capabilities to implement the existing Stormwater Management Program (SWMP) and the provisions of this permit. For the core program the District shall provide a dedicated funding source. Each annual report under Part 6 of this permit shall include a demonstration of adequate fiscal capacity to meet the requirements of this permit.

2.3 Stormwater Management Program Administration/Permittee Responsibilities

2.3.1 The Government of the District of Columbia is the permittee, and all activities of all agencies, departments, offices and authorities of the District must comply with the requirements of this permit. The permittee has designated the District Department of the Environment (DDOE) as the agency responsible for managing the MS4 Stormwater Management Program and all activities necessary to comply with the requirements of this permit and the Comprehensive Stormwater Management Enhancement Amendment Act of 2008 by coordinating and facilitating a collaborative effort among other city agencies and departments including but not limited to departments designated as "Stormwater Agencies" by the Comprehensive Stormwater Management Enhancement Amendment Act of 2008:

District Department of Transportation (DDOT);
Department of Public Works (DPW);
Office of Planning (OP);
Office of Public Education Facilities Modernization (OPEFM);
Department of Real Estate Services (DRES);
Department of Parks and Recreation; and
DC Water and Sewer Authority (also known as and hereinafter referred to as DC Water).

Each named entity is responsible for complying with those elements of the permit within its jurisdictional scope and authorities.

2.3.2 DDOE shall coordinate, and all agencies, offices, departments and authorities shall implement provisions of the existing MS4 Task Force Memorandum of Understanding (MOU) dated 2000, updated matrix of responsibilities (January 2008), any subsequent updates, and other institutional agreements to coordinate compliance activities among agency partners to implement the provisions of this permit. DDOE's major responsibilities under these MOUs and institutional agreements shall include:

1. Convening regular meetings and communication with MS4 Task Force agencies and other committees established to implement this permit to budget, assign and implement projects, and monitor, inspect and enforce all activities required by the MS4 permit.

2. Providing technical and administrative support for the MS4 Task Force and other committees established to implement this permit

3. Evaluating, assessing, and synthesizing results of the monitoring and assessment programs and the effectiveness of the implementation of management practices and coordinating necessary adjustments to the stormwater management program in order to ensure compliance.

4. Coordinating the completion and submission of all deliverables required by the MS4 Permit.

5. Projecting revenue needs to meet MS4 Permit requirements, overseeing the District's stormwater fees to fulfill revenue needs, and coordinating with DC Water to ensure the District's stormwater fee is collected.

6. Making available to the public and other interested and affected parties, the opportunity to comment on the MS4 stormwater management program.

2.3.3 Within 180 days of permit issuance, the permittee shall complete an assessment of additional governmental agencies and departments, non-governmental organizations, watershed groups or other community organizations in the District and adjacent states to partner with to administer required elements of the permit. Intra- and inter-agency agreements between relevant governmental and nongovernmental organizations shall be established to ensure successful coordination and implementation of stormwater management activities in accordance with the requirements of this permit. Additional government and nongovernmental organizations and programs to consider include; land use planning, brownfields redevelopment, fire department, building and safety, public health, parks and recreation, and federal departments and agencies, including but not limited to, the National Park Service, Department of Agriculture, Department of Defense, and General Services Administration, responsible for facilities in the District.

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

The permittee shall continue to implement, assess and upgrade all of the controls, procedures and management practices, described in this permit, and in the SWMP dated

February 19, 2009, and any subsequent updates. This Program has been determined to reduce the discharge of pollutants to the maximum extent practicable. The Stormwater Management Program is comprised of all requirements in this permit. All existing and new strategies, elements, initiatives, schedules or programs required by this permit must be documented in the SWMP Plan, which shall be the consolidated document of all stormwater program elements. Updates to the plan shall be consistent with all compliance deadlines in this permit. A current plan shall be posted on the District's website at an easily accessible location at all times.

New Stormwater Management Program strategies, elements, initiatives and plans required to be submitted to EPA for review and approval are included in Table 1.

TABLE 1
Elements Requiring EPA Review and/or Approval

Element	**Submittal Date (from effective date of this permit)**
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.6)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

No later than 3 years from the issuance date of this permit the permittee shall public notice a fully updated Plan including all of the elements required in this permit. No later than 4 years from the issuance date of this permit the permittee shall submit to EPA the fully updated plan for review and approval, as part of the application for permit renewal.

The measures required herein are terms of this permit. These permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.

TABLE 2
Legal Authority for Selected Required Program Stormwater Elements

Required Program Application Element	**Regulatory References**
Adequate Legal Authority	40 C.F.R. § 122.26(d)(2)(I)(C)-(F)

Green technology stormwater management practices, which incorporate technologies and practices across District activities.	Chapter 5 of Title 21 of District of Columbia Municipal Regulations (Water Quality and Pollution)
Existing Structural and Source Controls	40 C.F.R. § 122.26(d)(2)(iv)(A)(1)
Roadways	40 C.F.R. § 122.26(d)(2)(iv)(A)(3)
Pesticides, Herbicides, and Fertilizers Application	40 C.F.R. § 122.26(d)(2)(iv)(A)(6)
Municipal Waste Sites	40 C.F.R. § 122.26(d)(2)(iv)(A)(5)
Spill Prevention and Response	40 C.F.R. § 122.26(d)(2)(iv)(B)(4)
Infiltration of Seepage	40 C.F.R. § 122.26(d)(2)(iv)(B)(7)
Stormwater Management Program for Commercial and Residential Areas	40 C.F.R. § 122.26(d)(2)(iv)(A)
Manage Critical Source Areas	40 C.F.R. § 122.26(d)(iii)(B)(6)
Stormwater Management for Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)
Industrial and High Risk Runoff	40 C.F.R. § 122.26(d)(2)(iv)(C), (iv)(A)(5)
Identify Priority Industrial Facilities	40 C.F.R. § 122.26(d)(2)(iv)(C)(1)
Illicit Discharges and Improper Disposal	40 C.F.R. § 122.26(d)(2)(iv)(B)(1)-(5), (iv)(B)(7)
Flood Control Projects	40 C.F.R. § 122.26(d)(2)(iv)(A)(4)
Public Education and Participation	40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)

Monitoring and Assessment and Reporting	40 C.F.R. § 122.26(d)(2)(iv)(D)(v)
Monitoring Program	40 C.F.R. § 122.26(d)(2)(iv)(B)(2), (iii), iv(A), (iv)(C)(2)
Characterization Data	40 C.F.R. § 122.26(d)(2)(iii)(B)-(D), 40 C.F.R. § 122.21(g)(7)
Reporting	40 C.F.R. § 122.41(l)

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

4.1 Standard for Long-Term Stormwater Management

The permittee shall continue to develop, implement, and enforce a program in accordance with this permit and the permittee's updated SWMP Plan that integrates stormwater management practices at the site, neighborhood and watershed levels that shall be designed to mimic pre-development site hydrology through the use of on-site stormwater retention measures (e.g., harvest and use, infiltration and evapotranspiration), through policies, regulations, ordinances and incentive programs

4.1.1 Standard for Stormwater Discharges from Development

No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement one or more enforceable mechanism(s) that will adopt and implement the following performance standard for all projects undertaking development that disturbs land greater than or equal to 5,000 square feet:

Require the design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet.

The District may allow a portion of the 1.2" volume to be compensated for in a program consistent with the terms and requirements of Part 4.1.3.

4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking

By the end of this permit term the District must review and revise, as applicable, stormwater, building, health, road and transportation, and other codes and regulations to remove barriers to, and facilitate the implementation of the retention performance standard required in

Section 4.1.1. The District must also establish/update and maintain a formal process for site plan reviews and a post-construction verification process (e.g., inspections, submittal of as-builts) to ensure that standards are appropriately implemented. The District must also track the on-site retention performance of each project subject to this regulatory requirement.

4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities

Within 18 months of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and comment an off-site mitigation and/or fee-in-lieu program to be utilized when projects will not meet stormwater management performance standard as defined in Section 4.1.1. The District has the option of implementing an off-site mitigation program, a fee-in-lieu program, or both. Any allowance for adjustments to the retention standard shall be defined in the permittee's regulations. The program shall include at a minimum:

1. Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2. Specific criteria for determining when compliance with the performance standard requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3. For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4. The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

The program may also include incentives for achieving other important environmental objectives such as ongoing measurable carbon sequestration, energy savings, air quality reductions in green house gases, or other environmental benefits for which the program can develop methods for quantifying and documenting those outcomes. Controls implemented to achieve those outcomes are subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls.

District-owned transportation right-of-way projects are subject to a similarly stringent process for determining an alternate performance volume, but for the duration of this permit term need not conduct off-site mitigation or pay into a fee-in-lieu program to compensate for the difference.

4.1.4 Green Landscaping Incentives Program

No later than one year following permit issuance, the permittee shall develop an incentive program to increase the quantity and quality of planted areas in the District while allowing flexibility for developers and designers to meet development standards. The Incentive Program

shall use such methods as a scoring system to encourage green technology practices such as larger plants, permeable paving, green roofs, vegetated walls, preservation of existing trees, and layering of vegetation along streets and other areas visible to the public.

4.1.5 Retrofit Program for Existing Discharges

4.1.5.1 Within two years of the effective date of this permit the District shall develop, public notice, and submit to EPA for review and approval a program that establishes performance metrics for retrofit projects. The District shall fully implement the program upon EPA approval. The starting point for the performance metrics shall be the standard in Section 4.1.1. Performance metrics may be established generally for all retrofit projects, or for categories of projects, e.g., roads, sidewalks, parking lots, campuses. Specific site conditions may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1, and a similar calculator or algorithm process may be used in conjunction with a specific site analysis.

4.1.5.2 The District, with facilitation assistance from EPA Region III, will also work with major Federal landholders, such as the General Services Administration and the Department of Defense, with the objective of identifying retrofit opportunities, documenting federal commitments, and tracking pollutant reductions from relevant federal actions.

4.1.5.3 For each retrofit project estimate the potential pollutant load and volume reductions achieved through the DC Retrofit program by major waterbody (Rock Creek, Potomac, Anacostia) for the following pollutants: Bacteria (E. coli), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash. These estimates shall be included in the annual report following implementation of the project.

4.1.5.4 The DC Retrofit Program shall implement retrofits for stormwater discharges from a minimum of 18,000,000 square feet of impervious surfaces during the permit term. A minimum of 1,500,000 square feet of this objective must be in transportation rights-of-way.

4.1.5.5 No later than 18 months following issuance of this permit, the permittee shall, through its Updated DC Stormwater Regulations or other permitting or regulatory mechanisms, implement an enforceable mechanism that will adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. The characteristics of these types of projects may constitute justifications for setting a performance standard at something less than the standard in Section 4.1.1.

4.1.5.6 The permittee shall ensure that every major renovation/rehabilitation project for District-owned properties within the inventory of DRES and OPEFM (e.g., schools and school administration buildings) includes on-site stormwater retention measures, including but not

limited to green roofs, stormwater harvest/reuse, and/or other practices that can achieve the retention performance standard.

4.1.6 Tree Canopy

4.1.6.1 No later than one year following issuance of this permit, the District shall develop and public notice a strategy to reduce the discharge of stormwater pollutants by expanding tree canopy throughout the city. The strategy shall identify locations throughout the District where tree plantings and expanded tree boxes are technically feasible and commit to specific schedules for implementation at locations throughout the District, with highest priority given to projects that offer the greatest stormwater retention potential. The strategy shall also include the necessary elements to achieve the requirements of Section 4.1.6.2.

4.1.6.2 The District shall achieve a minimum net annual tree planting rate of 4,150 plantings annually within the District MS4 area, with the objective of a District-wide urban tree canopy coverage of 40% by 2035. The annual total tree planting shall be calculated as a net increase, such that annual mortality is also included in the estimate. The District shall ensure that trees are planted and maintained, including requirements for adequately designed and sized tree boxes, to achieve optimal stormwater retention and tree survival rate. Trees shall be planted in accordance with the Planting Specifications issued by the International Society of Arboriculture as appropriate to the site conditions.

4.1.6.3 The District shall annually document the total trees planted and make an annual estimate of the volume of stormwater that is being removed from the MS4 (and combined system, as relevant) in a typical year of rainfall as a result of the maturing tree canopy over the life of the MS4 permit. Also report annually on the status of achieving 40% canopy District-wide.

4.1.7 Green Roof Projects

4.1.7.1 Complete a structural assessment of all District properties maintained by DRES and slated for redevelopment to determine current roof conditions and the feasibility for green roof installation. These assessments shall be performed on an ongoing basis for all properties as they are considered for redevelopment. Based on the structural assessment and other factors, identify all District-owned properties where green roof projects are technically feasible and commit to specific schedules for implementing these projects. Highest priority shall be given to projects that offer the greatest stormwater capture potential.

4.1.7.2 The permittee shall install at a minimum 350,000 square feet of green roofs on District properties during the term of the permit (including schools and school administration buildings).

4.1.7.3 Document the square footage of green roof coverage in the District, whether publicly or privately owned, report any incentive programs implemented during the permit term, and estimate the volume of stormwater that is being removed from the MS4 (and combined

system, as relevant) in a typical year of rainfall as a result of the combined total green roof facilities in the District.

4.2 Operation and Maintenance of Stormwater Capture Practices

4.2.1 District Owned and Operated Practices.

Within two years of the effective date of this permit, develop and implement operation and maintenance protocols and guidance for District-owned and operated on-site retention practices (development and retrofits) to include maintenance needs, inspection frequencies, estimated maintenance frequencies, and a tracking system to document relevant information. Provide training to all relevant municipal employees and contractors, with regular refreshers, as necessary.

4.2.2 Non-District Owned and Operated Practices.

In conjunction with updating of relevant ordinances and policies, develop accountability mechanisms to ensure maintenance of stormwater control measures on non-District property. Those mechanisms may include combinations of deed restrictions, ordinances, maintenance agreements, or other policies deemed appropriate by the District. The District must also include a long-term verification process of O&M, which may include municipal inspections, 3rd party inspections, owner/operator certification on a frequency deemed appropriate by the District, and/or other mechanisms. The District must continue to maintain an electronic inventory of practices on private property to include this information.

4.2.3 Stormwater Management Guidebook and Training

4.2.3.1 No later than 18 months from the permit issuance date, the permittee shall finalize a Stormwater Management Guidebook to be available for wide-spread use by land use planners and developers. The Stormwater Management Guidebook shall provide regular updates, as applicable, in a format that facilitates such regular updates, and shall include objectives and specifications for integration of stormwater management technologies, including on site retention practices, in the areas of:

a. Site Assessment.
b. Site Planning and Layout.
c. Vegetative Protection, Revegetation, and Maintenance.
d. Techniques to Minimize Land Disturbance.
e. Techniques to Implement Measures at Various Scales.
f. Integrated Water Resources Management Practices.
g. Designing to meet the required performance standard(s).
h. Flow Modeling Guidance.
i. Hydrologic Analysis.
j. Construction Considerations.
k. Operation and Maintenance

4.2.3.2 The permittee shall continue to provide key industry, regulatory, and other stakeholders with information regarding objectives and specifications of green infrastructure practices contained in the Stormwater Management Guidebook through a training program. The Stormwater Management training program will include at a minimum the following:

a. Stormwater management/green technology practices targeted sessions and materials for builders, design professionals, regulators, resource agencies, and stakeholders.
b. Materials and data from stormwater management/green technology practices pilot projects and demonstration projects including case studies.
c. Design and construction methods for integration of stormwater management/green technology practices measures at various project scales.
d. Guidance on performance and cost of various types of stormwater management/green technology practices measures in the District.

4.3 Management of for District Government Areas

Procedures to reduce the discharge of pollutants in stormwater runoff shall include, but not be limited to:

4.3.1 Sanitary Sewage System Maintenance Overflow and Spill Prevention Response

The permittee shall coordinate with DC Water to implement an effective response protocol for overflows of the sanitary sewer system into the MS4. The response protocol shall clearly identify agencies responsible and telephone numbers and e-mail for any contact and shall contain at a minimum, procedures for:

1. Investigating any complaints received within 24 hours of the incident report.
2. Responding within two hours to overflows for containment.
3. Notifying appropriate sewer, public health agencies and the public within 24 hours when the sanitary sewer overflows to the MS4.

This provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4.

4.3.2 Public Construction Activities Management

The permittee shall implement and comply with the Development and Redevelopment and the Construction requirements in Part 4.6 of this permit at all permittee-owned or operated public construction projects.

The permittee shall obtain discharge authorization under the applicable EPA Construction General permit for construction activities and comply with provisions therein.

4.3.3 Vehicle Maintenance/Material Storage Facilities/ Municipal Operations.

The permittee shall implement stormwater pollution prevention measures at all permittee-owned, leased facilities and job sites including but not limited to vehicle/ equipment maintenance facilities, and material storage facilities.

For vehicle and equipment wash areas and municipal facilities constructed, redeveloped, or replaced, the permittee shall eliminate discharges of wash waters from vehicle and equipment washing into the MS4 by implementing any of the following measures at existing facilities with vehicle or equipment wash areas:

1. Self-contain, and haul off-site for disposal;
2. Equip with a clarifier; or
3. Equip with an alternative pre-treatment device.

4.3.4 Landscape and Recreational Facilities Management, Pesticide, Herbicide, Fertilizer and Landscape Irrigation

4.3.4.1 The permittee shall further reduce pollutants and pollutant discharges associated with the storage and application of pesticides, fertilizers, herbicides, the use of other toxic substances and landscape irrigation according to an integrated pest management program (IPM). The IPM shall be an ecosystem based strategy that focuses on long-term prevention of pests or their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes, in accordance with the provisions of this permit, procedures and practices described in the SWMP and regulations.

The permittee shall further utilize IPM controls to reduce pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied by employees or contractors, to public rights-of-way, parks, and other District property to ensure that:

a. Pesticides are used only if monitoring indicates they are needed according to established guidelines;

b. Fertilizers are used only when soil tests indicate that they are necessary, and only in minimum amounts and for needed purposes (e.g., seed germination).

c. Treatments are made with the purpose of removing only the target organism;

d. Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial, non-target organisms, and the environment;

e. No pesticides or fertilizers are applied to an area immediately prior to an expected rain event, or during or immediately following a rain event, or when water is flowing off the area;

f. No banned or unregistered pesticides are stored or applied;

g. All staff applying pesticides are certified or are under the direct supervision of a pesticide applicator certified in the appropriate category;

h. Procedures are implemented to encourage the retention and planting of native and/or non-invasive, naturalized vegetation to reduce water, pesticide and fertilizer needs;

i. Pesticides and fertilizers are stored indoors or under cover on paved surfaces or enclosed in secondary containment and storage areas inspected regularly to reduce the potential for spills; and

j. Landscapes that maximize on-site retention of stormwater, while minimizing mowing, chemical inputs and irrigation are given preference for all new landscape installation.

4.3.4.2 The District shall coordinate internally among departments for the purpose of ensuring that pesticide and fertilizer use within its jurisdiction does not threaten water quality.

4.3.4.3 The District shall partner with other organizations to ensure that pesticide and fertilizer use within their jurisdiction does not threaten water quality.

4.3.4.4 The District shall continue to conduct education and outreach, as well as provide incentives, to curtail the use of turf-grass fertilizers for the purpose of reducing nitrogen and phosphorous discharges to surface waters. The program shall incentivize the use of vegetative landscapes other than turf grass and other measures to restrict the use of turf grass fertilizers.

4.3.4.5 The District shall use GIS layers of public land and sewersheds, as well as background data, to identify priority areas for a targeted strategy to reduce the sources of pesticides, herbicides, and fertilizers that contaminate the stormwater runoff, and report progress toward completing the screening characterization in the next Updated SWMP.

4.3.4.6 The District shall include in each Annual Report a report on the implementation of the above application procedures, a history of the improvements in the control of these materials, and an explanation on how these procedures will meet the requirements of this permit.

4.3.5 Storm Drain System Operation and Management and Solids and Floatables Reduction

4.3.5.1 Within 18 months of the effective date of this permit, the District shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The District shall fully implement the plan upon EPA approval.

4.3.5.2 Until such time as the catch basin maintenance study has been completed and approved, the permittee shall ensure that each catch basin within the DC MS4 Permit Area is cleaned at least once annually during the life of the permit. The permittee shall continue to use strategies for coordinated catch basin cleaning and street-sweeping that will optimize reduction of stormwater pollutants.

4.3.5.3 Within 18 months of the effective date of this permit, and consistent with the 2006 Outfall Survey, the District shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022. This schedule may be combined with the catch basin maintenance study outlined in 4.3.5.1. The repair schedule shall be fully implemented upon EPA approval.

4.3.5.4 The permittee shall comply with the Anacostia River Trash TMDL implementation provisions in Part 4.10 of this permit and apply the technologies and other activities developed in the Anacostia River Watershed Trash TMDL throughout the entire MS4 Permit Area. The permittee shall continue to report the progress of trash reduction in the Consolidated Annual Report.

4.3.6 Streets, Alleys and Roadways

4.3.6.1 Street sweeping shall be conducted on no less than 641 acres of roadway in the MS4 area annually in accordance with the following schedule:

TABLE 3
Street Sweeping

Area/Street Classification	Frequency
Arterials-heavily developed commercial and central business districts with considerable vehicular and pedestrian traffic	At least nine (9) times per year
Industrial areas	At least six (6) times per year
Residential-residential areas with limited throughway and pedestrian traffic AND neighborhood streets which are used for local purposes only	At least four (4) times per year
Central Business District/Commercial-neighborhood business districts and main streets with moderate vehicular and pedestrian traffic	At least one (1) time every two weeks
Environmental hot spots in the	At least two (2) times per month

Anacostia River Watershed	March through October

4.3.6.2 Standard road repair practices shall include limiting the amount of soil disturbance to the immediate area under repair. Stormwater conveyances which are denuded shall be resodded, reseeded and mulched, or otherwise stabilized for rapid revegetation, and these areas should have effective erosion control until stabilized.

4.3.6.3 The permittee shall continue to evaluate and update the use, application and removal of anti-icers, chemical deicers, salt, sand, and/or sand/deicer mixtures in an effort to minimize the impact of these materials on water quality. The permittee shall investigate and implement techniques available for reducing pollution from deicing salts in snowmelt runoff and runoff from salt storage facilities. The permittee shall evaluate and implement the use of porous/permeable surfaces that require less use of deicing materials and activities. This evaluation shall be made a part of an overall investigation of ways to meet the requirements of the Clean Water Act and reported in each Annual Report.

4.3.6.4 The permittee shall continue to implement and update a program to ensure that excessive quantities of snow and ice control materials do not enter the District's water bodies. The permittee shall report its progress in implementing the program in each Annual Report. Except during a declared Snow Emergency when the permittee determines that the foremost concern of snow removal activities is public health and safety, it shall avoid snow dumping or storage in areas adjacent to water bodies, wetlands, and areas near public or private drinking water wells which would ultimately reenter the MS4.

4.3.7 Infrastructure Maintenance/Pollution Source Control Maintenance

The permittee shall continue to implement an operation and maintenance program that incorporates good housekeeping components at all municipal facilities located in the DC MS4 Permit Area, including but not limited to; municipal waste water treatment facility, potable drinking water facility, municipal fleet operations, maintenance garages, parks and recreation, street and infrastructure maintenance, and grounds maintenance operations, libraries and schools. The permittee shall document the program in the Annual Report, as required at Section 6.2 herein. The permittee shall, at a minimum:

1. Continue to implement maintenance standards at all municipal facilities that will protect the physical, chemical and biological integrity of receiving waters.

2. Continue to implement an inspection schedule in which to perform inspections to determine if maintenance standards are being met. Inspections shall be performed no less than once per calendar year and shall provide guidance in Stormwater Pollution Prevention Plan development and implementation, where needed.

3. Continue to implement procedures for record keeping and tracking inspections and maintenance at all municipal facilities.

4. Continue to implement an inspection and maintenance program for all permittee-owned management practices, including post-construction measures.

5. Continue to ensure proper operation of all treatment management practices and maintain them as necessary for proper operation, including all post-construction measures.

6. Ensure that any residual water following infrastructure maintenance shall be self-contained and disposed of legally in accordance with the Clean Water Act.

4.3.8 Public Industrial Activities Management/Municipal and Hazardous Facilities

For any municipal activity associated with industrial activity, as defined by 40 C.F.R. § 122.26, which discharges stormwater to, from and through the DC MS4, the permittee shall obtain separate coverage under either: (1) the EPA Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) (As modified May 27, 2009); or (2) an individual permit.

4.3.9 Emergency Procedures

The permittee may conduct repairs of essential public service systems and infrastructure in emergency situations. An emergency includes only those situations included as conditions necessary for demonstration of an upset at 40 C.F.R. 122.41(n). For each claimed emergency, the permittee shall submit to the Permitting Authority a statement of the occurrence of the emergency, an explanation of the circumstances, and the measures that were implemented to reduce the threat to water quality, no later than required by applicable Clean Water Act regulations.

4.3.10 Municipal Official Training

The permittee shall continue to implement an on-going training program for those employees specified below, and any other employees whose job functions may impact stormwater program implementation. The training program shall address the importance of protecting water quality, the requirements of this permit, design, performance, operation and maintenance standards, inspection procedures, selecting appropriate management practices, ways to perform their job activities to prevent or minimize impacts to receiving waters, and procedures for tracking, inspecting and reporting, including potential illicit discharges. The permittee shall provide follow-up and refresher training at a minimum of once every twelve months, and shall include any changes in procedures, techniques or requirements.

The training program shall include, but is not limited to, those employees who work in the following areas:

1. Municipal Planning
2. Site plan review

3. Design
4. Construction
5. Transportation planning and engineering
6. Street/sewer and right-of-way construction and maintenance
7. Water and sewer departments
8. Parks and recreation department
9. Municipal water treatment and waste water treatment
10. Fleet maintenance
11. Fire and police departments
12. Building maintenance and janitorial
13. Garage and mechanic crew
14. Contractors and subcontractors who may be contracted to work in the above described
15. areas
16. Personnel responsible for answering questions about the permittee's stormwater program,
17. including persons who may take phone calls about the program
18. Any other department of the permittee that may impact stormwater runoff

4.4 Management of Commercial and Institutional Areas

The District shall establish and implement policies and procedures to reduce the discharge of pollutants in stormwater runoff from all commercial and institutional (including federal) areas covered by this permit.

The permittee shall ensure maintenance of all stormwater management controls in commercial and institutional land areas in accordance with the following provisions:

1. Tracking all controls;
2. Inspecting all controls on a regular basis, according to an inspection schedule;
3. Ensure compliance with the MS4 permit and municipal ordinances at commercial and institutional facilities.

4.4.1 Inventory of Critical Sources and Source Controls

4.4.1.1 The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. Critical sources to be tracked shall include the following:

a. Automotive service facilities, *e.g.*, service, fueling and salvage facilities;
b. Industrial activities, as defined at 40 C.F.R. §§ 122.26(b)(14); and
c. Construction sites exceeding one acre, or sites under one acre that are part of a larger common plan of development.
d. Dry cleaners
e. Any other facility the District has identified as a Critical Source

4.4.1.2 The permittee shall include the following minimum fields of information for each industrial and commercial facility identified as a critical source:

a. Name of facility and name of owner/ operator;
b. Address of facility;
c. Size of facility; and
d. Activities conducted at the facility that could impact stormwater.
e. Practices and/or measures to control pollutants.
f. Inspection and maintenance schedules, dates and findings.

4.4.1.3 The permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available inter and intra-agency informational databases (*e.g.*, business licenses, pretreatment permits, sanitary sewer hook-up permits, and similar information).

4.4.2 Inspection of Critical Sources

The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner.

4.4.3 Compliance Assurance.

At each facility identified as a critical source, the permittee's inspector(s) shall verify that the operator is implementing a control strategy necessary to protect water quality. Where the permittee determines that existing measures are not adequate to protect water quality, the permittee shall require additional site-specific controls sufficient to protect water quality.

4.5 Management of Industrial Facilities and Spill Prevention

4.5.1 The District shall continue to implement a program to monitor and control pollutants in stormwater discharged from Industrial Facilities located within the MS4 Permit Area, as defined herein, pursuant to the requirements in 40 C.F.R. § 122.26(d)(2)(iv)(C). These facilities shall include, but are not limited to:

a. Private Solid Waste Transfer Stations
b. Hazardous Waste Treatment, Disposal, and/or Recovery Plants
c. Industrial Facilities subject to SARA or EPCRA Title III
d. Industrial Facilities with NPDES Permits
e. Industrial facilities with a discharge to the MS4

4.5.2 The District shall continue to maintain and update the industrial facilities database.

4.5.3 The District shall continue to perform or provide on-site assistance/inspections and outreach focused on the development of stormwater pollution prevention plans and NPDES permit compliance.

4.5.4 The District shall continue to refine and implement procedures to govern the investigation of facilities suspected of contributing pollutants to the MS4, including at a minimum: (i) a review, if applicable, of monitoring data collected by the facility pursuant to its NPDES permit; and (ii) wet weather screening as required by Part 5.2.1 herein (including collecting data on discharges from industrial sites). These procedures shall be submitted as part of each Annual Report required by Part 6.2 herein.

4.5.5 The District shall continue to implement the prohibition against illicit discharges, control spills, and prohibit dumping. Continue to implement a program to prevent, contain, and respond to spills that may discharge to the MS4, and report on such implementation submitted in each Annual Report. The spill response program may include a combination of spill response actions by the permittee and/or another public or private entity.

4.5.6 The District shall report progress in developing and carrying out industrial-related programs in each Annual Report required by Section 6 herein. Provide an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act.

4.6 Stormwater Management for Construction Sites

4.6.1 Continue implementation of the Program that reduces the discharge of pollutants from construction sites. In each Annual Report, the permittee shall evaluate and report to determine if the existing practices meet the requirements of 40 C.F.R. § 122.26(d)(2)(iv)(A) and (D).

4.6.2 Continue the review and approval process of the sediment and erosion control plans under this program. Also, the permittee shall ensure that all construction projects impacting one acre or greater, or less than one acre when part of a larger common plan of development or sale equal to or larger than one acre, are not authorized until documentation is provided that they have received EPA NPDES Construction General Permit Coverage.

4.6.3 Continue to implement inspection and enforcement procedures, including but not limited to inspection of permitted construction sites that disturb more than 5,000 square feet of soil as follows:

1. First inspection prior to ground disturbing activities to review planned sediment and erosion control measures;
2. Second inspection to verify proper installation and maintenance of sediment and erosion control measures;
3. Third inspection to review planned installation and maintenance of stormwater BMPs;

4. Fourth inspection to verify proper installation of stormwater management practices following final stabilization of the project site; and
5. Other inspections as necessary to ensure compliance with relevant standards and requirements.

4.6.4 When a violation of local erosion and sediment control ordinances occurs, the permittee shall follow existing enforcement procedures and practices using standardized reports as part of the inspection process to provide accurate record keeping of inspections of construction sites. The permittee shall use a listing of all violations and enforcement actions to assess the effectiveness of the Enforcement Program in each Annual Report.

4.6.5 Continue with educational measures for construction site operators (Section 4.9 of this permit) that consist, at a minimum, of providing guidance manuals and technical publications.

4.6.6 Report progress in developing and carrying out the above construction-related programs in each Annual Report required by Parts 6.2 herein, including: (i) an explanation as to how the implementation of these procedures will meet the requirements of the Clean Water Act; (ii) an explanation as to how the implementation of these procedures, particularly with regard to District "waivers and exemptions", will meet the requirements of the Clean Water Act; and (iii) discussion of progress toward meeting TMDL and the District Watershed Implementation Plan deadlines.

4.7 Illicit Discharges and Improper Disposal.

4.7.1 The District shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following:

a. An updated schedule of procedures and practices to prevent illicit discharges, as defined at 40 C.F.R. § 122.26(b)(2), and, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), to detect and remove illicit discharges as defined herein;

b. An updated inventory (organized by watershed) of all outfalls that discharge through the MS4 including any changes to the identification and mapping of existing permitted outfalls. Such inventory shall include, but not be limited to, the name and address, and a description (such as SIC code) which best reflects the principal products or services provided by each facility which may discharge to the MS4;

c. Continue to implement an illicit connection detection and enforcement program to perform dry weather flow inspections in target areas;

d. Visual inspections of targeted areas;

e. Issuance of fines, tracking and reporting illicit discharges, and reporting progress on stopping targeted illicit discharges, and in appropriate cases, chemical testing immediately after discovery of an illicit discharge;

f. Enforcement procedures for illicit discharges set forth in Part 4 herein;

g. All necessary inspection, surveillance, and monitoring procedures to remedy and prevent illicit discharges. The permittee shall submit an inspection schedule, inspection criteria, documentation regarding protocols and parameters of field screening, and allocation of resources as a part of each Annual Report.

h. The permittee shall continue to implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The permittee shall provide for the training of appropriate personnel in spill prevention and response procedures.

i. The permittee shall report the accomplishments of this program in each Annual Report.

4.7.2 The District shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls.

4.7.3 The District shall continue to implement the prohibition against the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal waste into separate storm sewers. The permittee shall ensure the implementation of programs to collect used motor vehicle fluids (at a minimum oil and anti-freeze) for recycle, reuse, and proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The permittee shall ensure that such programs are readily available within the District, and that they are publicized and promoted on a regular basis, pursuant to Public Education provisions in this permit at Part 4.9 herein.

4.7.4 The District shall continue to work with members of the Metropolitan Police Department to enhance illegal dumping enforcement.

4.7.5 The District shall implement the District's ban on coal tar pavement products, including conducting outreach and enforcement activities.

4.7.6 The District shall implement the Anacostia Clean Up and Protection Act of 2009, to ban the use of disposable non-recyclable plastic carryout bags and restrict the use on disposable carryout bags in certain food establishments.

4.8 Flood Control Projects

4.8.1 The District shall update the impervious surface analysis of floodplains six months after the approval of the revised Flood Insurance Rate Maps by the Federal Emergency Management Agency.

4.8.2 The District shall assess potential impacts on the water quality and the ability of the receiving water to support beneficial uses for all flood management projects. Evaluate the feasibility of retrofitting existing flood control devices to provide additional pollutant and volume removal from stormwater. Report results of such assessment, mapping program, and feasibility studies in the Annual Report (Part 6.2 herein).

4.8.3 The District shall review all development proposed in flood plain areas to ensure that the impacts on the water quality of receiving water bodies have been properly addressed. Information regarding impervious surface area located in the flood plains shall be used (in conjunction with other environmental indicators) as a planning tool. The permittee shall collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development beginning six months after the effective date of this permit. The permittee shall collect similar data for existing development in flood plain areas, in accordance with the mapping program and other activities designed to improve water quality. Critical unmapped areas shall be prioritized by the permittee with an emphasis on developed and developing acreage. Reports of this work shall be summarized in the Annual Report.

4.9 Public Education and Public Participation

The District shall continue to implement a public education program including but not limited to an education program aimed at residents, businesses, industries, elected officials, policy makers, planning staff and other employees of the permittee. The purpose of education is to reduce or eliminate behaviors and practices that cause or contribute to adverse stormwater impacts. Education initiatives may be developed locally or regionally.

4.9.1 Education and Outreach.

4.9.1.1 The District shall continue to implement its education and outreach program for the area served by the MS4 that was established during the previous permit cycle. The outreach program shall be designed to achieve measurable improvements in the target audience's understanding of stormwater pollution and steps they can take to reduce their impacts.

4.9.1.2 The permittee shall assess current education and outreach efforts and identify areas where additional outreach and education are needed. Audiences and subject areas to be considered include:

a. General public

1) General impacts of stormwater flows into surface waters
2) Impacts from impervious surfaces
3) Source control practices and environmental stewardship actions and opportunities in the areas of pet waste, vehicle maintenance, landscaping, and rain water reuse.

4) A household hazardous waste educational and outreach program to control illicit discharges to the MS4 as required herein
5) Information and education on proper management and disposal of used oil, other automotive fluids, and household chemicals
6) Businesses, including home-based and mobile businesses
7) Management practices for use and storage of automotive chemicals, hazardous cleaning supplies, carwash soaps and other hazardous materials
8) Impacts of illicit discharges and how to report them including information for industries about stormwater permitting and pollution prevention plans and the requirement that they develop structural and non-structural control systems

b. Homeowners, landscapers and property managers

1) Use of low or no phosphorus fertilizers, alternatives to fertilizers, alternative landscaping requiring no fertilizers
2) Landscape designs to reduce runoff and pollutant loadings
3) Car washing alternatives with the objective of eliminating phosphorus detergent discharges
4) Yard care techniques that protect water quality
5) Management practices for use and storage of pesticides and fertilizers
6) Management practices for carpet cleaning and auto repair and maintenance
7) Runoff Reduction techniques, including site design, on-site retention, pervious paving, retention of forests and mature trees
8) Stormwater pond maintenance

c. Engineers, contractors, developers, review staff and land use planners

1) Technical standards for construction site sediment and erosion control
2) Runoff Reduction techniques, including site design, on-site reduction, pervious pavement, alternative parking lot design, retention of forests and mature trees
3) Stormwater treatment and flow control controls
4) Impacts of increased stormwater flows into receiving water bodies

4.9.2 Measurement of Impacts.

The permittee shall continue to measure the understanding and adoption of selected targeted behaviors among the targeted audiences. The resulting measurements shall be used to direct education and outreach resources most effectively, as well as to evaluate changes in adoption of the targeted behaviors.

4.9.3 Recordkeeping.

The permittee shall track and maintain records of public education and outreach activities.

4.9.4 Public Involvement and Participation.

The permittee shall continue to include ongoing opportunities for public involvement through advisory councils, watershed associations and/or committees, participation in developing updates to the stormwater fee system, stewardship programs, environmental activities or other similar activities. The permittee shall facilitate opportunities for direct action, educational, and volunteer programs such as riparian planting, volunteer monitoring programs, storm drain marking or stream clean up programs.

4.9.4.1 The permittee shall continue to create opportunities for the public to participate in the decision making processes involving the implementation and update of the permittee's SWMP. The permittee shall continue to implement its process for consideration of public comments on their SWMP.

4.9.4.2 The permittee shall continue to establish a method of routine communication to groups such as watershed associations and environmental organizations that are located in the same watershed(s) as the permittee, or organizations that conduct environmental stewardship projects located in the same watershed(s) or in close proximity to the permittee. This is to make these groups aware of opportunities for their direct involvement and assistance in stormwater activities that are in their watershed.

4.9.4.3 The permittee shall make all draft and approved MS4 documents required under this permit available to the public for comment. The current draft and approved SWMP and the MS4 annual reports deliverable documents required under this permit shall be posted on the permittee's website.

4.9.4.4 The permittee shall continue to develop public educational and participation materials in cooperation and coordination with other agencies and organizations in the District with similar responsibilities and objectives. Progress reports on public education shall be included in the Annual Report. An explanation shall be provided as to how this effort will reduce pollution loadings to meet the requirements of this permit.

4.9.4.5 The permittee shall periodically, and at least annually, update its website.

4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation

4.10.1 Anacostia River Watershed Trash TMDL Implementation

The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term.

Reductions must be made through a combination of the following approaches:

1. Direct removal from waterbodies, e.g., stream clean-ups, skimmers
2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks

3. Direct removal prior to entry to the MS4, e.g., street sweeping
4. Prevention through additional disposal alternatives, e.g., public trash/recycling collection
5. Prevention through waste reduction practices, regulations and/or incentives, e.g., bag fees

At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL.

Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach.

The requirements of this Section, and related elements as appropriate, shall be included in the Consolidated TMDL Implementation Plan (Section 4.10.3).

4.10.2 Hickey Run TMDL Implementation

The permittee shall implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run as described in the updated Plan to satisfy the requirements of the oil and grease wasteload allocations for Hickey Run. If monitoring or other assessment determine it to be necessary, the permittee shall install or implement appropriate controls to address oil & grease in Hickey Run no later than the end of this permit term. As appropriate, any requirement of this Section not completed prior to finalization of the Consolidated TMDL Implementation Plan (Section 4.10.3) shall be included in that Plan.

4.10.3 Consolidated TMDL Implementation Plan

For all TMDL wasteload allocations assigned to District MS4 discharges, the District shall develop, public notice and submit to EPA for review and approval a consolidated TMDL Implementation Plan within 2 years of the effective date of this permit. This Plan shall include, at a minimum, the following TMDLs and any subsequent updates:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)
3. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
4. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
5. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
6. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

7. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
8. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
9. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
10. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
11. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
12. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
13. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
14. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
15. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
16. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

This Plan shall place particular emphasis on the pollutants in Table 4, but shall also evaluate other pollutants of concern for which relevant WLAs exist. The District shall fully implement the Plan upon EPA approval. This Plan shall preempt any existing TMDL implementation plans for the relevant WLAs. For any new or revised TMDL approved during the permit term with wasteload allocations assigned to District MS4 discharges, the District shall update this Plan within six months and include a description of revisions in the next regularly scheduled annual report. The Plan shall include:

1. A specified schedule for compliance with each TMDL that includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
2. Interim numeric milestones for TMDLs where final attainment of applicable waste load allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
3. Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
4. The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
5. Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

4.10.4 Adjustments to TMDL Implementation Strategies

If evaluation data, as outlined in the monitoring strategy being developed per Part 5.1, indicate insufficient progress towards attaining any WLA covered in 4.10.1, 4.10.2 or 4.10.3, the

permittee shall adjust its management programs within 6 months to address the deficiencies, and document the modifications in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the necessary reductions. Annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant, outlined in Part 4.10.

4.11 Additional Pollutant Sources

For any additional pollutant sources not addressed in sections 4.1 through 4.9, the permittee shall continue to compile pertinent information on known or potential pollution sources, including significant changes in:

1. land use activities,
2. population estimates,
3. runoff characteristics,
4. major structural controls,
5. landfills,
6. publicly owned lands, and
7. industries impacting the MS4.

For purposes of this section, "significant changes" are changes that have the potential to revise, enhance, modify or otherwise affect the physical, legal, institutional, or administrative characteristics of the above-listed potential pollution sources. This information shall be submitted in each of the Annual Reports submitted to EPA pursuant to the procedures in Part 6.2 herein. For the Stormwater Model, analysis of data for these pollution sources shall be reported according to Part 7 herein.

The permittee shall implement controls to minimize and prevent discharges of pollutants from additional pollutant sources, including but not limited to Bacteria (*E. coli*), Total Nitrogen, Total Phosphorus, Total Suspended Solids, Cadmium, Copper, Lead, Zinc, and Trash, to receiving waters. Controls shall be designed to prevent and restrict priority pollutants from coming into contact with stormwater, *e.g.*, restricting the use of lawn fertilizers rather than end-of-pipe treatment. These strategies shall include program priorities and a schedule of activities to address those priorities and an outline of which agencies will be responsible for implementing those strategies. The strategies used to reduce or eliminate these pollutants shall be documented in updates to the Stormwater Management Program Plan.

5. MONITORING AND ASSESSMENT OF CONTROLS

5.1 Revised monitoring program

5.1.1 Design of the Revised Monitoring Program

Within two years of the effective date of this permit the District shall develop, public notice and submit to EPA for review and approval a revised monitoring program. The District shall fully implement the program upon EPA approval. The revised monitoring program shall meet the following objectives:

1. Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of sampling stations must be adequate to ensure data are statistically significant and interpretable.

2. Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).

3. Include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

Table 4
Monitoring Parameters

Parameter
E. coli
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

4. All chemical analyses shall be performed in accordance with analytical methods approved under 40 C.F.R. Part 136. When there is not an approved analytical method, the applicant may use any suitable method as described in Section 5.7 herein, but must provide a description of the method.

5.1.2 Utilization of the Revised Monitoring Program

The permittee must use the information to evaluate the quality of the stormwater program and the health of the receiving waters at a minimum to include:

1. The permittee shall estimate annual cumulative pollutant loadings for pollutants listed in Table 4. Pollutant loadings and, as appropriate, event mean concentrations, will be reported in DMRs and annual reports on TMDL implementation for pollutants listed in Table 4 in discharges from the monitoring stations in Table 5.

2. The permittee shall perform the following activities at least once during the permit term, but no later than the fourth year of this permit:

    a. Identify and prioritize additional efforts needed to address water quality exceedances, and receiving stream impairments and threats;

    b. Identify water quality improvements or degradation

Upon approval of the Revised Monitoring Program by EPA Region III, or 2 years from the effective date of this permit, whichever comes first, the permittee shall begin implementation of the Revised Monitoring Program.

5.2 Interim Monitoring

Until such time as EPA has approved the Revised Monitoring Program, the permittee shall implement the following monitoring program:

5.2.1 Wet Weather Discharge Monitoring

The permittee shall monitor for the parameters identified in Table 4 herein, at the locations listed in Table 5 herein. Monitoring frequency for chemical/physical parameters shall be taken by at least three times per year at a minimum. This does not include a geomorphologic assessment and/or physical habitat assessment. The permittee shall conduct sampling as provided in 40 C.F.R. § 122.21(g)(7).

The permittee shall monitor and provide an annual Discharge Monitoring Report for the period of interim monitoring.

TABLE 5
Monitoring Stations

A. Anacostia River Sub Watershed Monitoring Sites
1. Gallatin Street & 14th Street N.E. across from the intersection of 14th St. and Gallatin St. in

an outfall (MS-2)
2. Anacostia High School/Anacostia Recreation Center – Corner of 17th St and Minnesota Ave SE
B. Rock Creek Subwatershed Monitoring Sites
1. Walter Reed -- Fort Stevens Drive -- 16th Street and Fort Stevens Road, N.W. at an outfall (MS-6)
2. Soapstone Creek -- Connecticut Avenue and Ablemarle Street N.W. at an outfall (MS-5)
C. Potomac River Subwatershed Monitoring Sites
1. Battery Kemble Creek-49th and Hawthorne Streets, N.W. at an outfall (MS-4)
2. Oxon Run-Mississippi Avenue and 15th Street, S.E. into Oxon Run via an outfall (MS-1)

The District may revise this list of sites in accordance with its revised monitoring program in Section 5.1 herein. Otherwise, changes to the above MS4 monitoring stations and/or sites for any reason shall be considered a major modification to the permit subject to the reopener clause.

During the interim monitoring period for the pollutants listed in Table 4, demonstration of compliance will be calculated using the procedures identified in the SWMP, the approved Anacostia River TMDL Implementation Plan, and/or other appropriate modeling tools and data on management practices efficiencies. The annual report will provide all monitoring data, and a brief synthesis of whether the data indicate that relevant wasteload allocations and other relevant targets are being achieved.

5.2.2 Storm Event Data

In addition to the parameters listed above, the permittee shall continue to maintain records of the date and duration (in hours) of the storm events sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and a calculated flow estimate of the total volume (in gallons) and nature of the discharge sampled.

5.2.3 Sample Type, Collection, and Analysis

The following requirements apply only to samples collected for Part 5.2.1, Representative Monitoring.

1. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one sample shall be taken for pollutants listed in Table 4 including temperature, DO, pH and specific conductivity. For all parameters, data shall be reported for the entire event of the discharge pursuant to 40 C.F.R. § 122.26(d)(2)(iii).

2. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge, with each aliquot being separated by a minimum period of fifteen minutes.

3. Analysis and collection of samples shall be done in accordance with the most recent EPA approved laboratory methods and procedures specified at 40 C.F.R. Part 136 and its subsequent amendments.

5.2.4 Sampling Waiver

When a discharger is unable to collect samples due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event.

Adverse climatic conditions which may prohibit the collection of samples includes weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.).

5.3 Dry Weather Monitoring

5.3.1 Dry Weather Screening Program

The permittee shall continue with ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4 pursuant to the District SWMP. The permittee shall perform the following: (1) continue to screen known problem sewersheds within the District based on past screening activities; (2) continue to inventory all MS4 outfalls in the District and inspect all outfalls by the end of the permit term; and (3) ensure that the dry weather screening program has addressed all watersheds within the permit term. The screening shall be sufficient to estimate the frequency and volume of dry weather discharges and their environmental impact.

5.3.2 Screening Procedures

Screening may be developed and/or modified based on experience gained during actual field screening activities. The permittee shall establish a protocol which requires screening to ensure that such procedures are occurring, but such protocol need not conform to the procedures published at 40 C.F.R. § 122.26(d)(1)(iv)(D). The permittee shall describe the protocol actually used in each Annual Report with a justification for its use. The procedures described in the SWMP shall be used as guidance.

5.3.3 Follow-up on Dry Weather Screening Results

The permittee shall continue to implement its enforcement program for locating and ensuring elimination of all suspected sources of illicit connections and improper disposal identified during dry weather screening activities. The permittee shall report the results of such implementation in each Annual Report.

5.4. Area and/or Source Identification Program

The permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein.

5.5 Flow Measurements

The permittee shall continue to select and use appropriate flow measurement devices and methods consistent with accepted scientific practices to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements is consistent with the accepted capability of that type of device.

5.6 Monitoring and Analysis Procedures

5.6.1 Monitoring must be conducted according to laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments, unless other test procedures have been specified in the permit.

5.6.2 The permittee is authorized to use a more current or sensitive (i.e., lower) detection method than the one identified in 40 C.F.R. Part 136 exists for a particular parameter, including but not limited to PCBs (Method 1668B) and mercury (Method 1631E). If used, the permittee shall report using the more current and/or more sensitive method for compliance reporting and monitoring purposes.

5.6.3 EPA reserves the right to modify the permit in order to require a more sensitive method for measuring compliance with any pollutant contamination levels, consistent with 40 CFR, Part 136, should it become necessary.

5.7 Reporting of Monitoring Results

The permittee shall continue to report monitoring results annually in a Discharge Monitoring Report. If NetDMR (http://www.epa.gov/netdmr/) is unavailable to any of the following then the original and one copy of the Report are to be submitted at the following addresses:

NPDES Permits Branch

U.S. EPA Region III

(3WP41)

Water Protection Division
1650 Arch Street
Philadelphia, PA 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive

Gloucester, Massachusetts

01930-2276

Monitoring results obtained during the previous year shall be summarized and reported in the Annual Report.

5.8 Additional Monitoring by the Permittee

If the permittee monitors (for the purposes of this permit) any pollutant more frequently than required by this permit, using laboratory and test procedures approved under 40 C.F.R. Part 136 and subsequent amendments or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Discharge Monitoring Report. Such frequency shall also be indicated.

5.9 Retention of Monitoring Information

The permittee shall continue to retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation for a period of at least five(5) years from the date of the sample, measurement or report. This period may be extended by request of EPA at any time.

5.10 Record Content

Records of monitoring information shall include:

1. The date, exact location, time and methods of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and

6. The results of such analyses.

6. REPORTING REQUIREMENTS

The permittee shall comply with the reporting requirements identified in this section, including but not limited to the deliverables identified in Table 6 below.

TABLE 6
Reporting Requirements

Submittal	Deadline
Discharge Monitoring Report	Each year on the anniversary of the effective date of the permit (AEDOP)
Annual Report	Each year on the AEDOP.
MS4 Permit Application	Six months prior to the permit expiration date.

6.1 Discharge Monitoring Reports

The permittee shall provide discharge monitoring reports per Part 5.7 of this permit on the quality of stormwater discharges from the MS4 for all analytical chemical monitoring stipulated in Part 5 of this permit.

6.2 Annual Reporting

The permittee shall submit an Annual Report to EPA on or by the effective yearly date of the permit for the duration of the permitting cycle. At the same time the Annual Report it submitted to EPA it shall also be posted on the District's website at an easily accessible location. If the annual report is subsequently modified per EPA approval (part 6.2.3 of this permit) the updated report shall be posted on the District's website.

6.2.1 Annual Report.

The Annual Report shall follow the format of the permit as written, address each permit requirement, and also include the following elements:

a. A review of the status of program implementation and compliance (or non-compliance) with all provisions and schedules of compliance contained in this permit, including documentation as to compliance with performance standards and other provisions and deliverables contained in Section 4 herein;
b. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings, including TMDL WLAs and TMDL implementation activities;

c. An assessment of the effectiveness of controls established by the SWMP;

d. An assessment of the projected cost of SWMP implementation for the upcoming year (or longer) and a description of the permittee's budget for existing stormwater programs, including: (i) an overview of the permittee's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs; and (iv) a demonstration of adequate fiscal capacity to meet the requirements of this permit, subject to the (a) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (b) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (c) D.C. Official Code § 47-105 (2001), and (d) D.C. Official Code § 1-204.46 (2006 Supp.), as the foregoing statutes may be amended from time to time;

e. A summary describing the number and nature of enforcement actions, inspections, and public education programs and installation of control systems;

f. Identification of water quality improvements or degradation through application of a measurable performance standard as stated throughout this permit;

g. Results of storm and water quality modeling and its use in planning installation of control systems and maintenance and other activities;

h. An assessment of any SWMP modifications needed to meet the requirements of this permit;

i. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 C.F.R. § 122.26(d)(2)(iv) and (v);

j. Methodology to assess the effects of the Stormwater Management Program (SWMP);

k. Annual expenditures and budget for the year following each annual report;

l. A summary of commitments for the next year and evaluation of the commitments from the previous year;

m. A summary of the monitoring data for stormwater and ambient sampling that is collected in the previous year and the plan, including identification of monitoring locations, to collect additional data for the next year;

n. The amount of impervious cover within the District, and within the three major watersheds in the District (Anacostia, Potomac and Rock Creek);

o. The percentage of effective impervious cover reduced annually, including but not limited to the number and square footage of green roofs installed in the District, including the square footage of drainage managed by practices that meet the performance standard in 4.1.1; and

p. An analysis of the work to be performed in the next successive year, including performance measures for those tasks. In the following year, progress with those performance measures shall be part of the Annual Report. The basis for each of the performance standards, which will be used as tools for evaluating environmental results and determining the success of each MS4 activity, shall be described incorporating an integrated program approach that considers all programs and projects which have a direct as well as an indirect affect on stormwater management quantity and quality within the District. The report shall also provide an update of the fiscal analysis for each year of the permit as required by 40 C.F.R. § 122.26(d)(2)(vi).

6.2.2 Annual Report Meeting

Within 12 months of the effective date of this permit the District shall convene an annual report meeting with EPA to present annual progress and plans for the following year. In conjunction with this meeting the annual written report may consist of presentation materials summarizing all required elements of the annual report rather than a lengthy written report, as long as all required elements are included. Following this first annual reporting meeting EPA and the District shall determine if the meeting and associated presentation materials constitute an effective reporting mechanism. With the agreement of both EPA and the District the annual reporting meeting and the use of summarized presentation materials in lieu of a lengthy written report may be extended for the remainder of the permit term.

6.2.3 Annual Report Revisions

Each Annual Report may be revised with written approval by EPA. The revised Report will become effective after its approval.

6.2.4 Signature and Certification

The permittee shall sign and certify the Annual Report in accordance with 40 C.F.R §122.22(b), and include a statement or resolution that the permittee's governing body or agency (or delegated representative) has reviewed or been appraised of the content of such submissions. The permittee shall provide a description of the procedure used to meet the above requirement.

6.2.5 EPA Approval

In reviewing any submittal identified in Table 1 or 6, EPA may approve or disapprove each submittal. If EPA disapproves any submittal, EPA shall provide comments to the permittee. The permittee shall address such comments in writing within thirty (30) days of receipt of the disapproval from EPA. If EPA determines that the permittee has not adequately addressed the disapproval/comments, EPA may revise that submittal or portions of that submittal. Such revision by EPA is effective thirty (30) days from receipt by the permittee. Once approved by EPA, or in the event of EPA disapproval, as revised by EPA, each submission shall be an enforceable element of this permit.

6.3 MS4 Permit Application

The permittee develop a permit Application based on the findings presented in each of the Annual SWMP Reports submitted during the permitting cycle to be submitted six months prior to the expiration date of the permit. The permit application shall define the next iterative set of objectives for the program and provide an analysis to demonstrate that these objectives will be achieved in the subsequent permit term.

7. STORMWATER MODEL

The permittee shall continue to update and report all progress made in developing a Stormwater Model and Geographical Information System (GIS) to EPA on an annual basis as an attachment to each Annual Report required herein.

On an annual basis, the permittee shall report on pollutant load reductions throughout the area covered by this permit using the statistical model developed by DDOE or other appropriate model. In the annual update, the permittee shall include, at a minimum, other applicable components which are not only limited to those activities identified in Section 6 herein, but which are necessary to demonstrate the effectiveness of the permittee's Stormwater Management Program toward implementing a sustainable strategy for reducing stormwater pollution runoff to the impaired waters of the District of Columbia.

Assess performance of stormwater on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine the volume of stormwater removed from the MS4 in a typical year of rainfall as a result of implementing stormwater controls. This provision does not require all practices to be individually monitored, only that a reasonable evaluation strategy must provide estimates of overall volume reductions by sewershed.

8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

8.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and may result in an enforcement action; permit termination, revocation and reissuance, or modification; and denial of a permit renewal application.

8.2 Inspection and Entry

The permittee shall allow EPA, or an authorized representative, and/or the District's contractor(s)/subcontractor(s), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises at reasonable times where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be maintained under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), processes, or operations regulated or required under this permit; and

4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

8.3 Civil and Criminal Penalties for Violations of Permit Conditions

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

The Clean Water Act provides that any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act, or any permit condition or limitation implementing such section, or any requirement imposed in an approved pretreatment program and any person who violates any Order issued by EPA under Section 301(a) of the Act, shall be subject to a civil penalty not to exceed $25,000 per day for each violation, Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, EPA has raised the statutory maximum penalty for such violations to $37,500 per day for each such violation. 74 Fed. Reg. 626 (Jan. 7, 2009). The Clean Water Act also provides for an action for appropriate relief including a permanent or temporary injunction.

Any person who negligently violates Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, any permit condition or limitation implementation any such section, shall be punished by a criminal fine of not less than $5,000 nor more than $50,000 per day of such violation, or by imprisonment for not more than 3 years, or by both. Any person who knowingly violates any permit condition or limitation implementing Section 301, 302, 305, 307, 308, 318, or 405 of the Clean Water Act, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000, or by imprisonment of not more than 15 years, or by both.

8.4 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

In the event that the permittee or permitting authority determines that discharges are causing or contributing to a violation of applicable WQS, the permittee shall take corrective action to eliminate the WQS exceedance or correct the issues and/or problems by requiring the party or parties responsible for the alleged violation(s) comply with Part I.C.1 (Limitations to Coverage) of this permit. The methods used to correct the WQS exceedances shall be documented in subsequent annual reports and in revisions to the Stormwater Management Program Plan.

8.5 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

1. Violation of any terms or conditions of this permit;

2. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

3. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge;

4. Information newly acquired by the Agency, including but not limited to the results of the studies, planning, or monitoring described and/or required by this permit;

5. Material and substantial facility modifications, additions, and/or expansions;

6. Any anticipated change in the facility discharge, including any new significant industrial discharge or changes in the quantity or quality of existing industrial discharges that will result in new or increased discharges of pollutants; or

7. A determination that the permitted activity endangers human health or the environment and that it can only be regulated to acceptable levels by permit modification or termination.

The effluent limitations expressed in this permit are based on compliance with the District of Columbia's water quality standards in accordance with the Clean Water Act. In the event of a revision of the District of Columbia's water quality standards, this document may be modified by EPA to reflect this revision.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition. When a permit is modified, only conditions subject to modification are reopened.

8.6 Retention of Records

The permittee shall continue to retain records of all documents pertinent to this permit not otherwise required herein, including but not limited copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the expiration date of this permit. This period may be extended by request of EPA at any time.

8.7 Signatory Requirements

All Discharge Monitoring Reports, plans, annual reports, certifications or information either submitted to EPA or that this permit requires be maintained by the permittee shall be signed by either a principal executive officer or ranking elected official, or a duly authorized representative of that person. A person is a duly authorized representative only if: (i) the

authorization is made in writing by a person described above and submitted to EPA; and (ii) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for an agency. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice satisfying the requirements of this paragraph must be submitted to EPA prior or together with any reports, information, or applications to be signed by an authorized representative.

8.8 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act, 33 U.S.C. § 1321.

8.9 District Laws, Regulations and Ordinances

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable District law, regulation or ordinance identified in the SWMP. In the case of "exemptions and waivers" under District law, regulation or ordinance, Federal law and regulation shall be controlling.

8.10 Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

8.11 Severability

The provisions of this permit are severable, and if any provisions of this permit, or the application of any provision of this permit to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

8.12 Transfer of Permit

In the event of any change in ownership or control of facilities from which the authorized discharge emanates, the permit may be transferred to another person if:

1. The current permittee notifies the EPA, in writing of the proposed transfer at least 30 days in advance of the proposed transfer date;

2. The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

3. The EPA does not notify the current permittee and the new permittee of intent to modify, revoke and reissue, or terminate the permit and require that a new application be submitted.

8.13 Construction Authorization

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8.14 Historic Preservation

During the design stage of any project by the Government of the District of Columbia within the scope of this permit that may include ground disturbance, new and existing or retrofit construction, or demolition of a structure, the Government of the District of Columbia shall notify the Historic Preservation liaison and provide the liaison planning documents for the proposed undertaking. The documents shall include project location; scope of work or conditions; photograph of the area/areas to be impacted and the methods and techniques for accomplishing the undertaking. Depending on the complexity of the undertaking, sketches, plans and specifications shall also be submitted for review. The documentation will enable the liaison to assess the applicability of compliance procedures associated with Section 106 of the National Historic Preservation Act. Among the steps in the process are included:

1. The determination of the presence or absence of significant historic properties (architectural, historic or prehistoric). This can include the evaluation of standing structures and the determination of the need for an archaeological survey of the project area.

2. The evaluation of these properties in terms of their eligibility for nomination to the National Register of Historic Places.

3. The determination of the effect that the proposed undertaking will have on these properties.

4. The development of mitigating measures in conjunction with any anticipated effects.

All such evaluations and determinations will be presented to the Government of the District of Columbia for its concurrence.

If an alternate Historic Preservation procedure is approved by EPA in writing during the term of this permit, the alternate procedure will become effective after its approval.

8.15 Endangered Species

The U.S. Fish and Wildlife Service (FWS) has indicated that Hay's Spring Amphipod, a Federally listed endangered species, occurs at several locations in the District of Columbia. The National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA Fisheries) has indicated that the endangered shortnose sturgeon occurs in the Potomac River drainage and may occur within the District of Columbia. The FWS and NOAA Fisheries indicate that at the present time there is no evidence that the ongoing stormwater discharges covered by this permit are adversely affecting these Federally-listed species. Stormwater discharges, construction, or any other activity that adversely affects a Federally-listed endangered or threatened species are not authorized under the terms and conditions of this permit.

The monitoring required by this permit will allow further evaluation of potential effects on these threatened and endangered species once monitoring data has been collected and analyzed. EPA requires that the permittee submit to NOAA Fisheries, at the same time it submits to EPA, the Annual Outfall Discharge Monitoring Report of the monitoring data which will be used by EPA and NOAA Fisheries to further assess effects on endangered or threatened species. If this data indicates that it is appropriate, requirements of this NPDES permit may be modified to prevent adverse impacts on habitats of endangered and threatened species.

The above-referenced Report of monitoring data is required under this permit to be sent on an annual basis to:

The United States Environmental Protection Agency
Region III (3WP41)
Water Protection Division
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

National Marine Fisheries Service/Northeast Region
Protected Resource Division
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

8.16 Toxic Pollutants

If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under section 307(a) of the Act, 33 U.S.C. § 1317(a), for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, the permittee shall comply with such standard or prohibition even if the permit has not yet been modified to comply with the requirement.

8.17 Bypass

8.17.1 Bypass not exceeding limitations. In accordance with 40 C.F.R. § 122.41(m), the permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation.

8.17.2 Notice

1. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice at least ten days before the date of the bypass. See 40 C.F.R. § 122.41(m)(3)(i).

2. Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required by 40 C.F.R. § 122.41(l)6) (24-hour notice). See 40 C.F.R. § 122.41(m)(3)(ii).

8.17.3 Prohibition of bypass. See 40 C.F.R. § 122.41(m)(4).

1. Bypass is prohibited, and EPA may take enforcement action against the permittee for bypass, unless:

    a. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage as defined herein;

    b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

    c. The permittee submitted notices as required herein.

2. EPA may approve an anticipated bypass, after considering its adverse effects, if EPA determines that it will meet the three conditions listed above.

8.18 Upset

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of 40 C.F.R. § 122.41(n) are met.

8.19 Reopener Clause for Permits

The permit may be modified or revoked and reissued, including but not limited to, any of the following reasons:

1. To incorporate any applicable effluent standard or limitation issued or approved under Sections 301, 304, or 307 of the Clean Water Act, and any other applicable provision, such as provided for in the Chesapeake Bay Agreements based on water quality considerations, and if the effluent standard or limitation so issued or approved:

   a. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or

   b. Controls any pollutant not limited in the permit. The permit, as modified or reissued under this paragraph, shall also contain any other requirements of the Act then applicable; or

2. To incorporate additional controls that are necessary to ensure that the permit effluent limits are consistent with any applicable TMDL WLA allocated to the discharge of pollutants from the MS4; or

3. As specified in 40 C.F.R. §§ 122.44(c), 122.62, 122.63, 122.64, and 124.5.

8.20 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, it must apply for and obtain a new permit. The application shall be submitted at least 180 days before the expiration date of this permit. EPA may grant permission to submit an application less than 180 days in advance but no longer than the permit expiration date. In the event that a timely and complete reapplication has been submitted and EPA is unable through no fault of he permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

9. PERMIT DEFINITIONS

Terms that are not defined herein shall have the meaning accorded them under section 502 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or its implementing regulations, 40 C.F.R. Part 122.

"Annual Report" refers to the consolidated Annual Report that the permittee is required to submit annually.

"Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. See 40 C.F.R. § 122.41(m)(1)(i).

"CWA" means Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended Pub. L. 95-217, Pub. L. 95-576, Pub. L. (6-483 and Pub. L. 97-117, 33 U.S.C. §§ 1251 *et seq.*

"Development" is the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet, including new development projects and redevelopment projects. For purposes of Parts 4.1.1 through 4.1.4 of the permit the requirements apply to discharges from sites for which design or construction commenced after 18 months from the effective date of this permit or as required by District of Columbia law, whichever is sooner. The District may exempt development projects receiving site plan approval prior to this date from these requirements.

"Director" means the Regional Administrator of USEPA Region 3 or an authorized representative.

"Discharge" for the purpose of this permit, unless indicated otherwise, refers to discharges from the Municipal Separate Storm Sewer System (MS4).

"Discharge Monitoring Report", "DMR" or "Outfall Discharge Monitoring Report" includes the monitoring and assessment of controls identified in Section 5 herein.

"EPA" means USEPA Region 3.

"Green Roof" is a low-maintenance roof system that stores rainwater where the water is taken up by plants and/or transpired into the air.

"Green Technology Practices" means stormwater management practices that are used to mimic pre-development site hydrology by using site design techniques that retain stormwater on-site through infiltration, evapotranspiration, harvest and use.

"Guidance" means assistance in achieving a particular outcome or objective.

"Illicit connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of stormwater except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities, pursuant to 40 C.F.R. § 122.26(b)(2).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment"): A water is impaired for purposes of this permit if it has been identified by the District or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State water quality standards (these waters are called "water quality limited segments" under 40 C.F.R. 30.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Landfill" means an area of land or an excavation in which wastes are placed for permanent disposal, and which is not a land application unit (i.e., an area where wastes are applied onto or incorporated into the soil surface [excluding manure spreading operations] for treatment or disposal), surface impoundment, injection well, or waste pile.

"Large or Medium municipal separate storm sewer system" means all municipal separate storm sewers that are either: (1) located in an incorporated place (city) with a population of 100,000 or more as determined by the latest Decennial Census by the Bureau of Census (these cities are listed in Appendices F and G of 40 C.F.R. Part 122); or (2) located in the counties with unincorporated urbanized populations of 100,000 or more, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties (these counties are listed in Appendices H and I of 40 C.F.R. Part 122); or (3) owned or operated by a municipality other than those described in paragraph (i) or (ii) and that are designated by the Director as part of the large or medium municipal separate storm sewer system.

"MS4" refers to either a Large or Medium Municipal Separate Storm Sewer System.

"Municipal Separate Storm Sewer" 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): (1) 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, stormwater, or other wastes; (2) Designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); (3) not a combined sewer; and (4) not part of a Publicly-Owned Treatment Works as defined at 40 C.F.R. § 122.2.

"Offset" means a unit of measurement, either used as monetary or non-monetary compensation, as a substitute or replacement for mitigation of a stormwater control practice that has been determined to be impracticable to implement.

"Performance measure" means for purposes of this permit, a minimum set of criteria for evaluating progress toward meeting a standard of performance.

"Performance standard" means for purposes of this permit, a cumulative measure or provision for attainment of an outcome or objective.

"Permittee" refers to the Government of the District of Columbia and all subordinate District and independent agencies, such as the District of Columbia Water and Sewer Authority, directly accountable and responsible to the City Council and Mayor as authorized under the Stormwater Permit Compliance Amendment Act of 2000 and any subsequent amendments for administrating, coordinating, implementing, and managing stormwater for MS4 activities within the boundaries of the District of Columbia.

"Point Source" means 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, landfill leachate collection system, vessel or other

floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.

"Pollutant of concern" means a pollutant in an MS4 discharge that may cause or contribute to the violation of a water quality criterion for that pollutant downstream from the discharge.

"Pre-Development Condition" means the combination of runoff, infiltration and evapotranspiration rates, volumes, durations and temperatures that typically existed on the site with natural soils and vegetation before human-induced land disturbance occurred. In the context of requirements in this permit the environmental objective is a stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed.

"Retention" means the use of soils, vegetation, water harvesting and other mechanisms and practices to retain a target volume of stormwater on a given site through the functions of: pore space and surface ponding storage; infiltration; reuse, and/or evapotranspiration.

"Retrofit" means improvement in a previously developed area that results in reduced stormwater discharge volumes and pollutant loads and/or improvement in water quality over current conditions.

"Stormwater" means the flow of surface water which results from, and which occurs immediately following, a rainfall event, snow melt runoff, and surface runoff and drainage.

"Stormwater management" means (1) for quantitative control, a system of vegetative or structural measures, or both, which reduces the increased volume and rate of surface runoff caused by man-made changes to the land; and (2) for qualitative control, a system of vegetative, structural, and other measures which reduce or eliminate pollutants which might otherwise be carried by surface runoff.

"SWMP" is an acronym for Stormwater Management Program. For purposes of this permit, the term includes all stormwater activities described in the District's SWMP Plan updated February 19, 2009, or any subsequent update, and all other strategies, plans, documents, reports, studies, agreements and related correspondences developed and used pursuant to the requirements of this permit.

"Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production. See 40 C.F.R. § 122.41(m)(1)(ii).

"Total Maximum Daily Load (TMDL) Units" means for purposes of this permit, the sum of individual waste load allocations (WLAs) and natural background. Unless specifically permitted otherwise in an EPA-approved TMDL report covered under the permit, TMDLs are expressed in

terms of mass per time, toxicity or other appropriate measure such as pollutant pounds of a total average annual load.

"TMDL Implementation Plan" means for purposes of this permit, a plan and subsequent revisions/updates to that plan that are designed to demonstrate how to achieve compliance with applicable waste load allocations as set forth in the permit requirements described in Section 8.1.4.

"Stormwater Management Program (SWMP)" is a modified and improved SWMP based on the existing SWMP and on information in each of the Annual Reports/Discharge Monitoring Reports. The purpose of the SWMP is to describe the list of activities that need to be done to meet the requirements of the Clean Water Act, an explanation as to why these activities will meet the Clean Water Act requirements, and a schedule for those activities.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. See 40 C.F.R. § 122.41(n)(1).

"Waste pile" means any non-containerized accumulation of solid, nonflowing waste.

"Water quality standards" refers to the District of Columbia's Surface and Ground Water Quality Standards codified at Code of District of Columbia Regulations §§ 21-1100 *et seq.*, which are effective on the date of issuance of the permit and any subsequent amendments which may be adopted during the life of this permit.

"Waters of the United States" is defined at 40 C.F.R. § 122.2.

FACT SHEET

National Pollutant Discharge Elimination System (NPDES)
Municipal Separate Storm Sewer System (MS4)
Permit No. DC0000221 (Government of the District of Columbia)

NPDES PERMIT NUMBER: DC0000221 (Reissuance)

FACILITY NAME AND MAILING ADDRESS:

Government of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

MS4 ADMINISTRATOR NAME AND MAILING ADDRESS:

Director, District Department of the Environment
1200 First Street, N.E., 6th Floor
Washington, D.C. 20002

FACILITY LOCATION:

District of Columbia's Municipal Separate Storm Sewer System (MS4)

RECEIVING WATERS:

Potomac River, Anacostia River, Rock Creek, and Stream Segments Tributary
To Each Such Water Body

INTRODUCTION:

Today's action finalizes reissuance of the District of Columbia Municipal Separate Storm Sewer System (MS4) Permit. In the Final Permit EPA has continued to integrate the adaptive management approach with enhanced control measures to address the complex issues associated with urban stormwater runoff within the corporate boundaries of the District of Columbia, where stormwater discharges via the Municipal Separate Storm Sewer System (MS4).

Since the United States Environmental Protection Agency, Region III (EPA) issued the District of Columbia (the District) its first MS4 Permit in 2000, the Agency has responded to a number of legal challenges involving both that Permit (as well as amendments thereto) and the second-round MS4 Permit issued in 2004. For the better part of ten years, the Agency has worked with various parties in the litigation, including the District and two non-governmental organizations, Defenders of Wildlife and Friends of the Earth, to address the concerns of the various parties. The Agency has engaged in both litigation and negotiation, including formal

mediation.[1] These activities ultimately led to an enhanced stormwater management strategy in the District, consisting of measurable outputs for addressing the issues raised during the litigation and mediation process.

FACILITY BACKGROUND AND DESCRIPTION:

The Government of the District of Columbia owns and operates its own MS4, which discharges stormwater from various outfall locations throughout the District into its waterways.[2]

On April 21, 2010 EPA public noticed the Draft Permit. The Draft Fact Sheet published with that Draft Permit contains more extensive permit background information, and the reader is referred to that document for the history of the District of Columbia MS4 permit.

The public comment period closed on June 4, 2010. EPA received comments from 21 individual commenters and an additional 53 form letters. The Draft Permit, Draft Fact Sheet, and comments received on those documents are all available at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html. The Final Permit reflects many of the comments received. EPA is simultaneously releasing a responsiveness summary responding to these comments.

ACTION TO BE TAKEN:

EPA is today reissuing the District of Columbia NPDES MS4 Permit. The Final Permit replaces the 2004 Permit, which expired on August 18, 2009 and has been administratively extended since that time. The Final Permit incorporates concepts and approaches developed from studies and pilot projects that were planned and implemented by the District under the 2000 and 2004 MS4 permits and modifying Letters of Agreement, and implements Total Maximum Daily Loads (TMDLs) that have been finalized since the prior permit was issued, including the Chesapeake Bay TMDL. A number of applicable measurable performance standards have been incorporated into the Final Permit. These and other changes between the 2004 Permit and today's Final Permit are reflected in a Comparison Document that is part of today's Permit issuance.

WATER QUALITY IN DISTRICT RECEIVING WATERS:

The District's *2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act*[3] documents the serious water

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1 A procedural history of Permit appeals can be viewed at the EPA Environmental Appeals Board web: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a56a5aa8525711400542d23/b5e5b68e89edabe98525714f00731c6f!OpenDocument&Highlight=2,municipal.

2 Portions of the District are served by a combined sanitary and storm sewer system. The discharges from the combined sewer system are not subject to the MS4 permit, but are covered under NPDES Permit No. xxxx issued to the District of Columbia Water and Sewer Authority.

3 District Department of the Environment, *The District of Columbia Water Quality Assessment, 2008 Integrated Report to the Environmental Protection Agency and U.S. Congress Pursuant to Sections 305(b) and 303(d) Clean Water Act* (hereinafter "2008 Integrated Report").

quality impairments in the surface waters in and around the District. A number of the relevant designated uses are not being met, *e.g.*, aquatic life, fish consumption, and full body contact, and there are a number of specific pollutants of concern that have been identified (for additional discussion on relevant TMDLs *see* Section 4.10 of this Final Fact Sheet).

Commenters on the Draft Permit expressed some frustration over very slow progress or even lack of progress after a decade of implementation of the MS4 program and even longer for other water quality programs. EPA appreciates this concern. Although the District's receiving waters are affected by a range of discharge sources, discharges from the MS4 are a significant contributor of pollutants and cause of stream degradation. EPA also recognizes, however, that stormwater management efforts that achieve a reversal of the ongoing degradation of water quality caused by urban stormwater discharges entail a long term, multi-faceted approach.

Consistent with the federal stormwater regulations for characterizing discharges from the MS4 (40 C.F.R. §122.26(d)(2)(iii)), the first two permit terms for the District's MS4 program required end-of-pipe monitoring to determine the type and severity of pollutants discharging via the system. The monitoring program was not designed to evaluate receiving water quality *per se*, therefore detection of trends or patterns was not reasonably possible. Today's Final Permit includes requirements for a Revised Monitoring Program, and one of the objectives for the program is to use a suite of approaches and indicators to evaluate and track water quality over the long-term (*see* discussion of Section 5.1 in this Final Fact Sheet).
There have been identified improvements in some areas. For example the *2008 Integrated Report* noted improvements in the diversity of submerged aquatic vegetation in the Potomac River, as well as improvements in fish species richness in Rock Creek. Biota metrics are often the best indicators of the integrity of any aquatic system.

EPA also notes that there are a variety of indirect measures indicative of improvement. The federal stormwater regulations foresaw the difficulty, especially in the near-term, of detecting measurable improvement in receiving waters, and relied instead on indirect measures, such as estimates of pollutant load reductions (40 C.F.R. §122.26(d)(2)(v)). The District documents these types of indirect measures in its annual reports, *e.g.*, tons of solids collected from catch basin clean-outs, amount of household hazardous waste collected, number of trees planted, square footage of green roofs installed, and many other measures of success.[4]

EPA believes that documenting trends in water quality, whether improvements, no change, or even further degradation, is an important element of a municipal water quality program. Today's Final Permit recognizes this principle, both in the types of robust measures required as well as the transition to new monitoring paradigms. EPA encourages all interested parties to provide the District with input during the development of these program elements.

THIS FACT SHEET:

(http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/DC_IR_2008_Revised_9-9-2008.pdf

4 District MS4 Annual Reports can be found at: http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495855.asp

This Final Fact Sheet is organized to correspond with the chronological organization and numbering in today's Final Permit. Where descriptions or discussions may be relevant to more than one element of the Final Permit the reader will be referred to the relevant section(s).

To keep today's Final Fact Sheet of readable length, many of the elements included in the fact sheet published with the Draft Permit (Draft Fact Sheet) on April 21, 2010 have not been repeated, but are referenced. Readers are referred to the Draft Fact Sheet published with the Draft Permit for additional discussion on provisions that have been finalized as proposed.[5] The Final Fact Sheet does discuss significant changes since the 2004 Permit (even if discussed in the Draft Fact Sheet). The Final Fact Sheet also contains additional explanation of the Final Permit where commenters requested additional clarification. In addition, this Final Fact Sheet explains modifications to the Final Permit where provisions were changed in response to comments.

In many cases EPA made a number of very simple modifications to the Final Permit, *e.g.*, a word, phrase, or minor reorganization, simply for purposes of clarification. These modifications were not intended to change the substance of the permit provisions, only to clarify them. Most of those types of edits are not discussed in this Final Fact Sheet, but EPA has provided a Comparison Document of the Draft and Final Permits for readers who would like that level of detail.

Many commenters noted that the Draft Permit was not logically organized. EPA agrees. The major reorganization principles include:

1) There is a new Section 3, Stormwater Management Program (SWMP) Plan consolidating the various plans, strategies and other documents developed in fulfillment of permit requirements.
2) All implementation measures, *i.e.*, those stipulating management measures and implementation policies, are included in Section 4 of today's Final Permit. This includes "Source Identification" elements (Section 3 in the Draft Permit) and "Other Applicable Provisions" elements (Section 8 in the Draft Permit), which included TMDL requirements.
3) All monitoring requirements are consolidated in Section 5 of the Final Permit.
4) All reporting requirements are consolidated in Section 6 of the Final Permit.

EPA also refers readers to the Responsiveness Summary released today along with the Final Permit and Final Fact Sheet, for responses to comments and questions received on the Draft Permit. That document contains additional detailed explanations of the rationale for changes made to the Draft Permit in the Final Permit.

Finally, EPA made significant effort to avoid appending or incorporating by reference other documents containing permit requirements into the Final Permit. In the interest of clarity

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5 The Permit and Fact Sheet proposed on April 21, 2010 can be viewed at: http://www.epa.gov/reg3wapd/npdes/draft_permits.html

and transparency EPA, to the extent possible, has included all requirements directly in the permit. Thus, EPA reviewed a variety of documents with relevant implementation measures, *e.g.*, TMDL Implementation Plans and the 2008 Modified Letter of Agreement to the 2004 permit[6], and translated elements of those plans and strategies into specific permit requirements that are now contained in the Final Permit. This Fact Sheet provides an explanation of the sources of provisions that are significant and are a direct result of one of those strategies.

1. DISCHARGES AUTHORIZED UNDER THIS PERMIT

(1.2 Authorized Discharges): The Final Permit authorizes certain non-stormwater discharges, including discharges from water line flushing. One commenter noted that many of these discharges, especially from potable water systems, contain concentrations of chlorine that may exceed water quality standards. EPA agrees, and has therefore clarified that dechlorinated water line flushing is authorized to be discharged under the Final Permit.

(1.4 Discharge Limitations): Comments on the language in Part 1.4 varied widely. Some commenters did not believe it was reasonable to require discharges to meet water quality standards. Other commenters believed this to be an unambiguous requirement of the Clean Water Act.

Today's Final Permit is premised upon EPA's longstanding view that the MS4 NPDES permit program is both an iterative and an adaptive management process for pollutant reduction and for achieving applicable water quality standard and/or total maximum daily load (TMDL) compliance. *See generally,* "National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges," 55 F.R. 47990 (Nov. 16, 1990).

EPA is aware that many permittees, especially those in highly urbanized areas such as the District, likely will be unable to attain all applicable water quality standards within one or more MS4 permit cycles. Rather the attainment of applicable water quality standards as an incremental process is authorized under section 402(p)(3)(B)(iii) of the Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), which requires an MS4 permit "to reduce the discharge of pollutants to the maximum extent practicable" (MEP) "and such other provisions" deemed appropriate to control pollutants in municipal stormwater discharges. To be clear, the goal of EPA's stormwater program is attainment of applicable water quality standards, but Congress expected that many municipal stormwater dischargers would need several permit cycles to achieve that goal.

Specifically, the Agency expects that attainment of applicable water quality standards in waters to which the District's MS4 discharges, requires staged implementation and increasingly more stringent requirements over several permitting cycles. During each cycle, EPA will continue to review deliverables from the District to ensure that its activities constitute sufficient progress toward standards attainment. With each permit reissuance EPA will continue to increase

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6 District Department of the Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

stringency until such time as standards are met in all receiving waters. Therefore today's Final Permit is clear that attainment of applicable water quality standards and consistency with the assumptions and requirements of any applicable WLA are requirements of the Permit, but, given the iterative nature of this requirement under CWA Section 402(p)(3)(B)(iii), the Final Permit is also clear that "compliance with all performance standards and provisions contained in the Final Permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term" (Section 1.4).

EPA believes that permitting authorities have the obligation to write permits with clear and enforceable provisions and thus the determination of what is the "maximum extent practicable" under a permit is one that must be made by the permitting authority and translated into provisions that are understandable and measurable. In this Final Permit EPA has carefully evaluated the maturity of the District stormwater program and the water quality status of the receiving waters, including TMDL wasteload allocations. In determining whether certain measures, actions and performance standards are practicable, EPA has also looked at other programs and measures around the country for feasibility of implementation. Therefore today's Final Permit does not qualify any provision with MEP thus leaving this determination to the discretion of the District. Instead each provision has already been determined to be the maximum extent practicable for this permit term for this discharger.

EPA modified the language in the Final Permit to provide clarity on the expectations consistent with the preceding explanation. Specifically Section 1.4.2 of the Final Permit requires that discharges 'attain' applicable wasteload allocations rather than just 'be consistent' with them, since the latter term is somewhat ambiguous.

In addition, the general discharge limitation 'no increase in pollutant loadings from discharges from the MS4 may occur to receiving waters' was removed because of the difficulty in measuring, demonstrating and enforcing this provision. Instead, consistent with EPA's belief that the Final Permit must include all of the enforceable requirements that would achieve this principle, the following discharge limitation is substituted: "comply with all other provisions and requirements contained in this permit, and in plans and schedules developed in fulfillment of this permit."

In addition, EPA made the following modifications: "Compliance with <u>the</u> performance standards and provisions contained in <u>Parts 2 through 8 of</u> this permit shall constitute adequate progress towards compliance with DCWQS <u>and WLAs for this permit term</u>" (*<u>underlined text added</u>*) (Section 1.4 of the Final Permit). EPA eliminated circularity with the addition of "Parts 2 through 8", clarifying that this requirement does not circle back to include the statements in 1.4.1 and 1.4.2, but rather interprets them. Also, although WLAs are a mechanism for attainment of water quality standards, EPA added the specific language "and WLAs" to make this concept explicit rather than just implicit. In addition this revised language emphasizes that the specific measures contained in the Final Permit, while appropriate for this permit term, will not necessarily constitute full compliance in subsequent permit terms. It is the expectation that with each permit reissuance, additional or enhanced requirements will be included with the objective

of ensuring that MS4 discharges do not cause or contribute to an exceedance of applicable water quality standards, including attainment of relevant WLAs.

2. LEGAL AUTHORITY, RESOURCES, AND STORMWATER PROGRAM ADMINISTRATION

(2.1 Legal Authority): Several commenters pointed out that there were a number of requirements in the Draft Permit without clear compliance schedules or deadlines, or with deadlines that did not correspond well to others in the permit. In the Final Permit, EPA has made several revisions to address these comments. For example, EPA changed a requirement that deficiencies in legal authority must be remedied "as soon as possible" to a 120-day requirement for deficiencies that can be addressed through regulation, and two years for deficiencies that require legislative action (Section 2.1.1). Also, EPA increased the compliance schedule for updating the District's stormwater regulation from twelve months to eighteen months, *id.,* so that this action could be adequately coordinated with the development of the District's new offsite mitigation/payment-in-lieu program (for more discussion see Section 4.1.3 below).

(2.2 Fiscal Resources): One commenter suggested eliminating the reference to the District's Enterprise Fund since funding was likely to come from a number of different budgets within the District. EPA agrees with this comment and has removed this reference.

On the other hand, many commenters noted that the implementation costs of the District's stormwater program will be significant. EPA agrees. The federal stormwater regulations identify the importance of adequate financial resources [40 C.F.R. §122.26(d)(1)(vi) and (d)(2)(vi)]. In addition, after seeing notable differences in the caliber of stormwater programs across the country, EPA recognizes that dedicated funding is critical for implementation of effective MS4 programs.[7,8,9] In 2009 the District established, and in 2010 revised, an impervious-based surface area fee for service to provide core funding to the stormwater program[10] (understanding that stormwater-related financing may still come from other sources as they fulfill multiple purposes, *e.g.,* street and public right-of-way retrofits). In conjunction with the 2010 rule-making to revise the fee the District issued a Frequently Asked Questions document[11] that indicates the intent to restrict this fee to its original purpose, *i.e.*, dedicated funding to implement the stormwater program and comply with MS4 permit requirements. EPA believes this action is essential, and he expects that the District will maintain a dedicated source of funding for the stormwater program.

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7 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

8 National Association of Flood and Stormwater Agencies, Funded by EPA, *Guidance for Municipal Stormwater Funding* (2006) http://www.nafsma.org/Guidance%20Manual%20Version%202X.pdf

9 EPA, *Funding Stormwater Programs* (2008) http://www.epa.gov/npdes/pubs/region3_factsheet_funding.pdf

10 District of Columbia, Rule 21-566 Stormwater Fees, http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleID=474056

11 District of Columbia, FAQ Document *Changes to the District's Stormwater Fee* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/information2/water.reg.leg/Stormwater_Fee_FAQ_10-5-10_-final.pdf

3. STORMWATER MANAGEMENT PROGRAM (SWMP) PLAN

A number of commenters were confused by the wide variety of plans, strategies and other written documents required by the Draft Permit. A number of commenters were also concerned about public access to several of these documents.

In today's Final Permit EPA is clarifying that any written study, strategy, plan, schedule or other element, existing or new, is part of the District Stormwater Management Program Plan. It is EPA's intent that all elements of the program be described in this central 'Plan'. This does not mean that the Plan cannot consist of separate documents. EPA understands that stand-alone elements may aid in implementation in certain situations. However, EPA is clarifying that all such documents are inherent components of the Plan.

To address the accessibility issue EPA is also requiring that the most current version of the Plan be posted on the District website. As such, all elements that may be documented in separate documents and deliverables must be posted at this location (a hyperlink to any element of the program in a different document is sufficient).

Moreover, today's Final Permit requires the District to public notice a fully updated Plan (to include all existing and new elements required by the Final Permit) within three years of the effective date of this Final Permit, and to then submit that Plan to EPA within four years of the effective date of the Final Permit. This schedule will enable this evaluation of the Plan to be part of EPA's evaluation of the Districts stormwater management program in preparation for the next reissuance of the permit.

The Final Permit requires the District to develop a number of new initiatives. Many commenters raised concerns about the rigor and suitability of these new elements in the absence of a requirement for public input, and in the absence of EPA review and approval. In light of those concerns EPA reviewed all elements of the Draft Permit, and where appropriate has added requirements to the Final Permit both for public notice and opportunity to comment and for submittal to EPA for review and approval. Not every new element has been subjected to this requirement. However, EPA agrees that the opportunity for the public and EPA to review new program elements that will become major components of the stormwater management program is reasonable. Thus, for provisions that EPA believes will be important foundations of the program in years to come, EPA has added a requirement for public notice and EPA review and approval. A new Table 1 in the Final Permit summarizes the elements that must now be submitted to EPA for review and approval.

TABLE 1
Elements Requiring EPA Review and Approval

Element	Submittal Date (from effective date of this permit)
Anacostia River Watershed Trash Reduction Calculation Methodology (4.10)	1 year
Catch Basin Operation and Maintenance Plan (4.3.5.1)	18 months
Outfall Repair Schedule (4.3.5.3)	18 months
Off-site Mitigation/Payment-in-Lieu Program (4.1.3)	18 months
Retrofit Program (4.1.6)	2 years
Consolidated TMDL Implementation Plan (4.10.3)	2 years
Revised Monitoring Program (5.1)	2 years
Revised Stormwater Management Program Plan (3)	4 years

4. IMPLEMENTATION OF STORMWATER CONTROL MEASURES

(4.1 Standard for Long-Term Stormwater Management): One of the fundamental differences between today's Final Permit and earlier permits is the inclusion of measurable requirements for green technology practices, sometimes referred to as "low-impact development" or "green infrastructure." These requirements, which include green roofs, enhanced tree plantings, permeable pavements, and a performance standard to promote practices such as bioretention and water harvesting, are designed to increase the effectiveness of stormwater controls by reducing runoff volumes and associated pollutant loads.[12,13] In past years, stormwater management requirements in permits did not include clear performance goals, numeric requirements or environmental objectives. Today's Final Permit stipulates a specific standard for newly developed and redeveloped sites, and also emphasizes the use of "green infrastructure" controls to be used to meet the performance standard. These permit requirements are intended to improve the permit by providing clarity regarding program performance and promoting the use of technologies and strategies that do not rely solely on end-of-pipe detention measures to manage runoff. EPA notes that much of this emphasis is based on changing paradigms in stormwater science, technology and policy (see discussion below), but also points out that the groundwork for this framework was laid during the prior permit term, and all of the green infrastructure elements agreed to in the 2008 Modified Letter of Agreement to the 2004 Permit.[14]

In the natural, undisturbed environment precipitation is quickly intercepted by trees and other vegetation, or absorbed by soils and humic matter on the surface of the ground where it is

12 The performance of green infrastructure control measures is well-established through numerous studies and reports, many of which are available at http://cfpub2.epa.gov/npdes/greeninfrastructure/research.cfm#research

13 Jay Landers, *Stormwater Test Results Permit Side-by-Side Comparisons of BMPs* (2006) Civil Engineering News http://www.unh.edu/erg/civil_eng_4_06.pdf

14 District Department of the Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222*, (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

used by plants, becomes baseflow (shallow groundwater feeding waterways) or infiltrates more deeply to aquifers. During most storms very little rainfall becomes stormwater runoff where the landscape is naturally vegetated or in cases where there are permeable soils. Runoff generally only occurs with larger precipitation events, which constitute a very small proportion of the storms that occur in Washington, DC. In contrast to natural settings, traditional development practices cover large areas of the ground with impervious surfaces such as roads, driveways, sidewalks, and buildings. In addition, the remaining soils are often heavily compacted and are effectively impervious. Under developed conditions, stormwater runs off or is channeled away even during small precipitation events. The collective force of the increased stormwater flows entering the MS4 and discharging through outfalls into receiving streams scours streambeds, erodes stream banks, and causes large quantities of sediment and other entrained pollutants, such as metals, nutrients and trash, to enter the water body each time it rains[15,16,17]. Stormwater research generally shows a high correlation between the level of imperviousness in a watershed and the degree of overall degradation of water quality and habitat. This principle is so well-settled that EPA has not included individual study results here, but refers interested readers to an excellent compendium of relevant studies compiled by the Maryland Department of Natural Resources at http://www.dnr.state.md.us/irc/bibs/effectsdevelopment.html.

To date stormwater management approaches generally have been focused primarily on flood management, in particular extended detention controls, such as wet ponds or dry detention basins, or on in-pipe or end-of-pipe treatment systems. Extended detention approaches are intended to reduce downstream flooding to the extent necessary to protect the public safety and private and public property. End-of-pipe systems are intended to filter or settle specific pollutants, but typically do not reduce the large suite of pollutants in storm water, nor do anything to address degradation attributable to increased discharge volumes. These approaches occurred largely by default since stormwater permits and regulations, including those with water quality objectives, did not stipulate specific, measurable standards or environmental objectives. In addition, water quality was not the primary concern during the early evolution of stormwater management practices.

There are multiple potential problems with extended detention as a water quality management practice, including the fact that receiving stream dynamics are generally based on balances of much more than just discharge rates.[18] Stream stability, habitat protection and water quality are not necessarily protected by the use of extended detention practices and systems. In fact the use of practices such as wet detention basins often results in continued stream bank

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15 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

16 Schueler, Thomas R., *The Importance of Imperviousness* (2000) Center for Watershed Protection, http://yosemite.epa.gov/R10/WATER.NSF/840a5de5d0a8d1418825650f00715a27/159859e0c556f1c988256b7f007525b9/$FILE/The%20Importance%20of%20Imperviousness.pdf

17 E. Shaver, R. Horner, J. Skupien, C. May, and G. Ridley. *Fundamentals of Urban Runoff Management: Technical and Institutional Issues – 2nd Edition*, (2007) North American Lake Management Society, Madison, WI. http://www.deq.state.ms.us/mdeq.nsf/0/A8E8B82B89DCDDCE862573530049EEE0/$file/Fundamentals_full_manual_lowres.pdf?OpenElement

18 Low Impact Development Center, *A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption* (2007) http://pepi.ucdavis.edu/mapinfo/pdf/CA_LID_Policy_Review_Final.pdf

destabilization and increased pollutant loadings of sediment, phosphorus and other pollutants due to bank and channel erosion. Numerous studies have documented the physical, chemical and biological impairments of receiving waters caused by increased volumes, rates, frequencies, and durations of stormwater discharges, and the critical importance of managing stormwater flows and volumes to protecting and restoring our nation's waters[19,20].

Traditional stormwater management is very heavily focused on extended detention approaches, *i.e.,* collecting water short-term (usually in a large basin), and discharging it to the receiving water over the period of one to several days, depending on the size of the storm. Extended detention practices are first and foremost designed to prevent downstream flooding and not to protect downstream channel stability and water quality. For decades, water quality protection has been a secondary goal, or one omitted entirely during the design of these facilities. Over time it has become apparent through research and monitoring that these traditional practices do not effectively protect the physical, chemical or biological integrity of receiving waters[21]. Furthermore, operation and maintenance of these systems to ensure they perform as designed requires a level of managerial and financial commitment that is often not provided, further diminishing the effectiveness of these practices from a water quality performance perspective. A number of researchers have documented that extended detention practices fail to maintain water quality, downstream habitat and biotic integrity of the receiving waters.[22,23,24,25] As a result, today's Final Permit shifts the District's practices from extended detention approaches to water quality protection approaches based on retention of discharge volumes and reduced pollutant loadings.

(4.1.1 Standard for Stormwater Discharges from Development): The 2008 National Research Council Report (NRC Report) on urban stormwater confirmed that current stormwater control efforts are not fully adequate. Three of the NRC Report's findings on stormwater management approaches are particularly relevant:

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19 Daren M Carlisle, David M Wolock, and Michael R Meador , *Alteration of streamflow magnitudes and potential ecological consequences: a multiregional assessment*, , Front Ecol Environ, (2010)

20 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

21 EPA, *Protecting Water Quality from Urban Runoff* (2003) http://www.epa.gov/npdes/pubs/nps_urban-facts_final.pdf

22 C.R. MacRae, *Experience from Morphological Research on Canadian Streams: Is Control of the Two Year Frequency Runoff Event the Best Basis for Stream Channel Protection?* (1997) in Effects of Watershed Development and Management on Aquatic Ecosystems, ASCE

23 R. Horner, C. May, E. Livingston, D. Blaha, M. Scoggins, J. Tims & J. Maxted, *Structural and Nonstructural BMPs for Protecting Streams* (2002) Seventh Biennial Stormwater Research & Watershed Management Conference http://www.p2pays.org/ref/41/40364.pdf

24 D.B. Booth & C.R. Jackson, *Urbanization of Aquatic Systems – Degradation Thresholds, Stormwater Detention and the Limits of Mitigation* (1997) Journal of the American Water Resources Association 22(5) http://clear.uconn.edu/projects/TMDL/library/papers/BoothJackson_1997.pdf

25 E. Shaver, R. Horner, J. Skupien, C. May, and G. Ridley. *Fundamentals of Urban Runoff Management: Technical and Institutional Issues – 2nd Edition*, (2007) North American Lake Management Society, Madison, WI. http://www.deq.state.ms.us/mdeq.nsf/0/A8E8B82B89DCDDCE862573530049EEE0/$file/Fundamentals_full_manual_lowres.pdf?OpenElement

1) Individual controls on stormwater discharges are inadequate as the sole solution to stormwater impacts in urban watersheds;
2) Stormwater control measures such as product substitution, better site design, downspout disconnection, conservation of natural areas, and watershed and land-use planning can dramatically reduce the volume of runoff and pollutant loadings from new development; and
3) Stormwater control measures that harvest, infiltrate, and evapotranspire stormwater are critical to reducing the volume and pollutant loading of storms.

The NRC Report points out the wisdom of managing stormwater flow not just for the hydrologic benefits as described above, but because it serves as an excellent proxy for pollutants, *i.e.,* by reducing the volume of stormwater discharged, the amount of pollutants typically entrained in stormwater will also be reduced. Reductions in the number of concentrated and erosive flow events will result in decreased mobilization and transport of sediments and other pollutants into receiving waters. The NRC Report also noted that it is generally easier and less expensive to measure flow than the concentration or load of individual pollutant constituents. For all of these reasons EPA has chosen to use flow volume as the management parameter to implement policies, strategies and approaches.

The objective of effective stormwater management is to replicate the pre-development hydrology to protect and preserve both the water resources onsite and those downstream by eliminating or reducing the amount of both water and pollutants that run off a site, enter the MS4, and ultimately are discharged into adjacent water bodies. The fundamental principle is to employ systems and practices that use or mimic natural processes to: 1) infiltrate and recharge, 2) evapotranspire, and/or 3) harvest and use precipitation near to where it falls to earth.

Retaining the volume of all storms up to and including the 95th percentile storm event is approximately analogous to maintaining or restoring the pre-development hydrology with respect to the volume, rate, and duration of the runoff for most sites. In the mid-Atlantic region the 95th percentile approach represents a volume that appears to reasonably represent the volume that is fully infiltrated in a natural condition and thus should be managed onsite to restore and maintain this pre-development hydrology for the duration, rate and volume of stormwater flows. This approach also employs and/or mimics natural treatment and flow attenuation methods, *i.e.*, soil and vegetation, that existed on the site before the construction of infrastructure (*e.g.,* building, roads, parking lots, driveways). The 95th percentile volume is not a "magic" number; there will be variation among sites based on site-specific factors when replicating predevelopment hydrologic conditions. However, this metric represents a good approximation of what is protective of water quality on a watershed scale, it can be easily and fairly incorporated into standards, and can be equitably applied on a jurisdictional basis.

In the Draft Permit EPA proposed two sets of performance standards to be implemented by the District: on-site retention of the 90th percentile volume, or 1.2" for all non-federal projects, and on-site retention of the 95th percentile volume, or 1.7" for all federal projects.

In determining 'maximum extent practicable' for discharges from development involving

federal facilities EPA considered several factors in the Draft Permit:

1) Energy Independence and Security Act (EISA) Section 438 and EPA Guidance[26]: Entitled "Storm water runoff requirements for federal development projects," EISA section 438 provides: "The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 share feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow."

   Guidance for federal agencies to implement EISA section 438 has been in place since December 2009, and sets forth two optional approaches to meeting the statutory requirements: a performance objective to retain the volume from the 95th percentile storm on site for any federally sponsored new development or redevelopment project and a site-specific hydrologic analysis to determine the pre-development runoff conditions and to develop the site such that the post-development hydrology replicates those conditions "to the maximum extent technically feasible."

2) Executive Orders:
   a. Executive Order 13508 - Chesapeake Bay Protection and Restoration: Calling the Chesapeake Bay a national treasure, E,O. 13508, issued May 12, 2009, establishes a mandate for federal leadership, action and accountability in restoring the Bay. Among the provisions of the Executive Order, section 202(c) directs the strengthening of stormwater management practices at Federal facilities and on Federal lands within the Chesapeake Bay watershed. In addition, section 501 directs federal agencies to implement controls as expeditiously as practicable on their own properties. As required by section 502, EPA issued guidance for federal land management practices to protect and restore the Bay, which includes guidance for managing existing development, as well as redevelopment, new development Thus federal agencies have an executive directive to be leaders in stormwater management in the District and throughout the Chesapeake Bay watershed.[27]

   b. Executive Order 13514 - Federal Leadership in Environmental, Energy, and Economic Performance E.O 13514, issued Oct. 5, 2009, directs the federal government to "lead by example" and includes a requirement for federal agencies to implement EPA's EISA Section 438 guidance (see Sections 2(d)(iv)[28] and 14).

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26 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

27 EPA, *Guidance for Federal Land Management in the Chesapeake Bay Watershed*, Chapter 3. Urban and Suburban, (2010) 841-R-10-002 (http://www.epa.gov/owow_keep/NPS/chesbay502/pdf/chesbay_chap03.pdf)

28 Sec. 2. Goals for Agencies. In implementing the policy set forth in Section 1 of this order, and preparing and implementing the Strategic Sustainability Performance Plan called for in Section 8 of this order, the head of each agency shall: . . . (d) improve water use efficiency and management by: . . . (iv) implementing and

3) Water Quality: These performance standards are aappropriate as water quality-based effluent limitations in the Final Permit. In order to meet the necessary water quality requirements of the Clean Water Act, and to be consistent with the assumptions and requirements of the wasteload allocations for the Chesapeake Bay TMDL, EPA has determined that this performance standard is necessary. In fact, the District's final Phase I WIP acknowledges reasonable assurance demonstration for meeting its obligations to implement the Chesapeake Bay TMDL on an expectation that federal new development and redevelopment projects will achieve a 1.7" stormwater retention objective[29].

EPA concluded in the Draft Permit, and maintains in the Final Permit, that in this first permit in which a performance standard is being required, a retention standard of 1.2" represents the "maximum extent practicable" (MEP) for the District to implement at this time. In the District of Columbia area the 90th percentile event volume is estimated at 1.2 inches. This volume was calculated from 59 years (1948-2006) of rainfall data collected at Reagan National Airport using the methodology detailed in the Energy Independence and Security Act (EISA) Section 438 Guidance[30]. EPA expects that the performance objective shall be accomplished largely by the use of practices that infiltrate, evapotranspire and/or harvest and use rainwater.

EPA's MEP determination included evaluating what has been demonstrated to be feasible in the mid-Atlantic region as well as in other parts of the country. Because on-site retention of the 90th percentile rainfall event volume and analogous approaches have been successfully implemented in other locations across the nation as requirements of stormwater permits, state regulations and local standards [31,32,33,34,35,36,37,38,39] and under a wide variety of climates and

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achieving the objectives identified in the stormwater management guidance referenced in Section 14 of this order. Sec. 14. Stormwater Guidance for Federal Facilities. Within 60 days of the date of this order, the Environmental Protection Agency, in coordination with other Federal agencies as appropriate, shall issue guidance on the implementation of Section 438 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17094).

29 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

30 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

31 EPA, *The Municipality of Anchorage and the Alaska Department of Transportation and Public Facilities Municipal Separate Storm Sewer System Permit*, NPDES No. AKS052558 (2010) http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/MS4+requirements+-+Region+10/$FILE/ATTCZX11/AKS052558%20FP.pdf

32 California Regional Water Quality Control Board Los Angeles Region, *Ventura County Municipal Separate Storm Sewer System Permit*, NPDES No. CAS004002 (2009) http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf

33 Montana Department of Environmental Quality, *General Permit for Stormwater Discharge Associated with Small Municipal Separate Storm Sewer System*, NPDES No. MTR040000 (2010) http://www.deq.mt.gov/wqinfo/mpdes/StormWater/ms4.mcpx

34 Tennessee Department of Environment and Conservation, *General Permit for Discharges from Small Municipal Separate Storm Sewer Systems*, NPDES No. TNS000000, (2010) http://state.tn.us/environment/wpc/stormh2o/finals/tns000000_ms4_phase_ii_2010.pdf

conditions, EPA considers this performance standard to be proven and therefore 'practicable' at this point in time. EPA believes that application of this performance standard will result in a significant improvement to the *status quo* and that it will provide notable water quality benefits. This approach will also provide a sound foundation and framework for future management approaches, strategies, measures and practices as the program evolves over subsequent permit cycles. In this context, EPA notes that there may be a need to improve upon this standard in the future, and expects to evaluate implementation success, performance of practices and the overall program, and water quality in the receiving waters when determining whether or not to modify this requirement in a future permit cycle.

EPA received a number of comments on these proposed development performance standards. Many commenters supported this approach. A few were opposed, largely to the numbers rather than the retention framework. Only one federal agency, the Department of Defense, to whom the 95th percentile standard would apply, opposed this provision, on the basis that they should not be subject to the higher standard.

In response to comments EPA revised the Final Permit to require the District to implement a performance standard of on-site retention of 1.2" for all development projects, regardless of who owns or operates the development. EPA's rationale for including a single performance standard for all development projects is based on the fact that this permit is issued to the District of Columbia and the MEP determination must be based on what is practicable for that permittee even though certain property owners discharging to the District's MS4 may have the ability as well as the mandate to achieve more. EPA concludes that it would be not be inappropriate to include the 1.7" performance standard in a permit to a federal permittee. This permit, however, is being issued to a non-federal permittee.

Therefore today's Final Permit includes a performance standard for stormwater discharges from development that disturbs an area of land greater than or equal to 5,000 square feet. The requirement must be in effect 18 months from today. The Permit requires the design, construction, and maintenance of stormwater management practices to retain rainfall onsite, and

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35 West Virginia Department of Environmental Protection, General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems, NPDES WV0116025 (2009) http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%202009%20General%20Permit.pdf

36 North Carolina Department of Environment and Natural Resources, *General Permit to Construct Operate and Maintain Impervious Areas and BMPs Associated with a Residential Development Disturbing Less than 1 Acre*, State Permit No. SWG050000 (2008) http://portal.ncdenr.org/c/document_library/get_file?uuid=724171cc-c208-4f39-a68c-b4cd84022cd9&groupId=38364

37 State of Maryland, *Stormwater Management Act of 2007*, Environment Article 4 §201.1 and §203 http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Pages/Programs/WaterPrograms/SedimentandStormwater/swm2007.aspx

38 City of Philadelphia, *Stormwater Regulations*, §600.0 Stormwater Management (2006) http://www.phillyriverinfo.org/WICLibrary/StormwaterRegulations.pdf

39 EPA, See Chapter 3, *Green Infrastructure Case Studies: Municipal Policies for Managing Stormwater with Green Infrastructure* (2010) http://www.epa.gov/owow/NPS/lid/gi_case_studies_2010.pdf

prevent the off-site discharge of the rainfall volume from all events less than or equal to the 90th percentile rainfall event.

The District's Phase I Watershed Implementation Plan (WIP) for the Chesapeake Bay TMDL[40] based its proposed nutrient and sediment reductions, and the associated reasonable assurance demonstration, on these performance standards, i.e., 1.2" for non-federal projects and 1.7" for federal projects. In establishing the Chesapeake Bay TMDL, EPA used the information in the Bay jurisdictions' final Phase I WIPs, including that of the District, where possible. Thus the wasteload allocations (WLAs) in the TMDL[41] are based, in part, on the expectation that all development in the District will be subject to these standards.

EPA notes that all federal facilities still must comply with the EISA requirements. The District will track the performance of federal development projects subject to the District's stormwater regulations, and therefore document those achieving better than 1.2" onsite retention. However, the District cannot, nor should they be expected to, enforce the EISA requirements.

EPA dropped the option for determination of the predevelopment runoff conditions based on a full hydrologic and hydraulic analysis of the site. EISA guidance had provided this option to federal facilities and EPA did not want to provide an *a priori* limitation to federal projects in the Draft Permit, but rather provide the District with the flexibility to include it if they determined it to be administratively feasible. However, since the Final Permit no longer includes an additional requirement for federal facilities, this provision is no longer necessary to provide federal facilities options consistent with EISA. With respect to non-federal facilities, in the seventeen months since the Draft Permit was proposed the District has continued with the process of finalizing their stormwater regulations, and has determined that inclusion of this option is not necessary or reasonable, and EPA concurs.

Several commenters raised the issue of costs associated with implementation of the performance standard. EPA has responded by noting that there are many locations where this stormwater management framework has already been implemented (*see* footnote 22), and also where costs have been well documented to be competitive or instances where infrastructure costs were less expensive because of avoided costs, *e.g.,* reduced infrastructure, narrower roads and otherwise fewer impervious surfaces, reduced or eliminated curbs and gutters, no or fewer buried storm sewers. In addition, where cost-benefit analyses have been conducted, green infrastructure practices are even more cost effective because of the wide array of additional benefits[42] that do not accrue when traditional stormwater management practices are used.[43,44,45,46,47,48,49,50,51,52,53,54]

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40 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

41 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

42 EPA, Managing Wet Weather with Green Infrastructure website, Benefits: (http://cfpub2.epa.gov/npdes/home.cfm?program_id=298)

43 LimnoTech, *Analysis of the Pollution Reduction Potential of DC Stormwater Standards* (2009)

44 EPA, *Reducing Stormwater Costs through Low Impact Development Strategies and Practices* (2007)

Several commenters took issue with the inclusion of any numeric performance standard for discharges from development. As discussed above EPA believes that stormwater discharge permits should include clear and enforceable standards, and where feasible, numeric limits are preferred. As discussed above, for the purpose of requiring the permittee to ensure adequate management of discharges from development, a numeric performance standard is a proven means of establishing a clear and enforceable requirement. EPA recognizes that there will be development projects that may not be able to meet the performance standard on site because of site conditions or site activities that preclude the use of extensive green infrastructure practices. Thus as proposed in the Draft Permit, the Final Permit requires the District to develop an alternative means of compliance for development projects under these circumstances (*see* discussion of Section 4.1.3 Off-Site Mitigation and/or Fee-in-Lieu for all Facilities).

In July 2010 EPA Region III issued *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed.*[55] This document provides direction to all NPDES permitting authorities in the Region and establishes expectations for the next generation of MS4 permits. Based on many of the reasons already articulated in this Final Fact Sheet, EPA directed states to incorporate performance-based standards into permits and regulations with the objective of maintaining or restoring a pre-development hydrologic site condition for newly developed and redeveloped sites. In fact most states with authorized NPDES permit programs in the Chesapeake

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http://www.epa.gov/owow/NPS/lid/costs07/

45 Report to Natural Resources Defense Council and Waterkeeper Alliance, *Economic Costs, Benefits and Achievability of Stormwater Regulations for Construction and Development Activities* (2008)

46 Meliora Environmental Design LLC, *Comparison of Environmental Site Design for Stormwater Management for Three Redevelopment Sites in Maryland* (2008)

47 City of Portland Environmental Services, *Cost-Benefit Evaluation of Ecoroofs* (2008) http://www.portlandonline.com/bes/index.cfm?a=261053&c=50818

48 Natural Resources Defense Council, *Rooftops to Rivers, Green Strategies for Controlling Stormwater and Combined Sewer Overflows* (2006) http://www.nrdc.org/water/pollution/rooftops/rooftops.pdf

49 Riverkeeper, *Sustainable Raindrops* (2006) http://www.riverkeeper.org/wp-content/uploads/2009/06/Sustainable-Raindrops-Report-1-8-08.pdf

50 City of Philadelphia Water Department, *A Triple Bottom Line Assessment of Traditional and Green Infrastructure Options for Controlling CSO Events in Philadelphia's Watersheds* (2009) http://www.epa.gov/npdes/pubs/gi_phil_bottomline.pdf

51 Richard R. Horner, *Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices for Ventura County,* and *Initial Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area,* and *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Development Practices for the San Francisco Bay Area,* (2007) http://docs.nrdc.org/water/files/wat_09081001b.pdf

52 J. Hathaway and W.F. Hunt. *Stormwater BMP Costs*. (2007) www.bae.ncsu.edu/stormwater/PublicationFiles/DSWC.BMPcosts.2007.pdf.

53 Center for Neighborhood Technology and American Rivers, *The Value of Green Infrastructure: A Guide to Recognizing Its Economic, Environmental and Social Benefits* (2010) http://www.cnt.org/repository/gi-values-guide.pdf

54 J. Gunderson, R. Roseen, T. Janeski, J. Houle, M. Simpson. *Cost-Effective LID in Commercial and Residential Development* (2011) Stormwater http://www.stormh2o.com/march-april-2011/costeffective-lid-development-1.aspx

55 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf

Bay Watershed have incorporated numeric on-site retention standards into final or draft regulations or permits.

In addition, this provision is consistent with the 2008 Modified Letter of Agreement to the 2004 Permit[56] in which the District committed to promulgate stormwater regulations that implement "Low Impact Development", *i.e.,* measures that infiltrate, evapotranspire and harvest stormwater.

(4.1.2 Code and Policy Consistency, Site Plan Review, Verification and Tracking): In Region III's *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed*, EPA emphasized the importance of establishing accountability measures around performance measures. The best standards will not provide the necessary environmental outcomes if they are not properly implemented, and the only way to ensure proper implementation is to ensure that stormwater control measures are properly designed and installed.

Today's Final Permit requires the District to ensure that all codes and policies are consistent with the standards in the Final Permit, and to establish and maintain adequate site plan review procedures, and a post-construction verification process (such as inspections or submittal of as-builts) to ensure that controls are properly installed.

Ensuring that local codes, ordinances and other policies are consistent with the requirements of the permit is critical element of success. A number local governments attempting to implement green infrastructure measures have found their own local policies to be one of the most significant barriers[57], *e.g.*, parking codes that require over-sized parking lots, plumbing codes that don't allow rainwater harvesting for indoor uses, or street design standards that prohibit the use of porous/pervious surfaces. EPA has published a document, the *Water Quality Scorecard*, to assist local governments in understanding and identifying these local policy barriers and also provides options for eliminating them.[58] EPA is not requiring the District to use the *Scorecard* or any other specific method, but recommends a systematic assessment of local policies in the context of the requirements of the Final Permit in order to comply with the provisions of this Section.

EPA and others have long recognized the importance of site plan review in ensuring that development projects are designed according to standards and regulations, and a verification process following construction that projects were constructed as designed and approved.[59,60,61,62]

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56 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

57 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

58 EPA, *Water Quality Scorecard, Incorporating Green Infrastructure Practices and the Municipal, Neighborhood and Site Scales* (2009) http://www.epa.gov/smartgrowth/pdf/2009_1208_wq_scorecard.pdf

59 EPA, *Post-Construction Plan Review*, Menu of BMPs http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=factsheet_results&view=specific&bmp=123

Most local governments, including the District, already have some form of site plan review and post-construction verification process for development projects. Today's Final Permit includes them as critical accountability elements of the District stormwater program.

In addition, today's Final Permit requires the District to track volume reductions from all projects. This is a critical element of determining whether wasteload allocations are being achieved.

One commenter noted that EPA had not imposed a clear compliance schedule for this requirement. The Final Permit includes a deadline of the end of the permit term for full compliance with this requirement, acknowledging that updating codes, ordinances and other policies may be a time-consuming process that typically requires consultation and support from elected officials, coordination amongst multiple departments and agencies, e.g., the Office of Planning, the Department of Transportation and the Department of the Environment, as well as public involvement.

(4.1.3 Off-Site Mitigation and/or Fee-in Lieu for all Facilities): Today's Final Permit requires the District to establish a program for Off-site Mitigation and/or Fee-In-Lieu within 18 months of the effective date of the Final Permit. The Final Permit provides the District flexibility to develop a program with either one of those elements or both. Specifically the Permit states:

The program shall include at a minimum:

1) Establishment of baseline requirements for on-site retention and for mitigation projects. On-site volume plus off-site volume (or fee-in-lieu equivalent or other relevant credits) must equal no less than the relevant volume in Section 4.1.1;
2) Specific criteria for determining when compliance with the baseline requirement for on-site retention cannot technically be met based on physical site constraints, or a rationale for why this is not necessary;
3) For a fee-in-lieu program, establishment of a system or process to assign monetary values at least equivalent to the cost of implementation of controls to account for the difference in the performance standard, and the alternative reduced value calculated; and
4) The necessary tracking and accounting systems to implement this section, including policies and mechanisms to ensure and verify that the required stormwater practices on the original site and appropriate required off-site practices stay in place and are adequately maintained.

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60 Center for Watershed Protection, *Managing Stormwater in Your Community, A Guide for Building an Effective Post-Construction Program* (2008) http://www.cwp.org/documents/cat_view/76-stormwater-management-publications/90-managing-stormwater-in-your-community-a-guide-for-building-an-effective-post-construction-program.html

61 EPA, *MS4 Permit Improvement Guide* (2010) http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

62 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

This provision is included in today's Final Permit in acknowledgement that meeting the performance standard in 4.1.1 may be challenging in some situations. The NRC Report noted that an offset system is critical to situations when on-site stormwater control measures are not feasible.[63] In cases where a full complement of onsite controls is not feasible, offsite practices should be employed that result in net improvements to watershed function and water quality at the watershed scale. The *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* contemplates offsets in MS4 programs.[64] EPA has also articulated expectations in the Chesapeake Bay TMDL that it expects the Bay jurisdictions to account for growth via offset programs that are consistent with Section 10 and Appendix S of the Chesapeake Bay TMDL.[65]

EPA received numerous comments on this provision. No commenter was opposed to an offset program *per se*, but there were various opinions on how it should function. Because there was so much general interest in how this program would be shaped, EPA is responding to these comments by requiring the program be subject to public notice followed by submittal to and review by EPA. EPA believes this provides all of those with an interest in this program the opportunity to provide meaningful input. EPA will also review the program to ensure that it has adequate tracking and enforceability components, and meets the water quality objectives of the Final Permit. It is EPA's expectation that these mechanisms will be described by the permittee in the proposed implementation scheme. EPA emphasizes that accountability measures (*e.g.,* inspections, maintenance, tracking) will be critical to ensure the success of the program, and therefore the District's plan will be closely scrutinized for those measures prior to implementation.

The Final Permit includes an option for the District to include incentives for other environmental objectives, e.g., carbon sequestration, in the offset program. As noted, because of the wide array of opinions EPA feels that consideration of some of these other environmental objectives deserve a full vetting by the community. The District is not required to include any incentives or credits along these lines in the program. If it chooses to do so, anything implemented to achieve those other environmental objectives must be subject to the same level of site plan review, inspection, and operation and maintenance requirements as stormwater controls implemented in fulfillment of other permit requirements.

Finally, for the duration of this permit term, the Final Permit exempts District owned and operated transportation rights-of-way projects from the requirement to mitigate stormwater off-site or pay into a fee-in-lieu program for development projects where the on-site performance standard cannot be met. This decision was based on the District request for short-term relief while the District Department of Transportation develops new stormwater management design, construction, and operation and maintenance processes, protocols, requirements and

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63 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

64 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3final07_29_10.pdf

65 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

specifications for transportation systems and public rights of way. EPA notes that this exemption does not apply to other District owned projects.

(4.1.4 Green Landscaping Incentives Program): Green infrastructure regulatory and incentive programs are becoming common across the country.[66,67] Landscaping requirements that provide flexibility and a suite of options from which to select appropriate green infrastructure practices and systems, e.g. Seattle's Green Factor[68], have proven to be quite popular with developers, land owners and municipal officials.

The green landscaping provision is consistent with the 2008 Modified Letter of Agreement to the 2004 Permit[69] that articulated a long list of specific green infrastructure measures to be implemented, coupled with the commitment by the District to develop green infrastructure policies and incentives. Because these green landscaping provisions fill an important gap in the District's suite of green infrastructure-related policies, EPA specifically identified landscaping as an important area for development of incentives.

Other than general support EPA received little comment on this provision, thus the Final Permit has not been modified from the Draft Permit.

(4.1.5 Retrofit Program for Existing Discharges): Changes in land cover that occurred when urban and urbanizing areas were developed have changed both the hydrology and pollutant loadings to receiving waters and have led to water quality problems and stream degradation. In order to protect and restore receiving waters in and around the District stormwater volume and pollutant loadings from sites with existing development must be reduced. Due to historical development practices, most of these areas were developed without adequate stormwater pollutant reduction or water quality-related controls. To compensate for the lack of adequate stormwater discharge controls in these areas, EPA is requiring the District to include retrofit elements in the stormwater management program.[70,71,72]

EPA has acknowledged the importance of including retrofit requirements in MS4 permits.[73,74] The Chesapeake Bay TMDL allocations are founded on the expectation of

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66 EPA, *Green Infrastructure Incentive Mechanisms*, Green Infrastructure Municipal Handbook Series, (2009) http://www.epa.gov/npdes/pubs/gi_munichandbook_incentives.pdf

67 EPA, *Green Infrastructure Case Studies: Municipal Policies for Managing Stormwater with Green Infrastructure* (2010) http://www.epa.gov/owow/NPS/lid/gi_case_studies_2010.pdf

68 City of Seattle, *Seattle Green Factor*, http://www.seattle.gov/dpd/Permits/GreenFactor/Overview/

69 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

70 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

71 Schueler, Thomas. *Urban Subwatershed Restoration Manual No. 1: An Integrated Framework to Restore Small Urban Watersheds* (2005)

72 EPA, *Green Infrastructure Retrofit Policies*, Managing Wet Weather with Green Infrastructure Municipal Handbook Series (2008) http://www.epa.gov/npdes/pubs/gi_munichandbook_retrofits.pdf

73 EPA, *MS4 Permit Improvement Guide* (2010) EPA 833-R-10-001,

stormwater retrofits in the District (*see* Section 8 of the TMDL[75]), based on actions outlined in the District's final Phase I WIP developed for the Chesapeake Bay TMDL.[76]

EPA received quite a few comments on this set of requirements. Some commenters strongly approved of the retrofit provisions in the Draft Permit, while others expressed concerns.

Today's Final Permit requires the District to develop performance metrics for retrofits, using the performance standard in Section 4.1.1 as the starting point, *i.e.*, if projects can meet the environmental objectives specified in Part 4.1.1 they should. However, understanding the challenges associated with retrofitting some sites, the Final Permit allows that the performance metrics for retrofit projects may vary from the performance standard in 4.1.1, *e.g.*, different requirements may apply to differing sets of circumstances, site conditions or types of projects. EPA believes the most important first step in a robust retrofit program is to set stringent environmental objectives, thus the requirement to develop clear and specific performance standards. EPA fully expects the District to utilize this permit term to develop design, construction and operation and maintenance protocols to meet the requisite performance standards.

Several modifications were made to this provision:

1) Because there was so much interest in this provision EPA added a requirement for public notice.
2) Because there were so many opinions on how this program should function, EPA removed some of the criteria in the Final Permit to allow the community to shape the program. In exchange EPA included a requirement that the relevant performance metrics be submitted to EPA for review and approval.
3) The compliance schedule for development, public notice and submittal to EPA of performance metrics for a retrofit program has been extended from one year to 18 months at the request of the District. EPA believes the additional time will allow better coordination of the offset program with the District's stormwater regulations (also with an 18 month compliance schedule), and allow adequate time for a public notice process and an EPA review.

Also included in the permit is a requirement that the District must work with federal agencies to document federal commitments to retrofitting their properties. Consistent with Executive Order 13508 on the Chesapeake Bay, the federal strategies developed pursuant thereto, and in fulfillment of the Chesapeake Bay TMDL, federal agencies have obligations to

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http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

74 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed* (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3fmal07_29_10.pdf

75 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

76 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

implement substantive stormwater controls. In order to accurately account for loads from federal lands that discharge through the District MS4 system, the District needs to be able to track the pollutant reductions resulting from federal actions. To do so the District will need to identify federal facilities and properties and work with federal agencies to identify retrofit opportunities on federal lands and properties and track progress in retrofitting these lands and properties.

In addition, the Final Permit requires the District to make pollutant load and volume reduction estimates for all retrofit projects for the nine pollutants in Table 4, and by each of the major District watersheds (Anacostia River, Rock Creek, Potomac River).

The Final Permit requires the District to implement retrofits to manage runoff from 18,000,000 square feet of impervious surfaces during the permit term. Of that total, 1,500,000 square feet must be in transportation rights-of-way. Although these initial drainage area objectives are not especially aggressive, EPA believes that a strong foundation for the retrofitting program must first be established. EPA can then set more aggressive drainage area objectives in subsequent permits. In its comments on the Draft Permit the District contended that the requirement in the Draft Permit for the retrofitting of 3,600,000 square feet of impervious surfaces in transportation rights-of-way was more than it could accomplish in a single permit term. The District suggested 1,500,000 square feet, almost 60% less than what was required in the Draft Permit would be achievable. In consideration of these comments, the total square footage of retrofitted impervious surfaces that must be in transportation rights-of-way is 1,500,000 square feet. EPA notes that the total square footage retrofit requirement is unchanged. EPA believes that this requirement will establish a strong foundation for the implementing a retrofitting program overall and in transportation rights-of-way, which can be followed in subsequent permits with more aggressive drainage area objectives. In addition, the Final Permit includes an additional provision that is intended to enhance the District's retrofit opportunities (*see* next paragraph).

The Final Permit establishes a requirement for the District to adopt and implement stormwater retention requirements for properties where less than 5,000 square feet of soil is being disturbed but where the buildings or structures have a footprint that is greater than or equal to 5,000 square feet and are undergoing substantial improvement. Substantial improvement, as consistent with District regulations at 12J DCMR § 202, is any repair, alteration, addition, or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. Although this specific element was not included in the Draft Permit, it reflects the fact that the District has already considered this provision in their proposed stormwater regulations, and is consistent with the overall retrofit approach in the Draft Permit. Both the District and EPA believe this will promote retrofitting on smaller sites that would not otherwise be subject to the performance standard in the stormwater regulations.

This section of the Final Permit also requires the District to ensure that every major renovation/ rehabilitation project for District-owned properties within the inventory of Department of Real Estate Services (DRES) and Office of Public Education Facilities Modernization (OPEFM) includes on-site retention measures to manage stormwater. This

requirement is based in part on EPA's understanding that these two agencies have control over most District buildings and renovation projects in the District. This provision was in Section 4.2 Operation and Maintenance of Stormwater Capture Practices of the Draft Permit, and was moved to Section 4.1.5 of the Final Permit since it is a retrofit requirement rather than a maintenance requirement.

(4.1.6 Tree Canopy): Several studies have documented the capacity for planting additional trees in the District and quantified the benefits.[77,78,79,80] The District commitments to the tree planting requirements of the Final Permit are documented in the 2008 Modified Letter of Agreement to the 2004 Permit,[81] and the District's Chesapeake Bay TMDL WIP.[82] The number was derived from the District Urban Tree Canopy Goal[83] of planting 216,300 trees over the next 25 years, an average of 8,600 trees per year District-wide. Adjusting this number for the MS4 area of the District, the Final Permit requires the District to develop a strategy to plant new trees at a rate of at least 4,150 annually.

There was some interest from commenters in providing input to the tree canopy strategy, thus the Final Permit includes a requirement for the District to public notice this strategy. Also, in response to several comments, EPA has clarified the annual number as a net increase in order to account for mortality.

(4.1.7 Green Roof Projects): Quite a few studies have documented the water quality benefits of green roofs.[84,85,86] The Green Build-out Model, a project specifically carried out to

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77 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, DC* (2007) (http://www.caseytrees.org/planning/greener-development/gbo/index.php).

78 University of Vermont and the U.S. Forest Service, A Report on Washington D.C.'s Existing and Potential Tree Canopy (2009) http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/documents/UnivofVermontUTCReport4-17-09.pdf

79 Casey Trees, et al. *See* several District tree inventories: http://www.caseytrees.org/geographic/tree-inventory/community/index.php

80 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, D.C.* (2007) http://www.caseytrees.org/planning/greener-development/gbo/documents/GBO_Model_Full_Report_20051607.pdf

81 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

82 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

83 Casey Trees, Urban Tree Canopy Goal website: http://www.caseytrees.org/geographic/key-findings-data-resources/urban-tree-canopy-goals/index.php

84 EPA, *Green Roofs for Stormwater Runoff Control* (2009) http://www.epa.gov/nrmrl/pubs/600r09026/600r09026.pdf

85 E. Oberndorfer et al, *Green Roofs as Urban Ecosystems: Ecological Structures, Functions, and Services* (2007) BioScience 57(10):823-833 http://www.bioone.org/doi/full/10.1641/B571005

86 M. Hathaway, W.F. Hunt, G.D. Jennings, *A Field Study of Green Roof Hydrologic and Water Quality Performance* (2008) Transactions of American Society of Agricultural and Biological Engineers, Vol. 51(1): 37-44 http://www.bae.ncsu.edu/people/faculty/jennings/Publications/ASABE%20Hathaway%20Hunt%20Jennings.pdf

evaluate the potential in the District for using green roofs and other green infrastructure measures to reduce flows and pollutants from the District's wet weather systems, documented significant opportunities for green roof implementation.[87]

The District commitments to green roof implementation are documented in the 2008 Modified Letter of Agreement to the 2004 Permit,[88] and the District Chesapeake Bay TMDL Watershed Implementation Plan.[89] The District is required to evaluate the feasibility of installing green roofs on District-owned buildings, and to install at least 350,000 square feet of green roof during the permit term.

(4.2 Operation and Maintenance of Retention Practices): Operation and maintenance, required pursuant to 40 C.F.R. 122.26(d)(2)(iv)(A)(*1*) and (*3*), is critical for the continued performance of stormwater control measures.[90,91] EPA has consistently noted the importance of operation and maintenance in regulatory guidance.[92,93,94] Today's Final Permit requires the District to ensure adequate maintenance of all stormwater control measures, both publicly and privately owned and operated.

The District has two years from the effective date of the Final Permit to develop and implement operation and maintenance protocols for all District owned and operated stormwater management practices. The District is also required to provide regular and ongoing training to all relevant contractors and employees.

The District is required to develop operation and maintenance mechanisms to ensure that stormwater practices are maintained and operated to meet the objectives of the program and that they continue to function over multiple permit cycles to provide the water quality benefits intended by design. Such mechanisms may include deed restrictions, ordinances and/or maintenance agreements to ensure that all non-District owned and operated stormwater control measures are adequately maintained. In addition the District must develop and/or refine

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87 Casey Trees, *The Green Build-out Model: Quantifying the Stormwater Management Benefits of Trees and Green Roofs in Washington, D.C.* (2007) http://www.caseytrees.org/planning/greener-development/gbo/documents/GBO_Model_Full_Report_20051607.pdf

88 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

89 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

90 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

91 EPA Website: Stormwater Control Operation and Maintenance. http://www.epa.gov/owow/NPS/ordinance/stormwater.htm

92 EPA, *MS4 Permit Improvement Guide* (2010) EPA 833-R-10-001, http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf

93 EPA, *MS4 Program Evaluation Guidance* (2007) EPA-833-R-07-003, http://www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf

94 EPA, *Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed*, (2010) http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/MS4GuideR3fmal07_29_10.pdf

verification mechanisms, such as inspections, and an electronic inventory system to ensure the long-term integrity of stormwater controls in the District.

In addition the District is required to develop a Stormwater Management Guidebook and associated training within eighteen months of the effective date of the Final Permit. This requirement is based on commitments in the 2008 Modified Letter of Agreement to the 2004 Permit[95]. Completion of the Guidebook has been delayed pending finalization of the District's revised stormwater regulations. However EPA expects Guidebook completion to parallel finalization of the District's revised stormwater regulations, which incorporate the standards and requirements of the Final Permit.

(4.3 Management of District Government Areas): Requirements in this section of the Final Permit largely continue provisions in the 2004 Permit. EPA received few comments on most elements of this section of the Draft Permit. The following revisions were made:

1) The District now must notify not only public health agencies within 24-hours in the event of a sanitary sewer overflow, but also ensure adequate public notification procedures within that same time period (Section 4.3.1 of the Final Permit). EPA emphasizes that this provision in no way authorizes sanitary sewer overflow discharges either directly or via the MS4. Those discharges are expressly prohibited.
2) Within 18 months of the effective date of the Final Permit, the District shall complete, public notice and submit to EPA for review and approval a plan for optimal catch basin inspections, cleaning and repairs. The District shall fully implement the plan upon EPA approval. This revision is based on comments that the catch basin maintenance provisions on the Draft Permit were vague and not within the context of a comprehensive plan (Section 4.3.5.1 of the Final Permit).
3) Section 3.2 of the Draft Permit required the District to update its outfall inventory. One commenter noted that the District's 2006 Outfall Survey had already essentially accomplished this, and that meanwhile many of these outfalls were in severe disrepair, thus contributing to increased sediment loading to receiving waters. EPA agrees this is a serious concern, and has thus modified the Final Permit to require the District to undertake the following: within 18 months of the effective date of the Final Permit, and consistent with the 2006 Outfall Survey, the District shall complete, public notice and submit to EPA for review and approval an outfall repair schedule to ensure that approximately 10% of all outfalls needing repair are repaired annually, with the overall objective of having all outfalls in good repair by 2022 (Section 4.3.5.3 of the Final Permit).
4) Consistent with the District's *Enhanced Street Sweeping and Fine Particle Removal Strategy*,[96] an additional element has been included in Table 3, Street Sweeping. The

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95 District Department of Environment, *Modification to the Letter of Agreement dated November 27, 2007 for the NPDES Municipal Separate Storm Sewer (MS4) Permit DC0000222* (2008) http://www.epa.gov/reg3wapd/npdes/pdf/DCMS4/Letter.PDF

96 District Department of the Environment, *Municipal Separate Storm Sewer System Program Annual Report* (2010)

table now documents that environmental hotspots in the Anacostia River Watershed will now be swept at least two times per month from March through October.

(4.6 Management of Construction Activities): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. Several commenters suggested that these provisions needed to be significantly improved, including specifying more stringent effluent limitations, in order to address the impairments attributable to sediment.

While permitting authorities have a fair amount of latitude to modify many elements of a permit based on public comments, inclusion of a *de novo* numeric effluent limitation, when neither the Draft Permit nor the Draft Fact Sheet suggested such an option would require further public notice. Therefore, this Final Permit does not include a numeric effluent limitation for sediment discharged in stormwater from active construction sites.

However, EPA agrees that construction activities cause serious water quality problems, and has revised this section to require more robust oversight of construction stormwater controls. A significant cause of water quality problems caused by construction activities is the failure of construction site operators to comply with existing regulations. Thus, EPA expects increased inspections and enforcement activity to result in improved compliance and therefore reduced sediment loads.[97] Therefore the Final Permit includes construction site inspection frequency requirements to ensure compliance with the District erosion and sediment requirements.

(4.8 Flood Control Projects): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. EPA received few comments on this section. The following revision was made: a start date of six months after the effective date of the Final Permit was added for the requirement to collect data on the percentage of impervious surface area located in flood plain boundaries for all proposed development.

(4.10 Total Maximum Daily Load (TMDL) Wasteload Allocation (WLA) Planning and Implementation): There are several TMDLs with wasteload allocations that either directly or indirectly affect the District's MS4 discharges. The following are those that EPA has determined to be relevant for purposes of implementation via the Final Permit:

1. TMDL for Biochemical Oxygen Demand (BOD) in the Upper and Lower Anacostia River (2001)
2. TMDL for Total Suspended Solids (TSS) in the Upper and Lower Anacostia River (2002)
3. TMDL for Fecal Coliform Bacteria in the Upper and Lower Anacostia River (2003)
4. TMDL for Organics and Metals in the Anacostia River and Tributaries (2003)
5. TMDL for Fecal Coliform Bacteria in Kingman Lake (2003)
6. TMDL for Total Suspended Solids, Oil and Grease and Biochemical Oxygen Demand in Kingman Lake (2003)

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97 EPA, *Office of Enforcement and Compliance Assurance Accomplishments Report* (2008) http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf

7. TMDL for Fecal Coliform Bacteria in Rock Creek (2004)
8. TMDL for Organics and Metals in the Tributaries to Rock Creek (2004)
9. TMDL for Fecal Coliform Bacteria in the Upper, Middle and Lower Potomac River and Tributaries (2004)
10. TMDL for Organics, Metals and Bacteria in Oxon Run (2004)
11. TMDL for Organics in the Tidal Basin and Washington Ship Channel (2004)
12. TMDL for Sediment/Total Suspended Solids for the Anacostia River Basin in Maryland and the District (2007) [pending resolution of court vacature, Anacostia Riverkeeper, Inc. v. Jackson, No. 09-cv-97 (RCL)]
13. TMDL for PCBs for Tidal Portions of the Potomac and Anacostia Rivers in the District of Columbia, Maryland and Virginia (2007)
14. TMDL for Nutrients/Biochemical Oxygen Demand for the Anacostia River Basin in Maryland and the District (2008)
15. TMDL for Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia (2010)
16. TMDL for Nitrogen, Phosphorus and Sediment for the Chesapeake Bay Watershed (2010)

On July 25, 2011, in connection with a challenge by the Anacostia Riverkeeper and other environmental organizations, the U.S. District Court for the District of Columbia vacated EPA's approval of a total maximum daily load (TMDL) for sediment in the Anacostia River. While the court ruled in EPA's favor on a number of issues of significant importance to the TMDL program and that the TMDL adequately would achieve the designated aquatic life use, the court held that EPA's decision record did not adequately support EPA's determination that the TMDL would lead to river conditions that would support the primary (swimming) and secondary (boating) contact recreation and aesthetic designated uses. Based on its holding regarding the recreational and aesthetic uses, the court vacated the TMDL, but stayed its vacatur for one year to give EPA sufficient time to address the court's concerns. This TMDL is included in the above list (#12), because EPA expects this vacatur to be resolved within the time frame for TMDL efforts outlined in this permit. However, District planning and implementation efforts on this TMDL are not required until such time as the legal challenge is resolved and the TMDL is established.

Most EPA developed TMDLs for the District, as well as all District developed and EPA approved TMDLs can be found at the following website:
http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/index.htm.

The Chesapeake Bay TMDL for nitrogen, phosphorus and sediment is available at:
http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html.

The District also has a number of TMDL-related documents on its website:
http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495456.asp.

In addition, the tidal Anacostia River is listed as impaired for TSS and BOD, and the Upper Potomac River is listed as impaired for pH. TMDL establishment by EPA is pending for both.

As part of permit reissuance EPA has reviewed several existing TMDL implementation plans, including those for the Potomac River, Anacostia River and Rock Creek. EPA has identified the relevant implementation actions from those Plans and included them as requirements of the Final Permit, *e.g.*, green roofs, tree plantings. This approach provides more clarity for the District and the general public, and is also consistent with the obligation of NPDES permit writers to articulate enforceable provisions in permits to implement TMDL WLAs.

EPA took the same approach with the Anacostia River Watershed Trash TMDL[98] (Trash TMDL) (Part 4.10.1 of the Final Permit), which was finalized in September 2010. This TMDL was well-developed with quantifiable information about the sources and causes of impairment. The Trash TMDL assigned a specific WLA to MS4 discharges: removal of 103,188 pounds of trash annually. The Final Permit requires the District to attain this WLA as a specific single-year measure by the fifth year of this permit term. The Final Permit provision is based on the annual trash WLA for the District MS4. In the TMDL, annual WLAs were divided by 365 days to obtain daily WLAs. Given the fact that the daily and annual WLAs are congruent with each other, use of the annual WLA as the permit metric is consistent with the assumptions and requirements of the TMDL and is a more feasible measure for monitoring purposes.

Because the Anacostia River Watershed Trash TMDL provided a solid foundation for action, EPA determined the implementation requirements and included them in the Final Permit rather than require the District to develop a separate implementation plan. The Permit requires the District to determine a method for estimating trash reductions and submit that to EPA for review and approval within one year of the effective date of the Final Permit. In addition, the District must annually report the trash prevention/removal approaches utilized, and the overall total weight (in pounds) of trash captured for each type of approach.

On December 29, 2010, the U.S. Environmental Protection Agency established the Chesapeake Bay TMDL[99] to restore clean water in the Chesapeake Bay Watershed. The TMDL identifies the necessary reductions of nitrogen, phosphorus and sediment from Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia that, when attained, will allow the Bay to meet applicable water quality standards. EPA based the TMDL allocations, where possible, on information provided by the Bay jurisdictions in their final Phase I WIPs. The TMDL requires the Bay jurisdictions to have in place by 2017 the necessary controls to attain 60% of the reductions called for in the TMDL, and to have all controls in place by 2025. EPA has committed to hold jurisdictions accountable for results along the way, including ensuring that NPDES permits contain provisions and limits that are consistent with the assumptions and requirements of the relevant WLAs.

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98 Maryland Department of the Environment and District of Columbia Department of Environment, *Total Maximum Daily Loads of Trash for the Anacostia River Watershed, Montgomery and Prince George's Counties, Maryland and the District of Columbia* (2010) http://www.epa.gov/reg3wapd/pdf/AnacostiaTMDLPortfolio.pdf

99 EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment* (2010) http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html

The District's final Phase I Chesapeake Bay WIP proposed very aggressive targets for pollutant reductions in its MS4 program.

Pollutant of Concern	% Reductions in Urban Runoff Loads by 2025 from 2009 Baseline	Reductions in Urban Runoff Loads by 2025 from 2009 Baseline
Total Nitrogen	17	29,310 lbs/yr
Total Phosphorus	33	7,740 lbs/yr
Sediment	35	2,192 tons/yr

These numbers are from the District's final input deck to the Chesapeake Bay Model in association with the final Phase I WIP.

The Final Permit requires a very robust set of measures, based on a determination that these measures are necessary to ultimately achieve the specified reductions. EPA took a similar approach with the Chesapeake Bay TMDL as it did with the aforementioned TMDLs, and incorporated specific implementation measures into the Final Permit. Although EPA did not finalize the Chesapeake Bay TMDL until December 2010, EPA had a reasonably clear understanding of what would be needed even prior to publishing the Draft Permit because of the significant amount of data, modeling output and other information available in advance of its finalization, as well as many months of ongoing discussions with the District about the elements of its final Phase I WIP.[100] Based on the final TMDL , EPA is assured that the Final Permit is consistent with the assumptions and requirements of the WLAs in the TMDL.

In partial fulfillment of attaining the Chesapeake Bay WLAs, the Final Permit contains: a new performance standard for development, a requirement for an offset program for development, numeric requirements for tree plantings and green roof installation, numeric requirements for retrofits, and a variety of other actions. The relevant sections of this Final Fact Sheet discuss those provisions more fully.

There will be two additional permit terms prior to 2025 during which the District will implement many additional and/or more robust measures to attain its Bay TMDL WLAs. Provisions, targets and numeric thresholds in this Final Permit are not necessarily the ones that will be included in subsequent permits. EPA believes, however, that the 2011 Final Permit sets the foundation for a number of actions and policies upon which those future actions will be based.

Section 4.10.2 of the Final Permit requires the District to implement and complete the proposed replacement/rehabilitation, inspection and enforcement, and public education aspects of the strategy for Hickey Run to satisfy the applicable oil and grease TMDL wasteload allocations. In addition, the District is required to install end-of-pipe management practices at four identified outfalls to address oil and grease and trash in Hickey Run no later than the end of this permit term. Implementation requirements to attain these WLAs were initiated during prior

100 District of Columbia Department of Environment, *Chesapeake Bay TMDL Watershed Implementation Plan* (2010) http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/tmdl/Final_District_of_Coluimbia_WIP_Bay_TMDL.pdf

permit terms. The requirements of today's Final Permit are intended to bring the District to the concluding stages of attaining the Hickey Run oil and grease and trash WLAs.

The 2003 District of Columbia TMDL for oil and grease in the Anacostia River noted that the waterbody was no longer impaired by oil and grease. In particular data from Hickey Run, which provided the basis for listing the Anacostia River as an impaired water body, had demonstrated consistent compliance with applicable water quality standards for oil and grease: for twenty-one samples taken in Hickey Run between January and December 2002, no values exceeded the 10mg/L standard, and only one sample exceeded a 5 mg/L detection limit value. The 2003 TMDL further concluded that on-going implementation activities, which included public education and automobile shop enforcement actions, caused a significant decrease in ambient pollutant concentrations.[101] The Final Permit includes a provision for additional controls on oil and grease in Hickey Run should monitoring during this permit term indicate it is necessary. However, per the demonstration noted above, EPA believes it likely this may not be necessary.

One commenter indicated that the shift from an aggregate numeric effluent limit for four outfalls into Hickey Run in the 2004 permit to a management practice-based approach in the Draft Permit violated the Clean Water Act's prohibition against backsliding, section 402(o)(1) of the CWA, 33 U.S.C. § 1342(o)(1) ("[A] Permit may not be renewed, reissued, or modified ... subsequent to the original issuance of such Permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous Permit"). In response, EPA notes that a non-numeric effluent limitation is not automatically less stringent than a numeric effluent limitation. A different (numeric or non-numeric) effluent limitation only violates the anti-backsliding prohibition if it can be fairly compared to the prior numeric limit and found to be less stringent than that requirement. *See e.g., Communities for a Better Environment v. State Water Resources Control Bd.,* 132 Cal. App. 4th 1313 (August 29, 2005) (finding that no backsliding had occurred where the effluent limit in existing permit was not "comparable" to WQBEL in previous permit). In this case EPA 1) notes that additional controls on oil and grease may not be needed (as explained above), and 2) has determined regardless that compliance with the performance standards in the Final Permit will result in improved water quality protections for the District MS4 receiving streams more effectively than did the previous numeric effluent limitations (see discussions in relevant sections).

Section 4.10.3 of today's Final Permit requires the District to develop a Consolidated TMDL Implementation Plan (Consolidated Plan) for all TMDL wasteload allocations assigned to District MS4 discharges. All applicable WLAs must be considered in this plan, though the TMDLs listed at the beginning of this Section form the basis for District action to meet this requirement. EPA has evaluated these TMDLs along with existing water quality data and has concluded that *E. coli*, total nitrogen, total phosphorus, total suspended solids, copper, lead, zinc and trash are critical pollutants of concern for District waters, and should be the focus of implementation measures as well as of a revised monitoring program (*see* Section 5.1 for a

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101 District of Columbia, *Final Total Maximum Daily Load for Oil and Grease in the Anacostia River* (2003) http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/AnacostiaRiver/AnacoatiaOilReport.pdf

discussion of the latter).

The rationale for a Consolidated Plan is to allow for more efficient implementation of control measures. In many cases TMDLs have been developed on a stream segment basis, which is not always the most logical framework for implementation of controls. In addition, the solutions for reducing many pollutants and/or improving water bodies will be the same stormwater control measures and/or policies, and it would be wasteful of resources and duplicative to have separate implementation plans under those circumstances.

The Final Permit requires the Consolidated Plan to include:

1) Specified schedules for attaining applicable wasteload allocations for each TMDL; such schedules must includes numeric benchmarks that specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks.
2) Interim numeric milestones for TMDLs where final attainment of applicable wasteload allocations requires more than one permit cycle. These milestones shall originate with the third year of this permit term and every five years thereafter.
3) Demonstration using modeling of how each applicable WLA will be attained using the chosen controls, by the date for ultimate attainment.
4) The Consolidated TMDL Implementation Plan elements required in this section will become enforceable permit terms upon approval of such Plans, including the interim and final dates in this section for attainment of applicable WLAs.
5) Where data demonstrate that existing TMDLs are no longer appropriate or accurate, the Plan shall include recommended solutions, including, if appropriate, revising or withdrawing TMDLs.

Some of the applicable TMDLs developed within the District were based on limited or old data. In those cases the District may choose to reevaluate these waters and impairments to determine if revising or withdrawing the TMDL, or other action, would be appropriate.

The District has two years from the date of Final Permit issuance to develop, public notice and submit the Consolidated Plan to EPA for review and approval. EPA believes the required elements (1-5, above) will ensure clarity and enforceability, but also encourages interested parties to participate in the public process. EPA added this public notice requirement to the Final Permit because of the significant interest expressed by commenters on District TMDLs.

Section 4.10.4, Adjustments to TMDL Implementation Strategies, requires the District to make mid-course improvements to implementation measures and policies whenever data indicate insufficient progress towards attaining any relevant WLA. The District must adjust its management programs to compensate for the inadequate progress within 6 months, and document the modifications in the Consolidated TMDL Implementation Plan. The Plan modification shall include a reasonable assurance demonstration of the additional controls to achieve the necessary reductions, *i.e.*, quantitatively linking sources and causes to discharge

quality. In addition, annual reports must include a description of progress as evaluated against all implementation objectives, milestones and benchmarks, as relevant.

Finally, with respect to any new or revised TMDL that may be approved during the permit term, the Final Permit makes allowances for reopening the permit to address those WLAs (see Section 8.19 of the Final Permit: Reopener Clause for Permits), if necessary. EPA believes that reopening the permit will not typically be necessary since the Final Permit requires the District to update the Consolidated Plan within six months for any TMDL approved during the permit term with wasteload allocations assigned to District MS4 discharges, and also to include a description of revisions in the next regularly scheduled annual report.

(4.11 Additional Pollutant Sources): Requirements in this Section of the Final Permit largely continue provisions in the 2004 Permit. EPA notes that the provisions of this section were mostly included in Section 3 of the Draft Permit.

5. MONITORING AND ASSESSMENT OF CONTROLS

(5.1 Revised Monitoring Program): As included in the Draft Permit, the monitoring requirements for the District's stormwater program have been significantly updated from the last permit cycle. This revision reflects the fact that the District has already performed broad monitoring of a variety of parameters over the last two permit cycles. The Phase I stormwater regulations require representative sampling for the purpose of discharge characterization in the first permit term, or initial years of the program (40 C.F.R. §122.26(d)(1)(iv)(E)). The District now has a decade worth of this type of data, and it is timely to update the monitoring program to more effectively evaluate the effectiveness of the program, and to more effectively and efficiently use the District's funds for this purpose. As noted in the National Research Council's report *Urban Stormwater Management in the United States* [102], the quality of stormwater from urbanized areas has been well-characterized. Continuing the standard end-of-pipe monitoring typical of most MS4 programs has produced data of limited usefulness because of a variety of shortcomings (as detailed in the report). The NRC Report strongly recommends that MS4 programs modify their evaluation metrics and methods to include biological and physical monitoring, better evaluations of the performance/effectiveness of controls and overall programs, and an increased emphasis on watershed scale analyses to ascertain what is actually going on in receiving waters. The report also emphasizes the link between study design and the ability to interpret data, *e.g.*, having enough samples to ensure that conclusions are statistically significant.

Consistent with these goals, the Final Permit requires the District to develop a Revised Monitoring Program to meet the following objectives:

1) Make wet weather loading estimates of the parameters in Table 4 from the MS4 to receiving waters. Number of samples, sampling frequencies and number and locations of

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102 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

sampling stations must be adequate to ensure data are statistically significant and interpretable.

2) Evaluate the health of the receiving waters, to include biological and physical indicators such as macroinvertebrates and geomorphologic factors. Number of samples, frequencies and locations must be adequate to ensure data are statistically significant and interpretable for long-term trend purposes (not variation among individual years or seasons).

3) Any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. This strategy must align with the Consolidated TMDL Implementation Plan required in Part 4.10.3 For all pollutants in Table 4 monitoring must be adequate to determine if relevant WLAs are being attained within specified timeframes in order to make modifications to relevant management programs, as necessary.

The Final Permit requires the District to public notice the Revised Monitoring Program, and to submit it to EPA for review and approval within two years of the effective date of the Final Permit.

EPA also significantly refined the list of required pollutant analytes/parameters for which monitoring is required from over 120 to 9:

(Table 4 from the Final Permit)
Monitoring Parameters

Parameter
E. coli
Total nitrogen
Total phosphorus
Total Suspended Solids
Cadmium
Copper
Lead
Zinc
Trash

These parameters are those for which relevant stormwater wasteload allocations exist, or (in the case of cadmium) where monitoring data indicate that the pollutant is occurring in discharges at concentrations and frequencies to consider it a pollutant of concern. End-of-pipe analytical monitoring is an expensive undertaking, and EPA feels strongly that the District's water quality-related evaluations will be much more robust and actionable with an enhanced focus on true pollutants of concern, along with the elimination of analytes for which monitoring routinely shows non-detect concentrations, and/or those to which notable water quality problems have not been linked.

One modification has been made to this list for the Final Permit from the Draft Permit.

The Draft Permit required evaluation of Trash reductions in the relevant sections for the Anacostia River Watershed Trash TMDL (4.10.1), but failed to include it in Table 4 (Table 3 of the Draft Permit). EPA has added trash as a monitoring parameter to this table to correct that oversight.

(5.2 Interim Monitoring): During the interim period from the effective date of the Final Permit until EPA approves the Revised Monitoring Program, the Final Permit requires the District to largely continue the monitoring program established and updated under the 2000 and 2004 permits, except the monitoring program is only required for the list of monitoring parameters in Table 4, which has been reduced to the nine parameters as discussed above.

EPA received several comments and questions on the interim monitoring requirements. Individual responses are included in the Responsiveness Summary published with the Final Permit and this Final Fact Sheet. EPA chose to not modify the interim monitoring provisions for the Final Permit because: 1) they are largely an extension of the same requirements and methods already approved and established under prior permits, which will ensure that data collected during the interim monitoring period are comparable to data collected during the past decade, thus providing "apples to apples" comparisons in data interpretation; and 2) EPA believes that the District's monitoring-related resources are more effectively spent developing a robust revised program, rather than revising the interim program.

(5.4 Area and/or Source Identification Program): The Final Permit provides that "[t]he permittee shall continue to implement a program to identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters, including but not limited to those pollutants identified in Table 4 herein." This is identical in substance to section 5.5 in the Draft Permit and essentially continues the requirements from the 2004 MS4 Permit. EPA received a comment that this provision has been inadequate to identify sources contributing pollutants to MS4 discharges. EPA recognizes that this provision is general, but believes that the District's ongoing practices are sufficient during the interim monitoring period. EPA notes that the Final Permit requires the Revised Monitoring Program to include any additional necessary monitoring for purposes of source identification and wasteload allocation tracking. The public will have a chance to comment on the proposed objectives and methods in Plan, and EPA will review and approve this Plan. Therefore there will be several opportunities to ensure that the District has robust methods for identify additional pollutant inputs to District MS4 discharges.

(5.7 Reporting of Monitoring Results): In response to several comments, and because of the potential availability of electronic reporting in the future, EPA made several modifications to this Section of the Final Permit. When available the District may submit monitoring data through NetDMR, a national tool for regulated Clean Water Act permittees to submit discharge monitoring reports (DMRs) electronically via a secure Internet application to EPA. *See* http://www.epa.gov/netdmr/. However, if this system is not available to the National Marine Fisheries Service, then the District must continue to submit hard copies. The Final Permit eliminates the requirement for the District to submit monitoring reports to itself. This section

clarifies (consistent with Section 6.2) that all monitoring results from a given year be summarized in the following annual report.

6. REPORTING REQUIREMENTS

Permit reporting is required pursuant to 40 C.F.R. § 122.41(l). EPA has made a number of minor edits to this section primarily for the purposes of: maintaining consistency with other Sections of the Final Permit (as those provisions necessitated changes in reporting, the Final Fact Sheet discusses those changes in association with the relevant Section); eliminating redundancy; and to provide clarification.

(6.2 Annual Reporting): Consistent with comments from a number of commenters regarding public access to documents, today's Final Permit requires the District to post each Annual Report on its website at the same time the Report is submitted to EPA.

The separate 'Reporting on Funding' in the Draft Permit has been eliminated in the Final Permit because it was largely redundant with other reporting requirements, and because it was beyond the scope of what is needed from the District. The Final Permit requires annual reporting on projected costs and budget for the coming year as well as expenditures and budget for the prior year, including (i) an overview of the District's financial resources and budget, (ii) overall indebtedness and assets, (iii) sources for funds for stormwater programs, and (iv) a demonstration of adequate fiscal capacity to meet the permit requirements. However, EPA has concluded that additional detail would be superfluous. In addition, beyond a demonstration of basic budget considerations as outlined in the Final Permit, how the District chooses to allocate resources to comply with the permit is an internal decision.

EPA has also included a provision for an Annual Report Meeting in this permit in order to improve communication between the District and the Agency. This meeting will provide an opportunity for EPA to obtain more in-depth knowledge of the District's program, and should also enhance feed-back on the program. The permit requires the District to convene the first Annual Report Meeting within 12 months of issuance of the permit. If both parties agree that this first meeting was successful, the Annual Report meeting shall be extended for the duration of the permit term.

7. STORMWATER MODEL

The Stormwater Model and associated Geographical Information System are tools used by the District to help track and evaluate certain components of the water quality program. The Final Permit requires the use and maintenance of this system as a component of the District's Stormwater Management Program. There were no modifications to this Section between the Draft Permit and the Final Permit.

8. STANDARD PERMIT CONDITIONS FOR NPDES PERMITS

The provisions in Part 8 are requirements generally applicable to all NPDES permits, pursuant to 40 C.F.R. § 122.41, as well as other applicable conditions pursuant to § 122.49 and specific statutory or regulatory provisions as noted in the permit. No changes were made to this section of the permit.

9. PERMIT DEFINITIONS

Most changes to this section from the Draft Permit consist of minor clarifications. In addition, several terms were eliminated from this section because they do not appear elsewhere in the Final Permit: 'goal', 'internal sampling station', 'significant spills', and 'significant materials'. The definition of 'MS4 Permit Area' was removed because it is already defined in Part 1.1.

A definition of "development" was added to clarify that development is "the undertaking of any activity that disturbs a surface area greater than or equal to 5,000 square feet." The definition further clarifies that the relevant performance standard for development applies to projects that commence after 18 months from the effective date of the Final Permit or as soon as the District's stormwater regulations go into effect, whichever is sooner.

The definition of 'green roof' was modified to allow for the fact that some types of ecoroofs may be constructed without vegetation or soil media.

The definition of "retrofit" was modified to focus on environmental outcomes, *i.e.,* reductions in discharge volumes and pollutant loads and improvements in water quality, rather than implementation of conveyance measures.

The definition of "predevelopment hydrology" was enhanced to clarify that the phrase refers to a "stable, natural hydrologic site condition that protects or restores to the degree relevant for that site, stable hydrology in the receiving water, which will not necessarily be the hydrologic regime of that receiving water prior to any human disturbance in the watershed." This definition is consistent with several seminal publications on the topic including *Urban Stormwater Management in the United States*[103] and references therein, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*[104], and *Guidance for Federal Land Management in the Chesapeake Bay Watershed*[105], issued in fulfillment of Part 502 of E.O. 13508.

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103 National Research Council, *Urban Stormwater Management in the United States* (2009) National Academy of Sciences http://www.nap.edu/catalog.php?record_id=12465

104 EPA, *Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act* (2009) http://www.epa.gov/owow_keep/nps/lid/section438/

105 EPA, *Guidance for Federal Land Management in the Chesapeake Bay Watershed*, Chapter 3. Urban

RELATIONSHIP TO NON-POINT SOURCE PROGRAM:

It should be noted that the measures required by the Permit are separate from those projects identified in the District's EPA-approved Non-Point Source Management Plan as being funded wholly or partially by funds pursuant to Section 319(h) of the Clean Water Act. See Section 3 of Permit ("These Permit requirements do not prohibit the use of 319(h) funds for other related activities that go beyond the requirements of this Permit, nor do they prohibit other sources of funding and/or other programs where legal or contractual requirements preclude direct use for stormwater permitting activities.").

ADMINISTRATIVE RECORD:

Copies of the documents that comprise the administrative record for the Permit are available to the public for review at the Martin Luther King, Jr. Public Library, which is located at 901 G Street, N.W. in Washington, D.C. An electronic copy of the proposed and final Permits and proposed and Final Fact Sheets are also available on the EPA Region III website, http://www.epa.gov/reg3wapd/npdes/draft_permits.html. For additional information, please contact Ms. Kaitlyn Bendik, Mail Code 3WP41, NPDES Permits Branch, Office of Permits and Enforcement, EPA Region III, United States Environmental Protection Agency, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

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and Suburban, EPA841-R-10-002, (2010) (http://www.epa.gov/owow_keep/NPS/chesbay502/pdf/chesbay_chap03.pdf)

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EXHIBIT 5

Boston, MA – Boston Water and Sewer Commission MS4 Permit

(Permit No. MAS010001)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

Boston Water and Sewer Commission

is authorized to discharge from all of its new or existing separate storm sewers: **195 identified Separate Storm Sewer Outfalls and associated receiving waters are Listed in Attachment A** to receiving waters named: **Belle Island Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler's Pond, Charles River, Chelsea River, Cow Island Pond, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond and unnamed wetlands, brooks and streams.**

in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective 30 days from date of signature.

This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists **of 20** pages and **Attachment A** in Part I including monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 29 day of September, 1999

Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA

Director, Division of
Watershed Management
Department of Environmental Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Boston or otherwise contributing to new or existing separate storm sewers owned or operated by the Boston Water and Sewer Commission, the "permittee".

2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new separate storm sewer outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by wastewater or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and are in compliance with applicable Federal, State and Boston Water and Sewer Commission regulations (Regulations Regarding the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission). The permittee shall provide a notification to EPA and MA DEP of all new separate storm sewer outfalls as they are activated and of all existing outfalls which are de-activated. The annual report (Part I.E.) will reflect all of the changes to the number of outfalls throughout the year.

3. Limitations on Coverage. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed at Attachment A are not authorized under this permit except where such discharges are:

   a. authorized by a separate NPDES permit; or

   b. identified by and in compliance with Part I.B.2.g.2 of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to develop and implement a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable the discharge of pollutants from the Municipal Separate Storm Sewer System. The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the Municipal Separate Storm Sewer System (MS4) authorized to discharge under this permit and shall reduce the discharge of pollutants to the maximum extent practicable. The storm water pollution prevention and management program requirements of this Part shall be implemented through the SWMP submitted as part of the permit application and revised as necessary.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures as they relate to discharges to the separate storm sewer:

a. Development The permittee shall assist and coordinate with the appropriate municipal agencies with jurisdiction over land use to ensure that municipal approval of all new development and significant redevelopment projects within the City of Boston which discharge to the MS4 is conditioned on due consideration of water quality impacts. The permittee shall cooperate with appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers. Such requirements shall limit increases in the discharge of pollutants in storm water as a result of new development, and reduce the discharge of pollutants in storm water as a result of redevelopment.

b. Used Motor Vehicle Fluids The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect used motor vehicle fluids (including, at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal. Such program shall be readily available to all residents of the City of Boston and publicized and promoted at least annually.

c. Household Hazardous Waste (HHW) The permittee shall coordinate with appropriate municipal agencies or private entities to assist in the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal and promote proper handling and disposal. Such program shall be readily available to all private residents. This program shall be publicized and promoted at least annually.

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the Storm Water Management Program (SWMP) which it described in its May 17, 1993 storm water permit application and updated June 1995 and June 1998 in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"). This SWMP outlined in the permit application, including all updates, is approvable upon issuance of this permit.

In accordance with Part I.E. Annual Report, no later than **March 1, 2000** the permittee shall describe all the updates which it has conducted and all additional measures it will take to satisfy the requirements of this permit and the goals of the storm water management program. The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis. The permittee will specifically address its roles and activities as they relate to portions of the SWMP which are not under its direct control (e.g. street sweeping, HHW collection, development, redevelopment). The permit may be modified to designate the agencies that administer these programs as co-permittees or require a separate permit. These entities would then be responsible for applicable permit conditions and requirements. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: The SWMP shall include controls necessary to reduce the discharge of pollutants from the Municipal Separate Storm Sewer System to the Maximum Extent Practicable (MEP). Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this standard. The SWMP shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). The permittee shall select measures or controls to satisfy the following water quality prohibitions:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts.

b. Structural Controls: The permittee shall operate and maintain all storm water structural controls which it owns or operates in a manner so as to reduce the discharge of pollutants to the MEP.

c. Areas of New Development and Significant Redevelopment: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also coordinate with appropriate municipal agencies to assist in the development, implementation, and enforcement of controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee shall assist appropriate municipal agencies to ensure that development activities conform to applicable state and local regulations, guidance and policies relative to storm water discharges to separate storm sewers.

d. Roadways: The permittee shall coordinate with appropriate agencies to assist in the implementation of measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including those related to deicing or sanding activities).

e. Flood Control Projects: The permittee shall ensure that any flood management projects within its direct control are completed after consideration of impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices it owns or operates to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall cooperate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the application of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee shall evaluate the necessity to implement controls to reduce discharge of pollutants related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators. The permittee shall require controls, within its authority, as necessary.

g. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its program to detect and remove illicit discharges (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for the discharge) and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit non-storm water discharges to the Municipal Separate Storm Sewer System, other than those authorized under this permit or a separate NPDES permit.

2. Unless identified by either the permittee, the Director, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee may incorporate appropriate control measures in the SWMP to ensure these discharges are not significant sources of pollutants to waters of the United States.

(a) water line flushing;
(b) landscape irrigation;
(c) diverted stream flows;
(d) rising ground waters;
(e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;

(f) uncontaminated pumped ground water;
(g) discharges from potable water sources;
(h) foundation drains;
(i) uncontaminated air conditioning or compressor condensate;
(j) irrigation water;
(k) uncontaminated springs;
(l) water from crawl space pumps;
(m) footing drains;
(n) lawn watering;
(o) non-commercial car washing;
(p) flows from riparian habitats and wetlands;
(q) swimming pool discharges which have been dechlorinated;
(r) street wash waters;
(s) discharges or flows from emergency fire fighting activities;
(t) fire hydrant flushing; and
(u) building washdown water which does not contain detergents.

3. The permittee shall prevent unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall implement a program to identify and limit the infiltration of seepage from sanitary sewers into the MS4.

4. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. The permittee must demonstrate that the prohibition is publicized at least annually, and that the information is available for non-English speaking residents of the City.

5. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for identification and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within sixty (60) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

h. Spill Prevention and Response: The permittee shall cooperate with appropriate federal, state, and municipal agencies in the development and implementation of a program to prevent, contain, and respond to spills that may discharge into or through the MS4. The spill response program may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use regulations. Except as explicitly authorized, materials from spills may not be discharged to Waters of the United States.

i. Industrial & High Risk Runoff: In cooperation with the DEP and EPA, the permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;

2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:

(a) any pollutants for which the discharger may monitor or which are limited in an existing NPDES permit for an identified facility;

(b) any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv);

(c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system.

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

j. Construction Site Runoff: The permittee shall continue to implement its site plan review process and ensure compliance with its existing regulations. The permittee shall also cooperate with appropriate municipal agencies in the development and implementation of a program to reduce the discharge of pollutants from construction sites to the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;

2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts and measures to minimize these impacts;

3. prioritized inspection of construction sites and enforcement of control measures as required by the permittee;

4. providing assistance to appropriate municipal agencies in the development of education and training measures for construction site operators; and

5. providing assistance to appropriate municipal agencies in the development of a notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

k. Public Education: The permittee, in coordination with other appropriate municipal agencies, shall implement a public education program including, but not limited to:

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, advertising on public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil, vehicle fluids and lubricants, and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) developed by municipal agencies or environmental organizations that facilitate better use, application, and/or disposal of materials identified in k.1 - k.3 of this section.

3. DEADLINES FOR PROGRAM COMPLIANCE: Except as provided in PART II, and Part I.B.7. the permittee shall continue to implement its Storm Water Management Program.

4. ROLES AND RESPONSIBILITIES OF PERMITTEE: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and appropriate municipal agencies impacting its efforts to comply with this permit.

5. LEGAL AUTHORITY: The permittee has demonstrated and shall maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, regulation, permit, contract, or an order to:

a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

b. Prohibit illicit discharges to the MS4;

c. As necessary, control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in regulations, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

6. STORM WATER MANAGEMENT PROGRAM RESOURCES The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

7. STORM WATER MANAGEMENT PROGRAM REVIEW AND MODIFICATION

a. Demonstration Project: Within **180** days of the effective date of the permit, the permittee shall submit a plan to assess the effectiveness of existing non-structural BMPs. This plan shall identify a drainage area or sub-area which has undergone an investigation for illicit connections and is believed to be reasonably free of sanitary sewer influence. The plan shall clearly specify activities to be conducted, responsible parties and method of assessment. The project shall commence within one year of the effective date of the permit and continue for at least one year. Within **90** days of project completion the permittee shall submit a report which identifies measures undertaken and effectiveness of those measures.

b. Program Review: The permittee shall participate in an annual review of its current SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;

2. An assessment of the effectiveness of controls established by the SWMP;

3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;

4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).

5. An assessment of staff and funding levels adequate to comply with the permit conditions.

c. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items c.2. or c.3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing or eliminating an ineffective or infeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless the Director comments on or denies the request within 60 days from submittal, the permittee shall implement the modification and proposed schedule. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost considerations),

(b) expectations on the effectiveness of the replacement BMP and proposed schedule for implementation, and

(c) an analysis of why the replacement of the BMP is expected to achieve the goals of the BMP to be replaced,

(d) in the case of an elimination of the BMP, an analysis of why the elimination is not expected to cause or contribute to a water quality impact.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part II.D.2.

d. Modifications required by the Permitting Authority: The Director or the State may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused, or contributed to, by discharges from the MS4;

2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or

3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications required by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet-weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. Improvement in the quality of discharges from the MS4 will be assessed based on the monitoring information required by this section, along with any additional pertinent information. There have been no numeric effluent limits established for this permit. Further monitoring or effluent limits may be established to ensure compliance with the goals of the Clean Water Act, appropriate Water Quality Standards, or applicable technology based requirements.

a. Representative Monitoring: Within **90** days after the effective date of this permit, the permittee shall submit a proposed sampling plan. The permittee shall monitor a minimum of five (5) representative drainage areas to characterize the quality of storm water discharges from the MS4. The proposed sampling plan shall consider monitoring each site three (3) times a year for a period of at least two years. All five sites shall be completed within the five year permit term and may be done partially or consecutively. The permittee shall choose locations representing the different land uses or is representative of drainage areas served by the MS4. The permittee may submit an alternative plan for sampling frequency only subject to the approval of EPA and DEP. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than **180** days from the effective date of the permit unless otherwise specified by EPA and DEP. Subsequent monitoring locations and parameters for the remainder of the permit term shall be determined based upon the results of these sampling locations and other water quality information available to EPA, DEP and the permittee.

b. Receiving Water Quality Monitoring. The permittee shall monitor a minimum of four (4) receiving waters three (3) times a year throughout the permit term to characterize the water quality impacts of storm water discharges from the MS4. Sampling shall be conducted during a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (0.1 inch) storm event. Within **90** days after the effective date of this permit, the permittee shall submit its proposed sampling plan. At a minimum, the monitoring program shall analyze for the following parameters: pH, Temperature, Dissolved Oxygen, Total Suspended Solids, BOD5, COD, Fecal Coliform, Total Nitrogen, Nitrate/Nitrite, Ammonia (as N), Total Phosphorous, Ortho-Phosphate, Oil and Grease, Total Petroleum Hydrocarbons, Surfactants, Fluoride, Copper, and Zinc. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved. This monitoring program shall commence no later than six months after the effective date of the permit.

c. Alternate Representative Monitoring: Monitoring locations may be substituted for just cause during the term of the permit. Requests for alternate monitoring locations by the permittee shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless commented on or denied by the Director, use of an alternate monitoring location may commence sixty (60) days from the date of the request.

2. Storm Event Data: For Part I.C.1.a Data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. The permittee shall maintain records of the date and duration (hours) of the storm event sampled; rainfall measurements or estimates (inches) of the storm event which generated the sampled runoff; the duration (hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and the total estimated volume (in gallons) of the discharge sampled. If manual sampling is employed, the permittee shall record physical observations of the discharge such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

3. Sample Type, Collection, and Analysis: The following requirements apply to samples collected pursuant to Part I.C.1.a.

a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.

b. Grab samples shall be used for the analysis of pH, temperature, cyanide, total phenols, residual chlorine, oil & grease, fecal coliform, and fecal streptococcus. For all other parameters, data shall be reported for flow weighted composite samples of the entire event or, at a minimum, the first three hours of discharge.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When the permittee is unable to collect samples required by Part I.C.1.a due to adverse climatic conditions, the discharger must submit, in lieu of sampling data, a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

5. Sampling Results. The permittee shall record the results of sampling and assessment of the data in a report and submit results with its Annual Report.

6. Wet Weather Screening: The permittee shall develop and implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4 as a result of rainfall or snow melt. Screening shall be conducted at anytime precipitation causes a flow from the storm sewer. At a minimum the wet weather screening program:

a. shall screen all major outfalls at least once during the permit term;

b. shall record the structural integrity of the outfall (if visible); physical observations of the discharge (if visible) such as color and smell; and visible water quality impacts such as floatables, oil sheen, or evidence of sedimentation in the vicinity of the outfall (e.g. sandbars).

c. shall summarize the results of the program in its Annual Report.

d. The permittee may submit an alternate wet weather screening pilot program on a watershed or sub-watershed basis. The pilot project concept must be submitted to EPA and DEP within 90 days of the effective date of the permit. The permittee shall identify reasons it believes that a system wide screening program would not be effective. The pilot project may be conducted in conjunction with Receiving Water Quality Monitoring (C.1.b.), but not Representative Monitoring(C.1.a.)

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: At least once during the permit term, the permittee shall inspect all major outfalls, or nearest upstream location not subject to tidal influence or backflow, during dry weather to identify those outfalls with dry weather flow. Dry weather screening shall be conducted when there has been no greater than 0.10 inches of precipitation in the 72 hours prior to screening. The permittee shall record the structural integrity of the outfall (if visible). If flow is observed, the permittee shall record physical observations such as color, visible sheen, turbidity, floatables, smell, and an estimate of flow. If sewage is suspected, the permittee shall develop a schedule for follow-up activities to eliminate the source as soon as is practicable. The permittee shall summarize the results in its Annual Report

2. Screening Procedures: Screening methodology need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D) or sample and collection methods of 40 CFR §136.

3. Follow-up on Dry Weather Screening Results: Follow-up activities shall be prioritized on the basis of:

   a. magnitude and nature of the suspected discharge;

   b. sensitivity of the receiving water; and

   c. other factors the permittee deems appropriate.

4. The permittee shall summarize the results of dry weather screening and submit with its Annual Report.

E. ANNUAL REPORT:

The permittee shall prepare and submit an annual report to be submitted by no later than **March 1, 2000** and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s);

2. Proposed changes to the storm water management program(s);

3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);

4. A summary of the data, including monitoring or screening data, that is accumulated throughout the reporting year;

5. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year.

6. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report as well as an assessment of adequacy of staffing and equipment;

7. A summary describing the number and nature of enforcement actions, inspections, and public education programs;

8. Identification of water quality improvements or degradation attributable to the permittee;

9. An analysis of the effectiveness and removal efficiencies of structural controls owned or operated by the permittee (such as the off-line particle separator in Fenwood Road); and,

10. An update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the costs of such repairs to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions-Part II of this permit.

G. REPORT SUBMISSION

1. Original signed copies of all notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
NPDES PROGRAMS (SPA)
P.O. Box 8127
Boston, MA 02114

2. Signed copies of all notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108
Attn: Mr. Steve Lipman

and

Massachusetts Department of Environmental Protection
Metro Boston/Northeast Regional Office
205A Lowell Street
Wilmington, MA 01887
Attn: Mr. Sabin Lord

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.

2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01E024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

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04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
25E037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

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26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B.U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

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21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 290062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

OUTFALL NUMBER	OUTFALL TYPE	LOCATION	NEIGHBORHOOD	SIZE (INCHES)	TIDEGATES No. OF GATES / NUMBER	RECEIVING WATER
08B066	MAJOR	EASEMENT/VFW PARKWAY	WEST ROXBURY	18		CHARLES RIVER
08B122	MAJOR	EASEMENT/NORTH OF SPRING STREET	WEST ROXBURY	30		CHARLES RIVER
08B126	MINOR	SPRING STREET EXTENDED	WEST ROXBURY	24		CHARLES RIVER
09B049	MAJOR	EASEMENT/RIVERMOOR STREET	WEST ROXBURY	30		COW ISLAND POND/ CHARLES RIVER
10B015	MAJOR	EASEMENT/CHARLES PARK ROAD	WEST ROXBURY	21		COW ISLAND POND/ CHARLES RIVER
11B123	MAJOR	EASEMENT/EAST OF BAKER ST. EXT.	WEST ROXBURY	72		BROOK FARM BROOK
12B010	MINOR	BAKER STREET	WEST ROXBURY	15		BROOK FARM BROOK
12B014	MINOR	BAKER STREET	WEST ROXBURY	12		BROOK FARM BROOK
12B031	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B033	MINOR	EASEMENT/BAKER STREET	WEST ROXBURY	18		BROOK FARM BROOK
12B124	MAJOR	EASEMENT/LaGRANGE STREET	WEST ROXBURY	120x102		BROOK FARM BROOK
13B002	MINOR	LaGRANGE STREET	WEST ROXBURY	15		UNNAMED STREAM
13B011	MINOR	LaGRANGE STREET	WEST ROXBURY	12		UNNAMED STREAM
06C110	MAJOR	EASEMENT/PLEASANTDALE ST. EXT.	WEST ROXBURY	60		NONE SHOWN
07C006	MAJOR	EASEMENT/VFW PARKWAY/BELLE AVENUE	WEST ROXBURY	126x126		CHARLES RIVER
08C318	MAJOR	WEDGEMERE ROAD	WEST ROXBURY	24		NONE SHOWN
08C319	MINOR	WEDGEMERE ROAD	WEST ROXBURY	24		UNNAMED STREAM
14C009	MAJOR	EASEMENT/WESTGATE ROAD	WEST ROXBURY	36		UNNAMED WETLANDS
21C212	MINOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	30		CHANDLERS POND
22C384	MAJOR	EASEMENT/LAKE SHORE ROAD	ALLSTON/BRIGHTON	36		CHANDLERS POND
24C174	MINOR	EASEMENT/NEWTON STREET	ALLSTON/BRIGHTON	9x20		CHARLES RIVER
24C031	MAJOR	PARSONS STREET	ALLSTON/BRIGHTON	60X60		CHARLES RIVER
06D057	MINOR	CEDAR CREST CIRCLE	WEST ROXBURY	21		NEPONSET RIVER
06D083	MINOR	MARGARETTA DRIVE	WEST ROXBURY	15		WETLANDS/CHARLES RIVER
06D084	MINOR	EASEMENT/MARGARETTA DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D085	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	12		WETLANDS/CHARLES RIVER
06D086	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D091	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	10		WETLANDS/CHARLES RIVER
06D184	MINOR	GEORGETOWN DRIVE	WEST ROXBURY	18		WETLANDS/CHARLES RIVER
06D187	MAJOR	EASEMENT/GROVE STREET	WEST ROXBURY	36		BROOK GROVE STREET CEMETERY
13D077/078	MAJOR	WEST ROXBURY PARKWAY/VFW PARKWAY	WEST ROXBURY	2-60		BUSSEY BROOK
24D032	MAJOR	NORTH BEACON STREET, ABOUT 800' EAST OF PARSONS STREET	ALLSTON/BRIGHTON	119X130	1 / 24D032-18	CHARLES RIVER
24D150	MAJOR	SOLDIERS FIELD PLACE	ALLSTON/BRIGHTON	36		CHARLES RIVER
25D033	MAJOR	ABOUT 390' NORTH OF INTERSECTION OF SOLDIERS FIELD ROAD & WESTERN AVENUE	ALLSTON/BRIGHTON	36		CHARLES RIVER
01E024	MAJOR	EASEMENT/LAKESIDE	HYDE PARK	15		SPRAGUE POND/NEPONSET RIVER
03E185	MAJOR	NORTON STREET	HYDE PARK	2-18		WETLANDS/NEPONSET RIVER
03E186	MINOR	RIVER STREET	HYDE PARK	24		MILL POND/MOTHER BROOK
03E207	MINOR	RIVER STREET	HYDE PARK			MILL POND/MOTHER BROOK

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

04E064	MINOR	ALVARADO AVE./RIVER STREET BRIDGE	HYDE PARK	12		MILL POND/MOTHER BROOK
04E069	MAJOR	KNIGHT STREET DAM	HYDE PARK	36		MOTHER BROOK
05E180	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E181	MINOR	GEORGETOWN DRIVE	HYDE PARK	12		NONE SHOWN/CHARLES RIVER
05E182	MINOR	DEDHAM STREET	HYDE PARK	21		UNNAMED STREAM/CHARLES RIVER
05E183	MINOR	GEORGETOWN PLACE/DEDHAM PARKWAY	HYDE PARK	12		UNNAMED STREAM
08E031	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	18		TURTLE POND
08E033	MINOR	TURTLE POND PARKWAY	WEST ROXBURY	UNKNOWN		TURTLE POND
08E035	MINOR	WASHINGTON STREET	WEST ROXBURY	15		TURTLE POND
09E229	MINOR	GRANDVIEW STREET	WEST ROXBURY	12		NONE SHOWN
09E243	MAJOR	BLUE LEDGE TR./EASEMENT	WEST ROXBURY	30		UNNAMED STREAM
13E174	MINOR	EASEMENT/VFW PARKWAY	ROSLINDALE	24		BUSSEY BROOK
13E175	MAJOR	EASEMENT/VFW PARKWAY	ROSLINDALE	108X86		BUSSEY BROOK
13E176	MAJOR	EASEMENT/WELD STREET	ROXBURY	15		NONE SHOWN
2SE037	MAJOR	EASEMENT/TELFORD STREET EXTENDED	ALLSTON/BRIGHTON	66		CHARLES RIVER
01F031	MAJOR	EASEMENT/MILLSTONE ROAD	HYDE PARK	48x24		NEPONSET RIVER
02F085	MINOR	LAWTON STREET	HYDE PARK	12		NEPONSET RIVER RESERVATION
02F093	MAJOR	EASEMENT/SIERRA ROAD	HYDE PARK	15		NEPONSET RIVER
02F120	MAJOR	EASEMENT/WOLCOTT CT./HYDE PARK AVE. EXT.	HYDE PARK	54		NEPONSET RIVER
04F016	MAJOR	EASEMENT RIVER STREET	HYDE PARK	30		MOTHER BROOK/NEPONSET RIVER
04F118	MINOR	MASON STREET EXT.	HYDE PARK	18		NEPONSET RIVER
04F119	MAJOR	EASEMENT/HYDE PARK AVE./RESERVATION RD.	HYDE PARK	24		NEPONSET RIVER
04F189	MAJOR	RESERVATION ROAD	HYDE PARK	36		MOTHER BROOK/NEPONSET RIVER
04F191	MINOR	FARADAY STREET	HYDE PARK	24		NONE SHOWN/NEPONSET RIVER
04F203	MINOR	GLENWOOD AVE	HYDE PARK	28		NEPONSET RIVER
04F204	MAJOR	TRUMAN HWY./CHITTICK STREET	HYDE PARK	36		NEPONSET RIVER
05F117	MAJOR	EASEMENT/TRUMAN HWY./WILLIAMS AVE.	HYDE PARK	33		NEPONSET RIVER
05F244	MINOR	HYDE PARK AVENUE BRIDGE	HYDE PARK	20		MOTHER BROOK/NEPONSET RIVER
05F245	MINOR	HYDE PARK AVENUE	HYDE PARK	33		MOTHER BROOK/NEPONSET RIVER
05F253	MAJOR	EASEMENT/BUSINESS ST., NEAR BUSINESS TERRACE	HYDE PARK	48x24		MOTHER BROOK/NEPONSET RIVER
05F254	MINOR	DANA AVENUE	HYDE PARK	12		NEPONSET RIVER
05F265	MAJOR	BEHIND L.E. MASON CO.	HYDE PARK	15		MOTHER BROOK/NEPONSET RIVER
06F233	MINOR	MOUNT ASH ROAD	HYDE PARK	UNK		WETLAND - STONY BROOK RESERVATION
12F322	MINOR	EASEMENT/WALTER STREET	ROSLINDALE	18		NONE SHOWN
13F095	MINOR	EASEMENT/BUSSEY STREET	ROSLINDALE	12		BUSSEY BROOK
14F181	MAJOR	CENTER STREET EXTENSION	ROSLINDALE	38X86		GOLDSMITH BROOK
14F185	MINOR	ALLANDALE STREET	ROSLINDALE	12		BUSSEY BROOK
15F288	MAJOR	ARNOLD ARBORETUM/MURRAY CIRCLE	JAMAICA PLAIN	54		GOLDSMITH BROOK
15F307	MAJOR	ARNOLD ARBORETUM, 100' EAST OF ARBORWAY & SAINT JOSEPH STREET	JAMAICA PLAIN	36X36		GOLDSMITH BROOK
17F012	MINOR	FRANCIS PARKMAN DRIVE	JAMAICA PLAIN	15		JAMAICA POND

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26F038	MAJOR	HARVARD STREET EXT.	ALLSTON/BRIGHTON	36		CHARLES RIVER
05G112	MAJOR	EASEMENT/RR ROW/WATER ST. EXT.	HYDE PARK	30		NEPONSET RIVER
05G115	MINOR	FAIRMOUNT AVENUE BRIDGE (NORTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116	MINOR	FAIRMOUNT AVE, BRIDGE (SOUTH BANK)	HYDE PARK	24		NEPONSET RIVER
05G116A	MINOR	WARREN AVENUE	HYDE PARK	24		NEPONSET RIVER
06G108	MAJOR	EASEMENT/WEST OF WOOD AVE. EXT.	HYDE PARK	69		NEPONSET RIVER
06G109	MAJOR	RIVER TERRACE EXT. NEAR ROSA STREET	HYDE PARK	48		NEPONSET RIVER
06G110	MAJOR	EASEMENT/WEST STREET EXT.	HYDE PARK	30		NEPONSET RIVER
06G111	MINOR	EASEMENT/VOSE STREET EXT., TRUMAN HWY.	HYDE PARK	24		NEPONSET RIVER
06G165	MINOR	TRUMAN HIGHWAY/METROPOLITAN AVE	HYDE PARK	10		NEPONSET RIVER
06G166	MAJOR	ABOUT 30 FEET FROM GUARDRAIL NORTHERLY SIDE OF TRUMAN HIGHWAY NEAR MILTON LINE.	HYDE PARK	36x36		NEPONSET RIVER
11G318	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	24		CANTERBURY BROOK
11G319	MINOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	18		CANTERBURY BROOK
11G344	MAJOR	CULVERT UNDER WALK HILL STREET	ROSLINDALE	162X78		CANTERBURY BROOK
18G233	MINOR	WILLOW POND ROAD	JAMAICA PLAIN	15		MUDDY RIVER
19G043	MAJOR	HUNTINGTON AVENUE	ROXBURY/MISSION HALL	45x45		MUDDY RIVER
19G194	MINOR	HUNTINGTON AVENUE	ROXBURY/MISSION HILL	24		MUDDY RIVER
19G199	MINOR	JAMAICA WAY	ROXBURY/MISSION HILL	10		MUDDY RIVER
20G161	MAJOR	EASEMENT/BROOKLINE AVENUE	ROXBURY/MISSION HILL	36		MUDDY RIVER
20G163	MINOR	EASEMENT/RIVERWAY	ROXBURY/MISSION HILL	20		MUDDY RIVER
23G132	MAJOR	EASEMENT/MASS TURNPIKE/WEST OF B.U. BRIDGE	ALLSTON/BRIGHTON	60		CHARLES RIVER
24G034	MAJOR	SOLDIER'S FIELD ROAD, SOUTH OF CAMBRIDGE STREET	ALLSTON/BRIGHTON	36	1 / 24G034-1	CHARLES RIVER
24G035	MAJOR	SOLDIERS FIELD ROAD/BABCOCK STREET	ALLSTON/BRIGHTON	90x84		CHARLES RIVER
25G005	MINOR	FROM WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	12		CHARLES RIVER
25G041	MINOR	SOLDIERS FIELD ROAD/NORTH OF WESTERN AVENUE BRIDGE	ALLSTON/BRIGHTON	24		CHARLES RIVER
06H106	MINOR	OSCEOLA STREET	HYDE PARK	24		NEPONSET RIVER
06H107	MAJOR	EASEMENT/BELNEL ROAD	HYDE PARK	24		NEPONSET RIVER
07H105	MAJOR	EASEMENT/EDGEWATER/SOUTH RIVER STREET	NEPONSET/MATTAPAN	102x72		NEPONSET RIVER
07H285	MAJOR	BLUE HILL AVENUE	NEPONSET/MATTAPAN	106x63		NEPONSET RIVER
07H287	MINOR	RIVER STREET/EDGEWATER DRIVE	NEPONSET/MATTAPAN	12		NEPONSET RIVER
07H346	MINOR	EDGEWATER DRIVE/HOLMFIELD AVENUE	HYDE PARK	18		NEPONSET RIVER
07H347	MINOR	EDGEWATER DRIVE/BURMAH ROAD	NEPONSET/MATTAPAN	21		NEPONSET RIVER
07H348	MINOR	EDGEWATER DRIVE/TOPALIAN STREET	NEPONSET/MATTAPAN	24		NEPONSET RIVER
12H085	MINOR	MORTON STREET	ROSLINDALE	15		CANTERBURY BROOK
	MAJOR	AMERICAN LEGION HIGHWAY	WEST ROXBURY	24		CANTERBURY BROOK
21H047	MINOR	PALACE ROAD EXT.	BOSTON PROPER	24		MUDDY RIVER

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

21H048	MINOR	EASEMENT/FENWAY/EVANS WAY	BOSTON PROPER	15		MUDDY RIVER
21H201	MINOR	PALACE ROAD EXT.	BOSTON PROPER	6		MUDDY RIVER
23H040	MINOR	RALEIGH STREET EXT.	BOSTON PROPER	24		CHARLES RIVER
23H042	MAJOR	DEERFIELD STREET	BOSTON PROPER	116x120		CHARLES RIVER
08I153	MINOR	DUXBURY ROAD	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I154	MINOR	EASEMENT/RIVER STREET/GLADSIDE AVE	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I155	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I156	MINOR	EASEMENT/RIVER STREET/MAMELON CIR	NEPONSET/MATTAPAN	24		NEPONSET RIVER
08I158	MINOR	EASEMENT/RIVER STREET/FREMONT ST.	NEPONSET/MATTAPAN	18		NEPONSET RIVER
08I207	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	15		NEPONSET RIVER
08I209	MINOR	MEADOWBANK AVENUE EXT.	NEPONSET/MATTAPAN	12		NEPONSET RIVER
11I577	MAJOR	HARVARD STREET	NEPONSET/MATTAPAN	102x102		CANTERBURY BROOK
08J041	MINOR	RIVER STREET	DORCHESTER	18		NEPONSET RIVER
08J102	MINOR	ADAMS STREET	DORCHESTER	15x15		NEPONSET RIVER
08J103	MAJOR	EASEMENT/CENTRAL AVENUE BRIDGE	DORCHESTER	30		NEPONSET RIVER
08J49/50	MAJOR	DESMOND ROAD	DORCHESTER	2-18&24		NEPONSET RIVER
26J052	MINOR	MONSIGNOR O'BRIEN HIGHWAY	BOSTON PROPER	12		CHARLES RIVER
26J055	MINOR	LEVERETT CIRCLE	BOSTON PROPER	12	1 / NOT MAPPED	CHARLES RIVER
27J001	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	72		MILLERS RIVER
27J044	MAJOR	PRISON POINT BRIDGE	CHARLESTOWN	15		MILLERS RIVER
27J096	MAJOR	EASEMENT/INTERSTATE 93	CHARLESTOWN	54		MILLERS RIVER
29J029	MINOR	ALFORD STREET/RYAN PLGD. EXT.	CHARLESTOWN	15		MYSTIC RIVER
29J129	MINOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
29J212	MAJOR	EASEMENT/MEDFORD STREET (ALSO OF017)	CHARLESTOWN	72		MYSTIC RIVER
30J006	MAJOR	EASEMENT/ALFORD STREET	CHARLESTOWN	18		MYSTIC RIVER
30J019	MAJOR	ALFORD STREET	CHARLESTOWN	15		MYSTIC RIVER
30J030	MAJOR	EASEMENT/ARLINGTON AVENUE	CHARLESTOWN	42	1 / NOT MAPPED	MYSTIC RIVER
08K049	MINOR	BEARSE AVENUE	DORCHESTER	12		NEPONSET RIVER
09K016	MINOR	EASEMENT/BEARSE AVENUE EXT.	DORCHESTER	15		NEPONSET RIVER
09K100	MAJOR	EASEMENT/MELLISH ROAD	DORCHESTER	34X24		NEPONSET RIVER
09K101	MINOR	EASEMENT/HUNTOON STREET EXT.	DORCHESTER	24		NEPONSET RIVER
21K069	MAJOR	EAST BERKELEY STREET	BOSTON PROPER	48	1 / 21K069-1	FORT POINT CHANNEL
26K099	MAJOR	CHELSEA STREET EXT.	CHARLESTOWN	84		CHARLES RIVER

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

26K245	MINOR	EASEMENT	CHARLESTOWN	15		CHARLES RIVER
28K018	MAJOR	OLD LANDING WAY EXT.	CHARLESTOWN	42	1 / 28K058	LITTLE MYSTIC CHANNEL
28K061	MAJOR	EASEMENT/MEDFORD STREET	CHARLESTOWN	42	1 / 28K062	LITTLE MYSTIC CHANNEL
28K386	MAJOR	EASEMENT/TERMINAL STREET	CHARLESTOWN	30	1 / 28K385	LITTLE MYSTIC CHANNEL
10L094	MAJOR	EASEMENT/GALLIVAN BOULEVARD	DORCHESTER	74x93		NEPONSET RIVER VIA DAVENPORT BROOK
10L096	MAJOR	HILLTOP AND LENOXDALE STREETS	DORCHESTER	36		NEPONSET RIVER
12L092	MAJOR	PINE NECK CREEK STORM DRAIN TENEAN STREET WEST OF LAWLEY	DORCHESTER	72	2 / 12L294	NEPONSET RIVER
16L097	MAJOR	EASEMENT/OFF SAVIN HILL AVENUE	DORCHESTER	24		PATTEN'S COVE
20L081	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
20L083	MINOR	EAST FIRST STREET	SOUTH BOSTON	20		RESERVED CHANNEL
21L077	MAJOR	CLAFLIN STREET EXT./EAST STREET EXT.	SOUTH BOSTON	24	1 / NOT MAPPED	RESERVED CHANNEL
23L016	MINOR	NORTHERN AVENUE	SOUTH BOSTON	2-15&16		BOSTON INNER HARBOR
23L074	MINOR	SUMMER STREET BRIDGE	SOUTH BOSTON	15		FORT POINT CHANNEL
23L075	MAJOR	CONGRESS STREET BRIDGE	SOUTH BOSTON	54		FORT POINT CHANNEL
23L140	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L145	MINOR	NORTHERN AVENUE	SOUTH BOSTON	10		BOSTON INNER HARBOR
23L164	MAJOR	CONGRESS STREET BRIDGE	BOSTON PROPER	48	1 / 23L164 IN CHANNEL WALL	FORT POINT CHANNEL
23L195	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
23L196	MAJOR	NEW NORTHERN AVENUE BRIDGE	SOUTH BOSTON	36		FORT POINT CHANNEL
23L202	MAJOR	NORTHERN AVENUE	SOUTH BOSTON	36		BOSTON INNER HARBOR
24L057	MINOR	STATE STREET EXT.	BOSTON PROPER	18x18		BOSTON INNER HARBOR
24L233	MAJOR	ROWE'S WHARF/ATLANTIC AVENUE	BOSTON PROPER	42		BOSTON HARBOR
25L058	MAJOR	CHRISTOPHER COLUMBUS PARK - WATERFRONT	BOSTON PROPER	84		BOSTON INNER HARBOR
25L144	MINOR	CLARK STREET	BOSTON PROPER	12		BOSTON INNER HARBOR
26L055	MAJOR	NEAR BATTERY WHARF	BOSTON PROPER	24X24		BOSTON INNER HARBOR
26L070	MAJOR	HANOVER STREET EXT.	BOSTON PROPER	36		BOSTON INNER HARBOR
26L84	MINOR	LEWIS STREET	EAST BOSTON	18		BOSTON INNER HARBOR
27L020	MAJOR	PIER NO. 4 EASEMENT - NAVY YARD	CHARLESTOWN	2-20&24	1 / 27K020-1	BOSTON INNER HARBOR
28L073	MINOR	EASEMENT/4TH STREET - NAVY YARD	CHARLESTOWN	6		LITTLE MYSTIC CHANNEL
28L074/075/076	MAJOR	16TH STREET/4TH AVENUE - NAVY YARD	CHARLESTOWN	3-30		LITTLE MYSTIC CHANNEL
28L077	MINOR	EASEMENT/4TH AVENUE - NAVY YARD	CHARLESTOWN	10		LITTLE MYSTIC CHANNEL
11M093	MAJOR	NEPONSET AVENUE AT NROTHWEST END OF NEPONSET AVENUE BRIDGE	DORCHESTER	48		NEPONSET RIVER
12M091	MAJOR	ERICSSON/WALNUT ST.	NEPONSET/MATTAPAN	36		NEPONSET RIVER
17M033	MAJOR	HARBOR POINT PARK (RELOCATED MT. VERNON ST. DRAIN)	DORCHESTER	72		DORCHESTER BAY
21M005	MAJOR	SUMMER STREET	SOUTH BOSTON	18		RESERVED CHANNEL

ATTACHMENT A
BOSTON WATER AND SEWER COMMISSION
STORMWATER OUTFALLS

29M032	MINOR	CONDOR STREET	EAST BOSTON	30		CHELSEA RIVER
29M041	MAJOR	EASEMENT/CONDOR STREET	EAST BOSTON	36x30		CHELSEA RIVER
29M049	MINOR	CONDOR STREET	EAST BOSTON	24		CHELSEA RIVER
29N135	MAJOR	ADDISON STREET	EAST BOSTON	30x30		CHELSEA RIVER
28N156	MINOR	COLERIDGE STREET EXT.	EAST BOSTON	12		BOSTON HARBOR
29O001	MAJOR	BENNINGTON STREET	EAST BOSTON	66	1 / 29O062	BOSTON HARBOR NEAR CONSTITUTION BEACH
31O004	MINOR	EASEMENT/WALDEMAR AVENUE	EAST BOSTON	15		CHELSEA RIVER
28P001	MINOR	EASEMENT	EAST BOSTON	12		BOSTON HARBOR NEAR CONSTITUTION BEACH
29P015	MINOR	EASEMENT/BARNES AVENUE	EAST BOSTON	12		BELLE ISLE INLET
29P044	MINOR	SHAWSHEEN STREET	EAST BOSTON	12		BOSTON HARBOR
30P062	MINOR	PALERMO AVENUE EXTENSION	EAST BOSTON	12		WETLANDS
31P084	MINOR	EASEMENT/BENNINGTON STREET	EAST BOSTON	30		BELLE ISLE INLET, REVERE

Major* : 93

Minor : 102

Total: 195

* Major outfall means : An outfall that discharges from a single pipe of 36" or larger in diameter or a non-circular pipe which is associated with drainage area of more than 50 acres; or an outfall that discharges from a single pipe of 12" or larger in diameter serving lands zoned for industrial activity or a non-circular pipe which is associated with drainage area of 2 acres or more.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

FACT SHEET

DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES.

NPDES PERMIT NO.: MAS010001

NAME AND ADDRESS OF APPLICANT:

Boston Water and Sewer Commission
425 Summer Street
Boston, Massachusetts 02210

NAME AND ADDRESS OF FACILITIES WHERE DISCHARGES OCCUR:

195 Storm water Outfalls listed in Permit Attachment A

RECEIVING WATERS:

Belle Isle Inlet, Boston Harbor, Boston Inner Harbor, Brook Farm Brook, Bussey Brook, Canterbury Brook, Chandler Pond, Charles River, Chelsea River, Dorchester Bay, Fort Point Channel, Goldsmith Brook, Jamaica Pond, Little Mystic Channel, Mill Pond, Millers River, Mother Brook, Muddy River, Mystic River, Neponset River, Old Harbor, Patten's Cove, Reserved Channel, Sprague Pond, Stony Brook, Turtle Pond, and unnamed wetlands, brooks and streams .

CLASSIFICATION: **Class SB and B**

I. Proposed Action, Type of Facility and Discharge Location.

The Boston Water and Sewer Commission(BWSC), the permittee, is empowered to promulgate rules and regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. BWSC applied for its Municipal Separate Storm Sewer System(MS4) permit, which will discharge storm water from 195 identified separate storm sewer outfalls to receiving waters listed in Attachment A.

1. Discharge Characteristics

At the time of this draft, BWSC operates 195 identified separate storm sewer outfalls. Locations, size, and receiving waters for these outfalls are identified in Attachment A. Storm water discharge sampling results from five representative outfalls are shown on Table 3-21 of the permit application (Part II) dated May 17, 1993 and are included as Attachment B. A discussion of the results of sampling can be found in Part II Chapter 3 of the application.

2. Limitations and Conditions.

Permit conditions and all other requirements described herein may be found in Part I of the draft permit. No numeric effluent limitations have been established for this draft permit.

3. Permit Basis and Explanation of Permit Conditions.

As authorized by Section 402(p) of the Act, this permit is being proposed on a system-wide basis. This permit covers all areas under the jurisdiction of BWSC or otherwise contributing to discharges from municipal separate storm sewers owned or operated by the permittee.

a. Statutory basis for permit conditions. The conditions established by this permit are based on Section §402(p)(3)(B) of the Act which mandates that a permit for discharges from MS4s must: effectively prohibit the discharge of non-storm water to the MS4 and require controls to reduce pollutants in discharges from the MS4 to the maximum extent practicable including best management practices, control techniques, and system design and engineering methods, and such other provisions determined to be appropriate. MS4s are required to achieve compliance with Water Quality Standards. Section 301(b)(1)(C) of the Act, requires that NPDES permits include limitations, including those necessary to meet water quality standards. The intent of the permit conditions is to meet the statutory mandate of the Act.

EPA has determined that under the provisions of 40 CFR 122.44(k) the permit will include Best Management Practices (BMPs). A comprehensive Storm Water Management Program (SWMP) includes BMPs to demonstrate compliance with the maximum extent practicable standard. Section 402(p)(3)(B)(iii) of the Act clearly includes structural controls as a component of the maximum extent practicable requirement as necessary to achieve compliance with Water Quality Standards.

EPA encourages the permittee to explore opportunities for pollution prevention measures, while reserving the more costly structural controls for higher priority watersheds, or where pollution prevention measures prove unfeasible or ineffective in achieving water quality goals and standards.

b. Regulatory basis for permit conditions. As a result of the statutory requirements of the Act the EPA promulgated the MS4 Permit application regulations, 40 CFR 122.26(d). These regulations describe in detail the permit application requirements for operators of MS4s. The information in the application (Parts 1 and 2) and supplemental information provided in June 1995 and June 1998 was used to develop the draft permit conditions.

4. Discharges Authorized By This Permit.

a. Storm water. This permit authorizes all existing or new storm water point source discharges to waters of the United States from the MS4.

b. Non-storm water. This permit authorizes the discharge of storm water commingled with flows contributed by wastewater, or Storm Water Associated with Industrial Activity, provided such discharges are authorized by separate NPDES permits and in compliance with the permittee's regulations regarding the use of storm drains. Nothing in this draft permit conveys a right to discharge to the permittee's system without the permittee's authorization. In addition, certain types of non-storm waters identified in the draft permit at Part I.B.2.g. are authorized if appropriately addressed in the permittee's Storm Water Management Program.

The following demonstrates the difference between the Act's statutory requirements for discharges from municipal storm sewers and industrial sites:

i. Section 402(p)(3)(B) of the Act requires an effective prohibition on non-storm water discharges to a MS4 and controls to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable (MEP).

ii. Section 402(p)(3)(A) of the Act requires compliance with treatment technology (BAT/BCT) and Section 301 water quality requirements on discharges of Storm Water Associated with Industrial Activity.

The Act requires Storm Water Associated with Industrial Activity discharging to the MS4 to be covered by a separate NPDES permit. However, the permittee is responsible for the quality of the ultimate discharge, and has a vested interest in locating uncontrolled and unpermitted discharges to the system.

c. Spills. This permit does not authorize discharges of material resulting from a spill. If discharges from a spill are unavoidable to prevent imminent threat to human life, personal injury, or severe property damage, the permittee has the responsibility to take (or insure the party responsible for the spill takes) reasonable and prudent measures to minimize the impact of discharges on human health and the environment.

5. Receiving Stream Segments and Discharge Locations.

The permittee discharges to the receiving waters listed in Attachment A, which are classified according to the Massachusetts Surface Water Quality Standards as Class B, B_{CSO}, SB, and SB_{CSO} water bodies. Despite variance conditions and CSO designation, storm water discharges shall achieve compliance with Class B and SB standards. Class B and SB waters shall be of such quality that they are suitable for the designated uses of protection and propagation of fish, other aquatic life and wildlife; and for primary and secondary contact recreation. Notwithstanding specific conditions of this permit, the discharges must not lower the quality of any classified water body below such classification, or lower the existing quality of any water body if the existing quality is higher than the classification, except in accordance with Massachusetts' Antidegradation Statutes and Regulations.

6. SWMP.

The following prohibitions apply to discharges from MS4s and were considered in review of the current management programs which the permittee is operating. In implementing the SWMP, the permittee is required to select measures or activities intended to achieve the following prohibitions.

No discharge of toxics in toxic amounts. The discharge of toxics in toxic amounts is prohibited (Section 101(a)(3) of the Act).

No discharge of pollutants in quantities that would cause a violation of State water quality standards. Section 301(b)(1)(C) of the Act and 40 CFR 122.44(d) require that NPDES permits include "...any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to State law or regulations..." Implementation of the SWMP is reasonably expected to provide for protection of State water quality standards.

No discharge of non-storm water from the municipal separate storm sewer system, except in accordance with Part II.B.2. Permits issued to MS4s are specifically required by Section 402(p)(3)(B) of the Act to "...include a requirement to effectively prohibit non-storm water discharges into the storm sewers..." The regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) allow the permittee to accept certain non-storm water discharges where they have not been identified as significant sources of pollutants. Any discharge allowed by the permittee and authorized by a separate NPDES permit is not subject to the prohibition on non-storm water discharges.

No numeric effluent limitations are proposed in the draft permit. In accordance with 40 CFR §122.44(k), the EPA has required a series of Best Management Practices, in the form of a comprehensive SWMP, in lieu of numeric limitations.

7. Storm Water Management Program.

BWSC provided updates to its SWMP in June 1995 and June 1998. The current SWMP addresses all required elements. Some of the elements of the SWMP are wholly or in part the responsibility of the City of Boston rather than BWSC. The permit requires the permittee to cooperate with appropriate municipal agencies to assure that the goals of the SWMP are achieved by building upon existing programs and procedures which address activities impacting storm water discharges to the MS4.

EPA has requested permit application information from the City of Boston. This information will be used to develop permit conditions for the City to implement the SWMP measures which are under its control. This will be effected through a permit modification identifying the City as a co-permittee and specifying its responsibilities or through the issuance of a separate permit to the City.

Table A identifies the required elements of the SWMP, the regulatory cite, and the relevant draft permit condition.

Table A - Storm Water Management Program Elements

Required Program Element	Permit Parts	Regulatory References (40 CFR 122.26...)
Structural Controls	I.B.2.b	(d)(2)(iv)(A)(1)
Areas of new development & significant redevelopment	I.B.2.c	(d)(2)(iv)(A)(2)
Roadways	I.B.2.d	(d)(2)(iv)(A)(3)
Flood Control Projects	I.B.2.e	(d)(2)(iv)(A)(4)
Pesticides, Herbicides, & Fertilizers Application	I.B.2.f	(d)(2)(iv)(A)(6)
Illicit Discharges and Improper Disposal	I.B.2.g	(d)(2)(iv)(B)(1)-(3), (iv)(B)(7)
Spill Prevention and Response	I.B.2.h	(d)(2)(iv)(B)(4)
Industrial and High Risk Runoff	I.B.2.i	(d)(2)(iv)(C), (iv)(A)(5)
Construction Site Runoff	I.B.2.j	(d)(2)(iv)(D)
Public Education	I.B.2.k	(d)(2)(iv)(A)(6), (iv)(B)(5), (iv)(B)(6)
Monitoring Program	I.C	(d)(2)(iv)(B)(2), (iii), (iv)(A), (iv)(C)(2)

Attachment C provides a discussion of the permit condition and the permittee's existing SWMP.

8. Legal Authority. BWSC has demonstrated its authority to promulgate regulations regarding the use of its common sewers, including its sanitary sewers, combined sewers and storm drains. Regulations Governing the Use of Sanitary and Combined Sewers and Storm Drains of the Boston Water and Sewer Commission were adopted January 15, 1998 and effective February 27, 1998.

9. Resources. Part I.B.6 of the permit requires the permittee to provide adequate support capabilities to implement its activities under the SWMP. Compliance with this requirement will be demonstrated by the permittee's ability to fully implement the SWMP, monitoring programs, and other permit requirements. The permit does not require specific funding or staffing levels, thus providing the permittee with the ability, and incentive, to adopt the most efficient and cost effective methods to comply with the permit requirements. The draft permit also requires an Annual Report (Part I.E.) which includes an evaluation of resources to implement the plan.

10. Monitoring and Reporting.

a. Monitoring. The BWSC sampled five locations which were selected to provide representative data on the quality and quantity of discharges from the MS4 as a whole. Parameters sampled included conventional, non-conventional, organic toxics, and other toxic pollutants. The EPA reviewed this information during the permitting process. Monitoring data is intended to be used by the BWSC to assist in its determination of appropriate storm water management practices. EPA used the data to identify the minimum parameters for sampling under Part I.C of the permit.

The BWSC is required (40 CFR §122.26(d)((2)(iii)(C) and (D)) to monitor the MS4 to provide data necessary to assess the effectiveness and adequacy of SWMP control measures; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation. The BWSC is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4.

EPA will make future permitting decisions based on the monitoring data collected during the permit term and available water quality information. Where the required permit term monitoring proves insufficient to show pollutant reductions, the EPA may require more stringent Best Management Practices, or where necessary to protect water quality, establish numeric effluent limitations.

1. Representative monitoring: The monitoring of the discharge of representative outfalls during actual storm events will provide information on the quality of runoff from the MS4, a basis for estimating annual pollutant loadings, and a mechanism to evaluate reductions in pollutants discharged from the MS4. Results from the monitoring program will be submitted annually with the annual report.

2. Requirements: The BWSC shall monitor representative discharges to characterize the quality of storm water discharges from the MS4. Within **90** days after the effective date of this permit, the BWSC will submit its proposed sampling plan. The BWSC shall choose five locations representing the different land uses or drainage areas representative of the system, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach or a shellfish bed. This submittal shall also include any related monitoring which the BWSC has done since its MS4 permit application was submitted. Unless commented on or denied by the Director within **60** days after its submittal, the proposed sampling plan shall be deemed approved.

3. Parameters: The EPA established minimum permit parameter monitoring requirements based on the information available regarding storm water discharges and potential impacts of these discharges. The basic parameter list allows satisfaction of the regulatory requirement [40 CFR §122.26(d)(2)(iii)] to provide estimates of pollutant loadings for each major outfall.

4. Frequency: The frequency of annual monitoring is based on monitoring at least one representative storm event three times a year. The plan should consider sampling events in the spring, summer, and fall (excluding January to March). Monitoring frequency is based on permit year, not a calendar year. The first complete calendar year monitoring could be less than the stated frequency.

5. Receiving Water Quality Monitoring: The draft permit is conditioned to include four sampling stations to assess the impact of storm water discharges from the MS4 to receiving waters. The permittee shall submit a plan to sample four locations three times a year for the permit term within 90 days of the effective date of the permit. The minimum parameters for analysis are consistent with the representative monitoring requirements.

b. Screening. The draft permit requires two screening programs. Part I.C.6 requires the permittee to develop a Wet Weather Screening Program. This screening shall record physical observations of wet weather flows from all major outfalls at least once during the permit term. The program will identify discharges which may be contributing to water quality impairments short of analytical monitoring. Part I.D. requires a dry weather screening program.

c. Reporting. The permittee is required (40 CFR §122.42(c)(1)) to contribute to the preparation of an annual system-wide report including the status of implementing the SWMP; proposed changes to the SWMP; revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application; a summary of the data, including monitoring data, that is accumulated throughout the reporting year; annual expenditures and the budget for the year following each annual report; a summary describing the number and nature of enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation. Part I.E. of the draft permit requires the permittee to do annual evaluations on the effectiveness of the SWMP, and institute or propose modifications necessary to meet the overall permit standard of reducing the discharge of pollutants to the maximum extent practicable. In order to allow the orderly collection of budgetary and monitoring data it was determined to establish the annual report due date relative to the permittee's annual fiscal year. BWSC's fiscal year ends on **December 31** and the annual report is due on **March 1** each year commencing March 1, 1999.

11. Permit Modifications.

a. Reopener Clause. The EPA may reopen and require modifications to the permit (including the SWMP) based on the following factors: changes in the State's Water Quality Management Plan and State or Federal requirements; adding co-permittee(s); SWMP changes impacting compliance with permit requirements; other modifications deemed necessary by the EPA to adhere to the requirements of the Clean Water Act. Co-permittees may be incorporated into this permit or separate permits may be required as necessary to achieve the goals of the SWMP. Implementation of the SWMP is expected to result in the protection of water quality. The draft permit contains a reopener clause should new information indicate that the discharges from the MS4 are causing, or are significantly contributing to, a violation of the State's water quality standards.

b. SWMP Changes. The SWMP is intended to be a tool to achieve the maximum extent practicable and water quality standards. Therefore, minor changes and adjustments to the various SWMP elements are expected and encouraged where necessary. Changes may be necessary to more successfully adhere to the goals of the permit. Part I.B.7.c of the draft permit describes the allowable procedure for the permittee to make changes to the SWMP. Any changes requested by a permittee shall be reviewed by the EPA and DEP. The EPA and DEP have 60 days to respond to the permittee and inform the permittee if the suggested changes will impact or change the SWMP's compliance with a permit requirement.

c. Additions. The EPA intends to allow the permittee to annex lands, activate new outfalls, deactivate existing outfalls, and accept the transfer of operational authority over portions of the MS4 without mandating a permit modification. Implementation of appropriate SWMP elements for these additions (annexed land or transferred authority) is required. Upon notification of the additions in the Annual Report, the EPA shall review the information to determine if a modification to the permit is necessary based on changed circumstances.

The remaining conditions of the permit are based on the NPDES regulations, 40 CFR Parts 122 though 125, and consist primarily of management requirements common to all permits.

II. State Certification Requirements.

EPA may not issue a permit unless the State Water Pollution Control Agency with jurisdiction over the receiving waters certifies that the effluent limitations contained in the permit are stringent enough to assure that the discharge will not cause the receiving water to violate State Water Quality Standards. The staff of the Massachusetts Department of Environmental Protection has reviewed the draft permit and advised EPA that the limitations are adequate to protect water quality. EPA has requested permit certification by the State and expects that the draft permit will be certified.

III. Comment Period, Hearing Requests and Procedures for Final Decisions.

All persons, including applicants, who believe any condition of the draft permit is inappropriate must raise all issues and submit all available arguments and all supporting material for their arguments in full by the close of the public comment period, to the U.S. EPA, Planning and Administration (SPA), P.O. Box 8127, Boston, MA 02114. Any person, prior to such date, may submit a request in writing for a public hearing to consider the draft permit to EPA and the State Agency. Such requests shall state the nature of the issues proposed to be raised in the hearing. A public hearing may be held after at least thirty days public notice whenever the Regional Administrator finds that response to this notice indicates significant public interest. In reaching a final decision on the draft permit the Regional Administrator will respond to all significant comments and make those responses available to the public at EPA's Boston Office.

Following the close of the comment period, and after a public hearing, if such hearing is held, the Regional Administrator will issue a final permit decision and forward a copy of the final decision to the applicant and to each person who has submitted written comments or requested notice. Within 30 days following the notice of the final permit decision any interested person any submit a request for a formal hearing to reconsider or contest the final decision. Requests for formal hearings must satisfy the requirements of 40 CFR §124.74, 48 Fed. Reg. 14279-14280 (April 1, 1983).

IV. EPA Contact

Additional information concerning the draft permit may be obtained between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, excluding holidays from:

Jay Brolin
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Office of Ecosystem Protection (CMA)
Boston, MA 02203-0001
Telephone: (617) 565-9453 Fax: (617) 565-4940

September 2, 1998
Date

Linda M. Murphy, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency

Attachment C

Structural Controls: The permittee shall operate the separate storm sewer system and any storm water structural controls in a manner to reduce the discharge of pollutants to the Maximum Extent Practicable. The permittee's existing SWMP includes operation and maintenance procedures to include an inspection schedule of storm water structural controls adequate to satisfy the permit condition.

Areas of New Development and Significant Redevelopment: The permittee has no authority over land use issues. The draft permit is conditioned to require the permittee to coordinate with the appropriate municipal agencies as it relates to discharges to the MS4. The permittee has its own site plan review process relating to new or modified connections for water, sewer, and drains and has the authority to require controls on discharges to the storm drain system during and after construction.

Roadways: The permittee has no authority to ensure that public streets, roads, and highways are operated and maintained in a manner to minimize discharge of pollutants, including those pollutants related to deicing or sanding activities. The draft permit is conditioned to require the permittee to coordinate with appropriate municipal agencies as it relates to discharge to the MS4.

Pesticide, Herbicide, and Fertilizer Application: The permittee shall coordinate with appropriate municipal agencies to evaluate existing measures to reduce the discharge of pollutants related to the storage and application of pesticides, herbicides, and fertilizers applied to public property.

Non-Storm Water discharges: Non-storm water discharges shall be effectively prohibited. However, the permittee may allow certain non-storm water discharges as listed in 122.26(d)(2)(iv)(B)(1) and Part I.B.2 of the draft permit. The permittee has identified allowable non-storm water discharges in its regulations.

The permittee shall implement controls to prevent discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall also control the infiltration of seepage from sanitary sewers into the MS4. This is presently accomplished through the permittee's illicit connection program and it's Inflow/Infiltration program.

The discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into the MS4 is prohibited in accordance with the permittee's regulations. The permittee shall coordinate with appropriate

regulations. The permittee shall coordinate with appropriate public and private agencies to ensure continued implementation of programs to collect used motor vehicle fluids (at a minimum, oil and antifreeze) for recycle, reuse, or proper disposal and to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. The City of Boston has an existing program.

Illicit Discharges and Improper Disposal: The BWSC shall continue to implement its program to locate and eliminate illicit discharges and improper disposal into the MS4. This program shall include dry weather screening activities to locate portions of the MS4 with suspected illicit discharges and improper disposal. Follow-up activities to eliminate illicit discharges and improper disposal may be prioritized on the basis of magnitude and nature of the suspected discharge; sensitivity of the receiving water; and/or other relevant factors. This program shall establish priorities and schedules for screening the entire MS4 at least once every five years. At present the permittee has on-going programs in Brighton (BOS 032) discharges to the Charles River, discharges to Brookline's Village and Tannery Brook drainage systems, and discharges through Dedham to Mother Brook. Facility inspections may be carried out in conjunction with other programs (e.g. pretreatment inspections of industrial users, health inspections, fire inspections, etc.).

The BWSC shall eliminate illicit discharges as expeditiously as possible and require the immediate termination of improper disposal practices upon identification of responsible parties. Where elimination of an illicit discharge within sixty (60) days is not possible, the BWSC shall establish an expeditious schedule for removal of the discharge. In the interim, the BWSC shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

Spill Prevention and Response: The permittee shall coordinate with appropriate municipal agencies to implement a program to prevent, contain, and respond to spills that may discharge into the MS4. The existing spill response program in the City includes a combination of spill response actions by the permittee, municipal agencies and private entities. The permittee's regulations include legal requirements for public and private entities within the permittee's jurisdiction.

Industrial & High Risk Runoff: The permittee shall coordinate with EPA and DEP to develop a program to identify and control pollutants in storm water discharges to the MS4 from municipal landfills; other treatment, storage, or disposal facilities for municipal waste (e.g. transfer stations, incinerators, etc.);

hazardous waste treatment, storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge which the permittee determine is contributing a substantial pollutant loading to the MS4 shall be implemented. The program shall include inspections, a monitoring program and a list of industrial storm water sources discharging to the MS4 which shall be maintained and updated as necessary. This requirement is not meant to cover all such discharges, but is intended to prioritize those discharges from this group which are believed to be contributing pollutants to the MS4 and to identify those dischargers which may require NPDES permit coverage or are not in compliance with existing permits.

Construction Site Runoff: The permittee shall coordinate with appropriate municipal agencies to implement a program to reduce the discharge of pollutants from construction sites to the separate storm sewer. This program shall include: requirements for the use and maintenance of appropriate structural and non-structural control measures to reduce pollutants discharged to the MS4 from construction sites; inspection of construction sites and enforcement of control measure requirements required by the permittee; appropriate education and training measures for construction site operators; and notification of appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff and any post-construction permitting.

Public Education: The permittee shall coordinate with appropriate municipal agencies to implement a public education program with the following elements: (a) a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials into the MS4; (b) a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes; and (c) a program to promote, publicize, and facilitate the proper use, application, and disposal of pesticides, herbicides, and fertilizers.

EXHIBIT 6

Worcester, MA – Department of Public Works MS4 Permit

(Permit No. MAS010002)

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AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the federal Clean Water Act, as amended, 33 U.S.C. §§1251 et seq., and the Massachusetts Clean Waters Act, as amended, Mass. Gen. Laws. ch. 21, §§26-53, the

City of Worcester
Department of Public Works

and is authorized to discharge from all new or existing separate storm sewers: **existing Separate Storm Sewer Outfalls which are listed in Attachment A (93 major outfalls) and all other known outfalls (170 minor outfalls)**

to receiving waters (in the BLACKSTONE RIVER BASIN) named: **Beaver Brook, Blackstone River, Broad Meadow Brook, Coal Mine Brook, Coes Pond, Curtis Pond, Fitzgerald Brook, Indian Lake, Kendrick Brook, Kettle Brook, Lake Quinsigamond, Leesville Pond, Middle River, Mill Brook, Mill Brook Tributary, Tatnuck Brook, Patch Reservoir, Poor Farm Brook, Smiths Pond, Weasel Brook and Williams Millpond** in accordance with effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective thirty (30) days after the date of signature.

This permit and the authorization to discharge expire at midnight, five years from the effective date.

This permit consists of **21** pages and **Attachment A** in Part I including wet and dry weather monitoring requirements, etc., and 35 pages in Part II including General Conditions and Definitions.

Signed this 30 day of September, 1998

Director
Office of Ecosystem Protection
Environmental Protection Agency
Region I
Boston, MA

Director, Division of
Watershed Management
Department of Environmental
Protection
Commonwealth of Massachusetts
Boston, MA

PART I. MUNICIPAL SEPARATE STORM SEWER SYSTEM

A. DISCHARGES THROUGH THE MUNICIPAL SEPARATE STORM SEWER SYSTEM AUTHORIZED UNDER THIS PERMIT

1. Permit Area. This permit covers all areas within the corporate boundary of the City of Worcester served by, or otherwise contributing to discharges from new or existing separate storm sewers owned or operated by the Department of Public Works, the "permittee".

2. Authorized Discharges. This permit authorizes all storm water discharges to waters of the United States from all existing or new outfalls owned or operated by the permittee (existing outfalls are identified in Attachment A). This permit also authorizes the discharge of storm water commingled with flows contributed by process wastewater, non-process wastewater, or storm water associated with industrial activity provided such discharges are authorized under separate NPDES permits and in compliance with applicable Federal, State and local regulations.

   Storm water discharges related to industrial activity which are not under the jurisdiction of the storm water program are authorized. The permittee shall provide in the annual report (Part I.E.) to EPA and MA DEP a review of all new separate storm sewer outfalls that are activated and of all existing outfalls which are de-activated.

3. Limitations on Coverage. The following discharges are not authorized by this permit:

   a. Discharges of non-storm water or storm water associated with industrial activity through outfalls listed in Attachment A are not authorized under this permit except where such discharges are:

      I. authorized by a separate NPDES permit; or

      ii. identified by and in compliance with Part B.2.g of this permit.

B. STORM WATER POLLUTION PREVENTION & MANAGEMENT PROGRAMS

The permittee is required to continue to develop, implement and revise as necessary, a storm water pollution prevention and management program designed to reduce, to the maximum extent practicable, the discharge of pollutants from the Municipal Separate Storm Sewer System (MS4). The permittee may implement Storm Water Management Program (SWMP) elements through participation with other public agencies or private entities in cooperative efforts satisfying the requirements of this permit in lieu of creating duplicate program elements. Either cumulatively, or separately, the permittee's storm water pollution prevention and management programs shall satisfy the requirements of Part I.B.1-7. below for all portions of the MS4.

1. POLLUTION PREVENTION REQUIREMENTS The permittee shall develop and implement the following pollution prevention measures:

a. Development The permittee, in cooperation with the agency with jurisdiction over land use, shall include requirements to consider water quality impacts of new development and significant re-development. The permittee shall ensure that development activities conform to applicable state and local regulations, guidance and policies relative to the discharge of storm water into the MS4. The goals of these requirements shall be to limit increases in the discharge of pollutants into the MS4 from new development and to reduce the discharge of pollutants into the MS4 from existing sources due to re-development.

b. Used Motor Vehicle Fluids The permittee shall describe educational activities, public information activities and other appropriate activities to facilitate the proper management, including recycling, reuse and disposal, of used motor vehicle fluids. The permittee shall coordinate with appropriate public agencies or private agencies where necessary. Such activities shall be readily available to all private residents and be publicized and promoted on a regular basis (at least annually).

c. Household Hazardous Waste (HHW) The permittee shall coordinate with the appropriate public agency or private entities to ensure the implementation of a program to collect household hazardous waste materials (including paint, solvents, pesticides, herbicides, and other hazardous materials) for recycle, reuse, or proper disposal. Such program shall be readily

available to all private residents and be publicized and promoted on a regular basis (at least annually).

2. STORM WATER MANAGEMENT PROGRAM REQUIREMENTS: The permittee shall continue to implement the current elements of its' Storm Water Management Program (SWMP) which was described in the May 11, 1993 Part II application in accordance with Section 402(p)(3)(B) of the Clean Water Act (CWA or "the Act"), including any updates.

The current SWMP does not adequately address all the required elements described on Pages 5-11 below. The EPA sent a letter to the City of Worcester on June 6, 1997 specifying which portions of the current SWMP needed more description, effort, or clarification. The items included were the illicit connection program, a discussion of the City's indebtedness and funding for storm water programs, geographic mapping, reevaluation of wet weather sampling locations, construction area oversight, and public education. The City submitted a letter addressing these concerns on March 25, 1998. Although most issues were discussed, there is still some detail and proposed effort that is insufficient.

In particular, the sampling plan proposes grab samples at five different outfalls, three times per year. In order to get a sense of any trend and how parameter concentrations change over time during storm events, the permittee must conduct composite sampling or a series of grab samples for the summer sampling event at each of the five outfalls, as described later. In Section C. below, this permit includes minimum expectations for outfall monitoring and instream monitoring during wet weather. Instream monitoring could provide information on both the pollutant concentration peaks as well as the pollutant loading increases that occur as a result of storm events.

More detail and effort is needed for the catch basin cleaning and inspection program, as shown on Page 6. This last issue was not raised in the letter of June 6, 1997, but this program was found to be deficient upon further review.

Within **120** days after the effective date of this permit, the permittee shall submit a written description of all additional measures it will take, relative to items mentioned above, to satisfy the requirements of this permit and the goals of the proposed SWMP. **This submittal will include the entire SWMP effort, including all the original items as included in Worcester's Part II application.** This

shall be submitted to the EPA the MA DEP at the addresses in Section G. Unless disapproved by EPA or the MA DEP within 60 days after its submittal, the SWMP shall be deemed approved. The permittee shall respond to all written comments by EPA and the MA DEP and shall make all changes to the SWMP required for its approval. As noted later, compliance with the SWMP shall occur no later than 180 days after the effective date of the permit or no later than EPA and DEP's approval of the SWMP. This SWMP shall be displayed at a convenient location accessible to the public.

The Controls and activities identified in the SWMP shall clearly identify goals, a description of the controls or activities, and a description of the roles and responsibilities of other entities' areas of applicability on a system, jurisdiction, or specific area basis.

The permittee will specifically address how it will have input on any portions of the SWMP which may not be under its direct control (i.e. Mass Highway Department's maintenance of interstate highway) and how it will cooperate with such entities to achieve the goals of the SWMP.

If, during the life of this permit, EPA and the DEP determine that the permittee cannot substantively operate these programs to effectively reduce pollutants to the MS4, then the permit may be modified to designate one or more agencies that administer these programs as co-permittees. These entities would then be responsible for applicable permit conditions and requirements. Alternatively, one or more entities may be required to apply for and obtain an individual storm water permit for their discharges. The SWMP, and all approved updates, are hereby incorporated by reference and shall be implemented in a manner consistent with the following requirements:

a. Statutory Requirements: SWMPs shall include controls necessary to reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable,"MEP". Controls may consist of a combination of best management practices, control techniques, system design and engineering methods, and such other provisions as the permittee, the Director or the State determines appropriate. The various components of the SWMP, taken as a whole (rather than individually), shall be sufficient to meet this "MEP" standard. The SWMPs shall be updated as necessary to ensure conformance with the requirements of CWA § 402(p)(3)(B). In implementing the SWMP, the permittee

is required to select measures or activities intended to meet these requirements:

No discharge of toxics in toxic amounts.

No discharge of pollutants in quantities that would cause a violation of State water quality standards.

No discharge of either a visible oil sheen, foam, or floating solids, in other than trace amounts, at any time.

No discharge of suspended or settleable solids in concentrations or combinations that would impair the uses of the class of receiving waters.

b. Structural Controls: The permittee shall operate and maintain any storm water structural controls, for which it is the owner or operator, in a manner so as to reduce the discharge of pollutants to the MEP. Each catch basin shall be cleaned at least every other year as described in the SWMP.

The cleaning program must include the recording and inputting of all activities in an automated database for all catch basins, including the date of cleaning, the location of each catch basin, and an estimate of how full the catch basin was when it was cleaned. For those catch basins which are found to be more than approximately 50% full, a follow up inspection will be conducted within 3 - 6 months and cleaning schedules modified as appropriate.

During the life of this permit, the permittee shall conduct a structural control demonstration. Within 180 days after the effective date of the permit, the permittee shall submit a demonstration proposal and schedule to the EPA and MA DEP. Unless disapproved by the EPA or the MA DEP within 30 days after its submittal, the proposed demonstration project shall be deemed approved.

The permittee can reference the MA DEP document titled, Stormwater Management, Volume 1: Stormwater Policy Handbook and Stormwater Management, Volume II: Stormwater BMP Handbook. This provides an overview of storm water controls, including ranges of removal for typical storm water pollutants. This proposal shall measure the removal efficiency of a particular structural control in the MS4 area for several pollutants with influent and effluent sampling during the life of this permit.

c. Areas of New Development and Significant Redevelopment: The permittee and/or cooperating agencies shall develop, implement, and enforce controls to minimize the discharge of pollutants to the separate storm sewer system from areas of new development and significant re-development during and after construction. The permittee and/or cooperating agencies shall ensure development activities conform to applicable state and local regulations, guidance and policies. The permittee and/or cooperating agencies shall consider water quantity and water quality impacts related to development and significant redevelopment. The permittee and/or cooperating agencies shall conform to the policy of the MA DEP titled **Performance Standards and Guidelines for Stormwater Management in Massachusetts.**

d. Roadways: The permittee shall coordinate with appropriate agencies to implement measures to ensure that roadways and highways are operated and maintained in a manner so as to minimize the discharge of pollutants to the separate storm sewer system (including discharges related to deicing and sanding activities and snow removal and disposal).

The permittee shall conduct an investigation of the drainage from roadways that are owned or operated by other entities, primarily the Massachusetts Highway Department. Within 180 days after the effective date of the permit, **the permittee shall report to the EPA and the MA DEP, which of these roadway drainage systems are connected to the MS4.** The SWMP will also include a description of how the permittee will coordinate with such entities to assure that discharges to the MS4 through such drainage meets the requirements of the permit.

e. Flood Control Projects: The permittee shall ensure any flood management projects consider impacts on the water quality of receiving waters. The permittee shall also evaluate the feasibility of retro-fitting existing structural flood control devices to provide additional pollutant removal from storm water.

f. Pesticide, Herbicide, and Fertilizer Application: The permittee shall implement measures to reduce the discharge of pollutants to the MS4 related to the application and storage of pesticides, herbicides, and fertilizers applied by municipal or public agency employees or contractors to public right of ways, parks, and other municipal facilities. The permittee, in cooperation with the entity with jurisdiction over land use (e.g. Parks Department), shall implement

controls to reduce discharge of pollutants to the MS4 related to the application and distribution of pesticides, herbicides, and fertilizers by commercial and wholesale distributors and applicators and its own employees.

g. Authorized Non-Storm Water Discharges: Unless identified by either the permittee, the EPA, or the State as significant sources of pollutants to waters of the United States, the following non-storm water discharges are authorized to enter the MS4. As necessary, the permittee shall incorporate appropriate control measures in the SWMP to insure that these discharges are not significant sources of pollutants to waters of the United States.

(a) water line flushing;
(b) landscape irrigation;
(c) diverted stream flows;
(d) rising ground waters;
(e) uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers;
(f) uncontaminated pumped ground water;
(g) discharges from potable water sources;
(h) foundation drains;
(I) uncontaminated air conditioning or compressor condensate;
(j) irrigation water;
(k) uncontaminated springs;
(l) water from crawl space pumps;
(m) footing drains;
(n) lawn watering;
(o) non-commercial car washing;
(p) flows from riparian habitats and wetlands;
(q) swimming pool discharges which have been dechlorinated;
(r) street wash waters; and
(s) discharges or flows from emergency fire fighting activities.
(t) fire hydrant flushing
(u) building washdown water which does not contain detergents

h. Illicit Discharges and Improper Disposal: The permittee shall continue to implement its ongoing program to detect and remove (or require the discharger to the MS4 to remove or obtain a separate NPDES permit for) illicit discharges and improper disposal into the separate storm sewer.

1. The permittee shall effectively prohibit unpermitted, industrial storm water discharges which are required to have a federal storm water permit, to the MS4.

2. The permittee shall prohibit unpermitted discharges of dry and wet weather overflows from sanitary sewers into the MS4. The permittee shall identify and limit the infiltration of seepage from sanitary sewers into the MS4.

3. The permittee shall prohibit the discharge or disposal of used motor vehicle fluids, household hazardous wastes, grass clippings, leaf litter, and animal wastes into separate storm sewers. Public education programs for proper disposal of these materials shall be included in the SWMP and publicized at least annually and shall include material for non-English speaking residents.

4. The permittee shall require the elimination of illicit connections as expeditiously as possible and the immediate cessation of improper disposal practices upon identification of responsible parties. The permittee shall describe its procedure for the identification, costing and elimination of illicit discharges. This information shall be included in the annual report required under Part I.E. below. Where elimination of an illicit connection within thirty (30) days is not possible, the permittee shall establish a schedule for the expeditious removal of the discharge. In the interim, the permittee shall take all reasonable and prudent measures to minimize the discharge of pollutants to the MS4.

i. Spill Prevention and Response: The permittee shall implement procedures to prevent, contain, and respond to spills that may discharge into the MS4. The spill response procedures may include a combination of spill response actions by the permittee (and/or other public or private entities), and requirements for private entities through the permittee's sewer use ordinances. The discharges of materials resulting from spills is prohibited.

j. Industrial & High Risk Runoff: The permittee shall implement a program to identify, monitor, and control pollutants in storm water discharges to the MS4 from municipal landfills; hazardous waste treatment,

storage, disposal and recovery facilities and facilities that are subject to EPCRA Title III, Section 313; and any other industrial or commercial discharge the permittee determines is contributing a substantial pollutant loading to the MS4. A list of these facilities which discharge to the MS4 shall be maintained and updated as necessary. This shall include industrial activities which are listed at 40 CFR §122.26(b)(14), which are required to obtain federal storm water permit coverage. The program shall include:

1. priorities and procedures for inspections and establishing and implementing control measures for such discharges;

2. a monitoring (or self-monitoring) program for facilities identified under this section, including the collection of quantitative data on the following constituents:

(a) any pollutants which the discharger may monitor for or are limited to in an existing NPDES permit for an identified facility;

(b) any information on discharges required under 40 CFR 122.21(g)(7)(iii) and (iv).

(c) any pollutant the permittee has a reasonable expectation is discharged in substantial quantity from the facility to the separate storm sewer system

Data collected by the industrial facility to satisfy the monitoring requirements of an NPDES or State discharge permit may be used to satisfy this requirement. The permittee may require the industrial facility to conduct self-monitoring to satisfy this requirement.

3. Alternative Certification: In lieu of monitoring, the permittee may accept a certification from a facility stating that raw and waste materials, final and intermediate products, by-products, material handling equipment or activities, and/or loading/unloading operations are not expected to be exposed to storm water for the certification period. The permittee shall still reserve the right to conduct and shall consider conducting site inspections for these facilities during the life of this permit.

k. Construction Site Runoff: The permittee shall implement a program to reduce the discharge of pollutants from construction sites into the MS4, including:

1. requirements for the use and maintenance of appropriate structural and non-structural best management practices to reduce pollutants discharged to the MS4 during the time construction is underway;

2. procedures for site planning which incorporate considerations for potential short term and long term water quality impacts to the MS4 and minimizes these impacts;

3. prioritized inspections of construction sites and enforcement of control measures;

4. appropriate education and training measures for construction site operators;

5. notification to appropriate building permit applicants of their potential responsibilities under the NPDES permitting program for construction site runoff.

l. Public Education: The permittee shall implement a public education program including, but not limited to the following items. Cooperation should be sought with city and state agencies where necessary. This program shall also include material for non-English speaking residents.

1. A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or improper disposal of materials (e.g. floatables, industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4 (e.g. curb inlet stenciling, citizen "streamwatch" groups, "hotlines" for reporting dumping, outreach materials included in billings, public access/government cable channels, etc.);

2. a program to promote, publicize, and facilitate the proper management and disposal of used oil and household hazardous wastes;

3. a program to promote, publicize, and facilitate the proper use, application, and disposal of

pesticides, herbicides, and fertilizers by the public and commercial and private applicators and distributors;

4. where applicable and feasible, the permittee should publicize those best management practices (including but not limited to the use of reformulated or redesigned products, substitution of less toxic materials, and improvements in housekeeping) used by the permittee that facilitate better use, application, and/or disposal of materials identified in 1.1 and 1.2 above.

2. Deadlines for Program Compliance. Except as provided in PART II, and Part I.B.7. compliance with the storm water management program shall be required within **180** days from the effective date of the permit.

3. Roles and Responsibilities of Permittee: The Storm Water Management Program shall clearly identify the roles and responsibilities of the permittee and any party impacting its efforts to comply with this permit.

4. Legal Authority: The permittee and/or cooperating agencies shall ensure that they have and maintain legal authority to control discharges to and from those portions of the MS4 which it owns or operates. This legal authority may be a combination of statute, ordinance, permit, contract, or an order to:

a. Control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

b. Prohibit illicit discharges to the MS4;

c. Control the discharge of spills and the dumping or disposal of materials other than storm water (e.g. industrial and commercial wastes, trash, used motor vehicle fluids, leaf litter, grass clippings, animal wastes, etc.) into the MS4;

d. Control through interagency or inter-jurisdictional agreements the contribution of pollutants from one portion of the MS4 to another;

e. Require compliance with conditions in ordinances, permits, contracts or orders; and

f. Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance with permit conditions.

5. Storm Water Management Program Resources The permittee shall provide adequate finances, staff, equipment, and support capabilities to implement its SWMP.

6. Storm Water Management Program Review and Modification

a. Program Review: The permittee shall participate in an annual review of its current or modified SWMP in conjunction with preparation of the annual report required under Part I.E. This annual review shall include:

1. A review of the status of program implementation and compliance with program elements and other permit conditions as necessary;

2. An assessment of the effectiveness of controls established by the SWMP;

3. A review of monitoring data and any trends in estimated cumulative annual pollutant loadings;

4. An assessment of any SWMP modifications needed to comply with the CWA §402(p)(3)(B)(iii) requirement to reduce the discharge of pollutants to the maximum extent practicable (MEP).

5. An annual public informational meeting held within two months of submittal of the Annual report.

b. Program Modification: The permittee may modify the SWMP in accordance with the following procedures:

1. The approved SWMP shall not be modified by the permittee(s) without the prior approval of the Director, unless in accordance with items 2. or 3. below.

2. Modifications adding (but not subtracting or replacing) components, controls, or requirements to the approved SWMP may be made by the permittee at any time upon written notification to the Director.

3. Modifications replacing an ineffective or unfeasible BMP specifically identified in the SWMP with an alternative BMP may be requested at any time. Unless denied by the Director, the modification shall be deemed approved and shall be implemented by the permittee 60 days from submittal of the request. Such requests must include the following:

(a) an analysis of why the BMP is ineffective or infeasible (including cost prohibitive),

(b) expectations on the effectiveness of the replacement BMP, and

(c) an analysis of why the replacement BMP is expected to achieve the goals of the BMP to be replaced.

4. Modification requests and/or notifications must be made in writing and signed in accordance with Part I.F.

c. Modifications required by the Permitting Authority: The permitting authority may require the permittee to modify the SWMP as needed to:

1. Address impacts on receiving water quality caused or contributed to by discharges from the MS4;

2. Include more stringent requirements necessary to comply with new State or Federal statutory or regulatory requirements; or

3. Include such other conditions deemed necessary by the Director to comply with the goals and requirements of the Clean Water Act.

Modifications requested by the Director shall be made in writing and set forth a time schedule for the permittee to develop the modification(s).

C. WET WEATHER MONITORING AND REPORTING REQUIREMENTS

1. Storm Event Discharges. The permittee shall implement a wet weather monitoring program for the MS4 to provide data necessary to assess the effectiveness and adequacy of control measures implemented under the SWMP; estimate annual cumulative pollutant loadings from the MS4; estimate event mean concentrations and seasonal pollutants in discharges from all major outfalls; identify and prioritize portions of the MS4 requiring additional controls, and identify water quality improvements or degradation.

The permittee is responsible for conducting any additional monitoring necessary to accurately characterize the quality and quantity of pollutants discharged from the MS4. Improvement in the quality of discharges from the MS4 will be assessed based on the

necessary monitoring information required by this section, along with any additional monitoring which is made available. There have been no effluent limits established for this draft permit. Numeric effluent limits may be established in the next permit to control impacts on water quality, to improve aesthetics, or for other reasons as necessary.

a. Representative Monitoring: The permittee shall monitor representative outfalls, internal sampling stations, and/or instream monitoring locations to characterize the quality of storm water discharges from the MS4. Within **90** days after the effective date of this permit, the permittee will submit its proposed sampling plan to the EPA and MA DEP for review. The permittee shall choose locations representing different land uses, with a focus on what it considers priority areas, such as an outfall in the vicinity of a public beach. The plan shall outline the parameters to be sampled, the frequency of sampling and reporting of results. This submittal shall also include any related monitoring which the permittee has done since its MS4 permit application was originally submitted. Unless disapproved by the EPA or MA DEP within **30** days after its submittal, the proposed sampling plan shall be deemed approved.

The sampling locations which the permittee submitted in its letter of March 25, 1998 to EPA appear to be adequate. These locations shall be monitored at least three times per year (spring, summer and fall) for all the parameters suggested, including cadmium and replacing oil & grease with Total Petroleum Hydrocarbons (TPH). The summer sampling event shall consist of composite samples, which shall be composed of, at a minimum, samples taken at hours 0 (pre-runoff), 4, 8, 12, 16 and 20. These samples shall be flow composited.

Instream sampling: This sampling is required as a supplement to the outfall monitoring as follows:

1) The mouth of the Mill Brook Conduit shall be grab sampled for fecal coliform during the spring and summer sampling seasons;

2) the high zinc load that was found during the Blackstone River Initiative (BRI) sampling from the Mill Brook conduit shall be investigated. Findings shall be reported in the annual report;

3) the two instream locations to be sampled are:

   a. Sampling station 00 from the BRI study; and

   b. A station downstream of where Beaver Brook and Tatnuck Brook completely mix, but above the Kettle Brook confluence

These two stations will be monitored during the spring and summer sampling events. The sampling parameters will be identical to those of the outfall sampling, with the addition of flow at station 00. Similar to the outfall monitoring, the summer sampling event shall

be conducted with composite samples. At station 00, flow can be determined from measuring the distance from a fixed point on the bridge to the water surface. The EPA will provide information on the relationship between this stage measurement and stream flows. The second sampling station can be flow composited using flow data derived from Station 00. For all instream sampling events, sampling shall be conducted during wet weather.

b. Alternate representative monitoring locations may be substituted for just cause during the term of the permit. Requests for approval of alternate monitoring locations shall be made to the Director in writing and include the rationale for the requested monitoring station relocation. Unless disapproved by the Director, use of an alternate monitoring location may commence thirty (30) days from the date of the request.

2. Storm Event Data: For Part I.C.1.a - Representative Monitoring only - quantitative data shall be collected to estimate pollutant loadings and event mean concentrations for each parameter sampled. In addition to the parameters which are to be sampled for in the sampling plan to be submitted, the permittee shall maintain records of the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration (in hours) between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; an estimate of the total volume (in gallons) of the discharge sampled and a description of the presence and extent of floatable debris, oils, scum, foam, solids or grease in any storm water discharges or in the receiving waters.

3. Sample Type, Collection, and Analysis: The following requirements apply only to samples collected for Part C.1.a - Representative Monitoring.

a. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water

discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken.

b. Grab samples taken during the first two hours of discharge shall be used for the analysis of pH, temperature, Total Petroleum Hydrocarbons (TPH), fecal coliform and residual chlorine. For all other parameters, data shall be reported for flow weighted composite samples as described on Page 15.

c. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.25 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquots taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes.

d. Analysis and collection of samples shall be conducted in accordance with the methods specified at 40 CFR Part 136. Where an approved Part 136 method does not exist, any available method may be used.

4. Sampling Waiver. When a discharger is unable to collect samples required by Part I.C.1.a (Representative Monitoring) due to adverse climatic conditions, the discharger must submit in lieu of sampling data a description of why samples could not be collected, including available documentation of the event. Adverse climatic conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms,etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

5. Wet Weather Screening Program: The permittee shall implement a program to identify, investigate, and address areas within their jurisdiction that may be contributing excessive levels of pollutants to the MS4. The wet weather screening program:

   a. Shall screen the MS4, in accordance with the procedures specified in the SWMP, at least once during the permit term.

   b. Shall specify the sampling and non-sampling techniques (such as observations or quantitative methods), to be used for initial screening and follow-up purposes. For samples collected for screening purposes only, sample collection and analysis need not conform to the requirements of 40 CFR Part 136 and are not subject to the requirements of Paragraphs 1, 2, and 3 above.

D. DRY WEATHER DISCHARGES

1. Dry Weather Screening Program: The permittee shall continue ongoing efforts to detect the presence of illicit connections and improper discharges to the MS4. All major outfalls identified in the Part I application and all other areas (but not necessarily all outfalls) of the MS4 must be screened at least once during the permit term. A schedule of inspections shall be identified to support activities undertaken in accordance with Part I.B.2.g. and may be in conjunction with any activities undertaken in accordance with Part I.C.. The schedule of inspections shall be included in the annual report Part I.E.

2. Screening Procedures: Screening methodology may be developed and/or modified based on experience gained during actual field screening activities and need not conform to the protocol at 40 CFR §122.26(d)(1)(iv)(D).

3. Follow-up on Dry Weather Screening Results: The permittee shall implement a program to locate and eliminate suspected sources of illicit connections and improper disposal identified during dry weather screening activities. Follow-up activities shall be prioritized on the basis of:

   a. magnitude and nature of the suspected discharge;

   b. sensitivity of the receiving water; and

   c. other relevant factors.

E. ANNUAL REPORT:

The permittee shall prepare an annual system-wide report to be submitted no later than April 1, 2000 and annually thereafter. The report shall include the following separate sections, with an overview for the entire MS4:

1. The status of implementing the storm water management program(s) (status of compliance with any schedules established under this permit shall be included in this section);

2. Proposed changes to the storm water management program(s);

3. Revisions, if necessary, to the assessments of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (d)(2)(v);

4. An evaluation of all the authorized non-storm water discharges at Part I.B.2.g. and whether it was determined that any controls or restrictions are necessary for any of these and descriptions of such;

5. A summary of the data, including monitoring data, that is accumulated throughout the reporting year; a portion of this data shall be compared to National Urban Runoff Program (NURP) values, as was done in the Part II application and to ambient water quality criteria.

6. A revised list of all current separate storm sewer outfalls and their locations, reflecting changes of the previous year and justification for any new outfalls.

7. Annual expenditures for the reporting period, with a breakdown of the major elements of the storm water management program, and the budget for the year following each annual report;

8. A summary describing the number and nature of enforcement actions, inspections, and public education programs;

9. Identification of water quality improvements or degradation; and,

10. Update on the illicit connection program to include the total number of identified connections with an estimate of flow for each, total number of connections found in the reporting period to include how they were found (i.e. citizen complaint, routine inspection), number of connections corrected in the reporting period to include total estimated flow, and the financing required for such to include how the repairs were financed (i.e. by the permittee, costs provided to the permittee by the responsible party, repairs effected and financed by the responsible party). As an attachment to the report, the permittee should submit any existing tracking system information. Also include updates to schedules and a summary of activities conducted under Parts I.C. and I.D.

F. CERTIFICATION AND SIGNATURE OF REPORTS

All reports required by the permit and other information requested by the Director shall be signed and certified in accordance with the General Conditions - Part II of this permit.

G. REPORT SUBMISSION

1. All original, signed notifications and reports required herein, shall be submitted to the Director at the following address:

U.S. Environmental Protection Agency
Water Technical Unit (SEW)
P.O. Box 8127
Boston, MA 02114
Attn: George Papadopoulos, Permit Writer

2. Signed copies of all other notifications and reports shall be submitted to the State at:

Massachusetts Department of Environmental Protection
Division of Watershed Management
Watershed Planning and Permitting Section
627 Main Street
Worcester, Massachusetts 01608

H. RETENTION OF RECORDS

The permittee shall retain all records of all monitoring information, copies of all reports required by this permit and records of all other data required by or used to demonstrate compliance with this permit, until at least three years after coverage under this permit terminates. This period may be modified by alternative provisions of this permit or extended by request of the Director at any time. The permittee shall retain the latest approved version of the SWMP developed in accordance with Part I of this permit until at least three years after coverage under this permit terminates.

I. STATE PERMIT CONDITIONS

1. This Discharge Permit is issued jointly by the U. S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection under Federal and State law, respectively. As such, all the terms and conditions of this permit are hereby incorporated into and constitute a discharge permit issued by the Commissioner of the Massachusetts DEP pursuant to M.G.L. Chap. 21, §43.

2. Each Agency shall have the independent right to enforce the terms and conditions of this Permit. Any modification, suspension or revocation of this Permit shall be effective only with respect to the Agency taking such action, and shall not affect the validity or status of this Permit as issued by the other Agency, unless and until each Agency has concurred in writing with such modification, suspension or revocation. In the event any portion of this Permit is declared, invalid, illegal or otherwise issued in violation of State law such permit shall remain in full force and effect under Federal law as an NPDES Permit issued by the U.S. Environmental Protection Agency. In the event this Permit is declared invalid, illegal or otherwise issued in violation of Federal law, this Permit shall remain in full force and effect under State law as a Permit issued by the Commonwealth of Massachusetts.

TABLE OF CONTENTS

ATTACHMENT A

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING
2	5F	MOUNTAIN ST WEST	48 inch storm drain	KENDRICK B
6	6F	ARARAT ST	48 inch storm drain	UNNAMED B
7	7F	BROOKS ST	24 inch storm drain	KENDRICK B
8	6D	GROVE ST	36 inch storm drain	UNNAMED B
10	8F	W BOYLSTON DR/HWY	15 inch storm drain	MILL BROOK
11	7F	NEW BOND ST	24 inch storm drain	MILL BROOK
12	7E	INDIAN HILL RD NEAR NASHOBA PL	18 inch storm drain	INDIAN LAK
16	7E	INDIAN LAKE RD	36 inch storm drain	INDIAN LAK
17	7E	SHOREHAM RD	42 inch storm drain	INDIAN LAK
27	10B	EDWIDGE ST	48 inch storm drain	UNNAMED B
32	10C	MOWER ST	42 inch storm drain	TATNUCK BI
38	10C	MAPLE LEAF RD	48 inch storm drain	TATNUCK BI
39	11D	CHANDLER ST	42 inch storm drain	OVERLAND
40	12D	BEAV BK PLAYGROUND	42 inch storm drain	BEAVER BRO
45	13D	BEAVER BROOK PKWY	60 inch storm drain	BEAVER BRO
46	12E	BEAVBK PLG/CHANDLER	48 inch storm drain	BEAVER BRO
56	12E	BEAVBK PLG/CHANDLER	15 inch storm drain	BEAVER BRO
58	13E	MID BEAV BK PLG	33 X 48 inch storm drain	BEAVER BRO
62	14D	LAKESIDE AVE	21 inch storm drain	COES POND
65	15D	STAFFORD ST	48 inch storm drain	CURTIS PON
68	14D	MILL/PARK/MAIN	21 inch storm drain	BEAVER BRO
69	14D	MILL/PARK/MAIN	12 inch storm drain	BEAVER BRO
70	14D	MAIN ST	24 inch storm drain	BEAVER BRO
72	13D	OLIVER ST/PARK AVE	24 X 36 inch storm drain	BEAVER BRO
74	14D	WEBSTER ST	18 inch storm drain	MIDDLE RIVI
75	15D	CAMBRIDGE ST	24 inch storm drain	MIDDLE RIVI
77	15D	LYMAN ST	24 inch storm drain	CURTIS PON
78	15C	MAIN ST/TOWN LINE	12 inch storm drain	UNNAMED P
80	16C	STAFFORD ST	39 inch storm drain	KETTLE BRO
81	16C	JAMES ST	36 inch storm drain	KETTLE BRO
84	16E	SOUTHBRIDGE ST	54 inch storm drain	OVERLAND
85	15D	HWY/RR/S OF RIVER	36 inch storm drain	MIDDLE RIVE

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
86	16E	SOUTHBRIDGE ST	24 inch storm drain	OVERLAND FLOW TO MIDDLE RIVER
87	15E	CAMP ST	24 X 36 inch storm drain	MIDDLE RIVER
88	15E	SOUTHBRIDGE ST/HWY	18 inch storm drain	BLACKSTONE RIVER
90	16F	FALMOUTH ST NEAR RR	24 inch storm drain	BLACKSTONE RIVER
91	17F	WISER AVE NEAR RR	30 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
92	17F	AGRAND ST/WARMLAND	36 inch storm drain	OVERLAND FLOW TO BLACKSTONE RIVER
93	18F	SEWAGE TMT PLANT	36 inch storm drain	WORCESTER SEWAGE TREATMENT PLANT
94	16G	MILLBURY ST	42 inch storm drain	BLACKSTONE RIVER
95	17G	MILLBURY ST	21 inch storm drain	BLACKSTONE RIVER
108	14H	JOLMA ROAD	12 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
109	14H	BRANDY LANE	36 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
110	12H	AYRSHIRE/COBURN	60 inch storm drain	UNNAMED BROOK TO QUINSIGAMOND LAKE
114	11H	BELMONT/LAKE	36 inch storm drain	QUINSIGAMOND LAKE
115	11H	SHERBROOK/LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
119	9H	PLANT ST	36 inch storm drain	COAL MINE BROOK
124	7F	W BOYLSTON ST/BOURNE ST	36 inch storm drain	MILL BROOK
125	7F	W BOYLSTON ST/SUMMERHILL ST	36 inch storm drain	MILL BROOK TRIB
128	7G	CONSTITUTION AVE	42 inch storm drain	POOR FARM BROOK
129	7H	PLANT/W BOYLSTON	30 inch storm drain	POOR FARM BROOK
130	7F	BROOKS ST	30 inch storm drain	KENDRICK BROOK
131	6G	CLARK ST	36 inch storm drain	POOR FARM BROOK
134	6F	W BOYLSTON ST	36 inch storm drain	KENDRICK BROOK
135	6F	EAMES ST	24 inch storm drain	KENDRICK BROOK
138	5F	HIGGINS ST	30 inch storm drain	KENDRICK BROOK
139	8F	NEPONSET/W BOYLSTON	12 inch storm drain	MILL BROOK
140	9F	W BOYLSTON TER/GOLD STAR	18 inch storm drain	MILL BROOK
141	9F	W BOYLSTON TER/GOLD STAR	24 inch storm drain	MILL BROOK
142	9F	GENNIE ST/DIST CTR	36 inch storm drain	MILL BROOK
143	9F	GENNIE ST/DIST CTR	66 inch storm drain	MILL BROOK
144	9F	GENNIE ST	15 inch storm drain	MILL BROOK
192	15F	PERRY/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
194	15F	MAXWELL/MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER

CITY OF WORCESTER
OUTFALL INFORMATION

OUTFALL ID	GRID	LOCATION	OUTFALL SIZE	RECEIVING WATER
202	8D	SALISBURY ST	36 inch storm drain	UNNAMED BROOK TO FLAGG ST SCHOOL
1007	13C	WILLIAMSBURG DR	60 inch storm drain	UNNAMED BROOK TO WILLIAMS MILLPOND
1008	15D	JACQUES ST	15 inch storm drain	MIDDLE RIVER
1012	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1013	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1014	18G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1015	18G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1016	16E	HOPE AVE/HWY	24 inch storm drain	LEESVILLE POND
1019	15E	MIDDLE RIV/HWY	12 inch storm drain	MIDDLE RIVER
1020	15E	MIDDLE RIV/HWY	12 inch storm drain	MIDDLE RIVER
1021	15E	MIDDLE RIV/HWY	48 inch storm drain	MIDDLE RIVER
1022	15E	MIDDLE RIV/HWY	48 inch storm drain	MIDDLE RIVER
1039	7F	STORES ST/SHORE RD	24 inch storm drain	DITCH TO MILL BROOK TRIB
1040	7F	STORES ST/SHORE DR	24 inch storm drain	DITCH TO MILL BROOK TRIB
1043	17H	ROUTE 20	12 inch storm drain	BROAD MEADOW BROOK
1045	8H	LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
1046	9H	LAKE AVE	36 inch storm drain	QUINSIGAMOND LAKE
1048	15D	STAFFORD ST	30 inch storm drain	CURTIS POND
1049	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1050	17G	MILLBURY ST	12 inch storm drain	BLACKSTONE RIVER
1051	8F	RT 190/WEST OF KENWOOD AVE	18 inch storm drain	MILL BROOK
1052	6F	HIGGINS ST	12 inch storm drain	KENDRICK BROOK
2003	16C	STAFFORD ST	30 inch storm drain	KETTLE BROOK
2004	16C	JAMES ST	12 inch storm drain	KETTLE BROOK
2006	17G	MILLBURY ST	30 inch storm drain	BLACKSTONE RIVER
3000	15G	DUNKIRK AND HAMPTON	60 inch storm drain	BROAD MEADOW BROOK
3001	5F	MOUNTAIN ST WEST	3.5 X 4 inch storm drain	KENDRICK BROOK
3002	10B	BAILEY ST AT AIRPORT DR	36 inch storm drain	UNNAMED BROOK TO TATNUCK BROOK
3003	6F	ARARAT ST	18 inch storm drain	UNNAMED BROOK TO KENDRICK BROOK

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SECTION 7 REBUTTAL DOCUMENTS

INDEX

TAB 1

Appalachian Power Co. v. EPA

United States Court of Appeals for the District of Columbia Circuit

February 8, 2000, Argued ; April 14, 2000, Decided

No. 98-1512, Consolidated with Nos. 98-1536, 98-1537, 98-1538, 98-1540 & 98-1542

Reporter
208 F.3d 1015 *; 2000 U.S. App. LEXIS 6826 **; 341 U.S. App. D.C. 46; 30 ELR 20560; 50 ERC (BNA) 1449

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Prior History: [**1] On Petitions for Review of an Order of the Environmental Protection Agency.

Core Terms

EPA, monitoring, requirements, testing, regulations, compliance, permits, emission standards, authorities, Air, applicable requirements, federal standard, rulemaking, emission, promulgated, binding, pollutants, agencies, limitations, frequency, notice, petitioners', revise, amend, procedures, sources, terms, policy statement, noninstrumental, instrumental

Case Summary

Procedural Posture

Petitioner's sought review of an order of the Environmental Protection Agency, which released a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" outlining periodic monitoring of source point emissions subject to Title V of the Clean Air Act Amendments of 1990.

Overview

In consolidated petitions for review, petitioners, electric power companies and trade associations representing the nation's chemical and petroleum industry, challenged the validity of portions of an Environmental Protection Agency (EPA) document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance). The court of appeals set aside the Guidance in its entirety. The court found that provisions of the Guidance directing state permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in state or federal emission standards significantly expanded the scope of 40 C.F.R. § 70.6(a)(3)(i)(B). The court held that these provisions should have been subject to the rulemaking procedures required by 42 U.S.C.S. § 7607(d). Accordingly, in view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the court concluded that the Guidance must be set aside in its entirety.

Outcome

Upon petition for review, an Environmental Protection Agency document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs" (Guidance) on finding certain Guidance provisions should have been subject to the rulemaking procedures required under federal law.

LexisNexis® Headnotes

Environmental Law > Air Quality > Operating Permits

Environmental Law > Air Quality > General Overview

HN1[⬇] Air Quality, Operating Permits

See 40 C.F.R. § 70.6(a)(3).

Administrative Law > Agency Rulemaking > Informal Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN2[] Agency Rulemaking, Informal Rulemaking

Only legislative rules have the force and effect of law. A legislative rule is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Governments > Federal Government > Claims By & Against

HN3[] Agency Rulemaking, Negotiated Rulemaking

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Publication

HN4[] Agency Rulemaking, Informal Rulemaking

5 U.S.C.S. § 552(a)(1)(D) requires publication in the Federal Register of all interpretations of general applicability.

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN5[] Agency Rulemaking, Informal Rulemaking

5 U.S.C.S. § 552(a)(2)(B) requires agencies to make available for inspection and copying those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > General Overview

HN6[] Rule Application & Interpretation, Binding Effect

Under the Administrative Procedure Act (APA), a rule may consist of part of an agency statement of

general or particular applicability and future effect. 5 U.S.C.S. § 551(4). Interpretative rules and policy statements may be rules within the meaning of the APA and the Clean Air Act, although neither type of rule has to be promulgated through notice and comment rulemaking. See 42 U.S.C.S. § 7607(d)(1), referring to 5 U.S.C.S. § 553(b)(A) & (B).

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN7[↓] Agency Rulemaking, Informal Rulemaking

In the administrative setting, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN8[↓] Reviewability, Reviewable Agency Action

The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN9[↓] Agency Rulemaking, Negotiated Rulemaking

An agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation. Courts must still look to whether the interpretation itself carries the force and effect of law, or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.

Environmental Law > Air Quality > Operating Permits

Environmental Law > Air Quality > General Overview

HN10[↓] Air Quality, Operating Permits

See 42 U.S.C.S. § 7661c(b).

Administrative Law > Agency Rulemaking > Negotiated Rulemaking

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Administrative Law > Agency Rulemaking > General Overview

HN11[↓] Agency Rulemaking, Negotiated Rulemaking

The Environmental Protection Agency cannot amend its regulations without complying with the rulemaking procedures required by 42 U.S.C.S. § 7607(d).

Administrative Law > Judicial

Review > General Overview

Environmental Law > Solid Wastes > Disposal Standards

HN12[↓] Administrative Law, Judicial Review

Partial affirmance of agency action is not an option when there is substantial doubt that the agency would have adopted the severed portion on its own.

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Operating Permits

HN13[↓] Enforcement, Administrative Proceedings

State permitting authorities therefore may not, on the basis of Environmental Protection Agency's "Periodic Monitoring Guidance for Title V Operating Permits Programs" or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

Counsel: Lauren E. Freeman argued the cause for petitioners. With her on the briefs were Henry V. Nickel, Leslie Sue Ritts, Michael H. Levin, Edmund B. Frost, David F. Zoll, Alexandra Dapolito Dunn, John Reese, Charles F. Lettow, Marcilynn A. Burke, L. Burton Davis, William H. Lewis, Michael A. McCord and Ellen Siegler. Michael P. McGovern and Neal J. Cabral entered appearances.

Jon M. Lipshultz, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the briefs were Lois J. Schiffer, Assistant Attorney General, and Gregory B. Foote, Attorney, Environmental Protection Agency.

Judges: Before: WILLIAMS, HENDERSON, and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge RANDOLPH.

Opinion by: RANDOLPH

Opinion

[*1017] RANDOLPH, *Circuit Judge*: These consolidated petitions for judicial review, brought by electric power companies, and trade associations representing the nation's chemical and petroleum industry, challenge the validity of portions of an EPA document entitled "Periodic Monitoring Guidance," released in 1998. In the alternative, petitioners seek review of a 1992 EPA rule **[**2]** implementing Title V of the Clean Air Amendments of 1990.

I.

Title V of the 1990 amendments to the Clean Air Act altered the method by which government regulated the private sector to control air pollution. Henceforth, stationary sources of air pollution, or of potential air pollution, must obtain operating permits from State or local authorities administering their EPA-approved implementation plans. The States must submit to EPA for its review all operating permits and proposed and final permits. *See* 42 U.S.C. § 7661d. EPA has 45 days to object; if it does so, "the permitting authority may not issue the permit," *id.* § 7661d(b)(3). [1] Congress instructed EPA to pass regulations establishing the "minimum elements of a permit program to be administered by any air pollution control agency," including "Monitoring and

[1] If the State permitting authority fails to revise the permit to satisfy EPA's objection, EPA shall issue or deny the permit, at which point EPA's action becomes subject to judicial review. *See* 42 U.S.C. § 7661d(c).

reporting requirements." 42 U.S.C. § 7661a(b). Under Title V, the Governor of each State could submit to EPA a permit program by November 15, 1993, to comply with Title V and with whatever regulations EPA had promulgated in the interim. *See* 42 U.S.C. § 7661a(d). This was to be accompanied **[**3]** by a legal opinion from the State's attorney general that the laws of the State contained sufficient authority to authorize the State to implement the program. *Id.* If a State decided not to participate, or if EPA disapproved the State's program, federal sanctions would kick in, including a cut-off of federal highway funds and an EPA takeover of permit-issuing authority within the State. *See Commonwealth of Virginia v. Browner*, 80 F.3d 869, 873-74 (4th Cir. 1996).

HN1[↑] EPA promulgated rules implementing the Title V permit program in 1992. The rules list the items each State permit program must contain, [2] including this one:

> (3) *Monitoring and related record-keeping and reporting requirements.* (i) Each permit shall contain the following requirements **[**4]** with respect to monitoring:
> (A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504(b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;
>
> (B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring **[*1018]** (which may consist of record-keeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph(a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent **[**5]** with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and
> (C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods....

40 C.F.R. § 70.6(a)(3).

The key language--key because this dispute revolves around it--is in the first sentence of § 70.6(a)(3)(i)(B). Permits contain terms and conditions with which the regulated entities must comply. Some of the terms and conditions--in regulatory lingo, "applicable requirements" (*see* § 70.6(a)(3)(i)(B)) [3]--consist of emission limitations and standards, State and federal. Experts in the field know that federal emission standards, such as those issued for hazardous air pollutants and new stationary sources, contain far more than simply limits on the **[**6]** amount of pollutants emitted.

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[2] The list is nicely summarized in DAVID R. WOOLEY, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 5.02[1] (9th ed. 2000).

[3] One EPA official explained:

> Permits must incorporate terms and conditions to assure compliance with all applicable requirements under the Act, including the [state implementation plan], title VI, sections 111 and 112, the sulfur dioxide allowance system and NOx limits under the acid rain program, emission limits applicable to the source, monitoring, recordkeeping and reporting requirements, and any other federally-recognized requirements applicable to the source.

John S. Seitz, Director, Office of Air Quality Planning and Standards, *Developing Approvable State Enabling Legislation Required to Implement Title V*, at p. 4 (Feb. 25, 1993).

Take for instance the following examples drawn at random from the Code of Federal Regulations. The national emission standard for hazardous air pollutants from primary lead smelting is contained in 40 C.F.R. §§ 63.1541-.1550. In addition to emission limits, [4] **[**8]** the operator must comply with detailed and extensive testing requirements **[**7]** contained in § 63.8 of the regulations, and must monitor certain pressure drops daily; make weekly checks to ensure that dust is being removed from hoppers; perform quarterly inspections of fans, and so forth. *Id.* § 63.1547. Or consider the standards of performance for new stationary sources contained in 40 C.F.R. part 60, one of the thickest of the dozen or so volumes EPA commands in the C.F.R. In the "beverage can surface coating industry," those subject to these regulations must--if they use "a capture system and an incinerator"--install some sort of "temperature measurement device," properly calibrated and having a specified accuracy stated in terms of degrees Celsius. 40 C.F.R. § 60.494. [5] Or if the new source is in the rubber tire manufacturing industry, an operator doing a "green tire spraying operation" using organic solvent-based sprays must install "an organics monitoring device used to indicate the concentration level of organic compounds **[*1019]** based on a detection principle such as infrared ..., equipped with a continuous recorder, for the outlet of the carbon bed." *Id.* § 60.544(a)(3).

Typically, EPA delegates to the States its authority to require companies to comply with these federal standards. The States incorporate the federal standards in their implementation plans and, under Title V of the 1990 law, the applicable standards become terms and conditions in permits. States too have their own emissions limitations and standards in their implementation plans, which they need in order to comply with national ambient air quality standards. *See* 40 C.F.R. part 52; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 846, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); *Union Electric Co. v. EPA*, 427 U.S. 246, 249-50, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976); **[**9]** *Commonwealth of Virginia v. EPA*, 323 U.S. App. D.C. 368, 108 F.3d 1397, 1406 (D.C. Cir.), *modified*, 116 F.3d 499 (D.C. Cir. 1997). Petitioners tell us that States may formulate their emission standards not only by limiting the amount of air pollutants, but also by imposing practices, including the monitoring of emissions. [6]

On one thing the parties are in agreement. If an applicable State emission standard contains no monitoring requirement to ensure compliance, EPA's regulation requires the State permitting agency to impose on the stationary source some sort of "periodic monitoring" as a condition in the permit or specify a reasonable frequency for any data collection mandate already specified in the applicable requirement. According **[**10]** to petitioners this sort of gap-filling is all § 70.6(a)(3)(i)(B)--the so-called periodic monitoring rule--requires of State permit programs. By petitioners' lights, if a federal or State emission standard already contains some sort of requirement

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[4] *See* 40 C.F.R. § 63.1543(a):

> No owner or operator of any existing, new, or reconstructed primary lead smelter shall discharge or cause to be discharged into the atmosphere lead compounds in excess of 500 grams of lead per megagram of lead metal produced ... from the aggregation of emissions discharged from the air pollution control devices used to control emissions from the sources [listed].

[5] If the facility does not use a capture system, it must calculate its emission limits using a series of equations provided by EPA. For some idea of the complexity of this exercise, consider that the facility must figure its total volume of coating solids per month using the following equation:

$$L[s] = \sum_{i=1}^{n} L[ci]V[si]$$

40 C.F.R. § 60.493(b)(1)(i)(B). It would serve no useful purpose to explain this or the many other equations in the sequence.

[6] In some instances, States may adopt emission standards or limitations that are more stringent than federal standards. 42 U.S.C. § 7416. States may also adopt more stringent permit requirements. 40 C.F.R. § 70.1(c).

to do testing [7] from time to time, this portion of the standard must be incorporated in the permit, not changed by the State to conform to EPA's imprecise and evolving notion of what constitutes "periodic monitoring." [8] Otherwise, State authorities will wind up amending federal emission standards in individual permits, something not even EPA could do without conducting individual rulemakings to amend the regulations containing the federal standards. And with respect to State standards, the State agency will in effect be revising its implementation plan at EPA's behest, without going through the procedures needed to accomplish this. *See, e.g.,* 42 U.S.C. § 7410(k)(5) & (*l*).

[11]** In a document entitled "Periodic Monitoring Guidance for Title V Operating Permits Programs," released in September 1998, EPA took a sharply different view of § 70.6(a)(3) than do petitioners. The "Guidance" was issued over the signature of two EPA officials--the Director of the Office of Regulatory Enforcement, and the Director of the Office of Air Quality Planning and Standards. It is narrative in form, consists of 19 single-spaced, typewritten pages, and is available on EPA's internet web site (www.epa.gov). "Periodic monitoring," the Guidance states, "is required for each emission point at a source subject to title V of the Act that is subject to an applicable requirement, such as a Federal regulation or a SIP emission limitation." PERIODIC MONITORING GUIDANCE FOR TITLE V OPERATING PERMITS PROGRAMS (hereinafter "GUIDANCE") at 5. New source performance standards, and national emission standards for hazardous pollutants, if EPA promulgated the standards after November 15, 1990, the effective date of the **[*1020]** Clean Air Act amendments, are "presumed to have adequate monitoring." *Id.* Also, for "emission units subject to the acid rain requirements," EPA has determined that its "regulations **[**12]** contain sufficient monitoring for the acid rain requirements." *Id.* Outside of these categories and one other, the Guidance states that "periodic monitoring is required ... when the applicable requirement does not require ... monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *Id.* at 6. How to determine this? Clearly, according to the Guidance, if an "applicable requirement imposes a one-time testing requirement, periodic monitoring is not satisfied ...," presumably because one time is not from time to time, which is what periodic means. *Id.*

II.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail **[**13]** regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed

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[7] By testing we mean to include instrumental and noninstrumental monitoring as well.

[8] In support of their view, petitioners point to the Title V rule's preamble which states: "If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing ..., the permit must simply incorporate this provision under § 70.6(a)(3)(i)(A)." 57 Fed. Reg. 32,278 (1992).

procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995). [9] The agency may also think there is another advantage--immunizing its lawmaking from judicial review.

[14]** A.

EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not "binding." [10] **[**16]** Brief of Respondent at 30. *See* GUIDANCE at 19. It is worth pausing a minute to consider what is meant by "binding" in this context. HN2[↑] Only "legislative rules" have the force and effect of law. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 & n.31, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979). A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. [11] If this were all that "binding" meant, EPA's **[*1021]** Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. [12] But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. *See, e.g.*, McLouth Steel Prods. Corp. v. Thomas, 267 U.S. App. D.C. 367, 838 F.2d 1317, 1321 (D.C. Cir. 1988). HN3[↑] If an agency **[**15]** acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *See* Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992), and cases there cited.

[17]** For these reasons, EPA's contention must be that the Periodic Monitoring Guidance is not binding in a practical sense. Even this, however, is not an accurate way of putting the matter. Petitioners are not challenging the Guidance in its entirety. HN6[↑] Under the Administrative Procedure Act, a "rule" may consist of "part of an agency statement of general or particular applicability and future effect...." 5 U.S.C. § 551(4), quoted in full in *supra* note 11; *see* 5 U.S.C. §§ 551(13), 702. "Interpretative rules" and "policy statements" may be rules within the meaning of the

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[9] How much more efficient than, for instance, the sixty rounds of notice and comment rulemaking preceding the final rule in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

[10] Our jurisdiction extends to "any ... nationally applicable ... final action taken by" the EPA "Administrator." 42 U.S.C. § 7607(b)(1). The Guidance issued over the signatures of two high level EPA officials rather than the Administrator. EPA does not, however, contest petitioners' assertion that because "the document was drafted, and reviewed by, high ranking officials in several EPA offices, including EPA's lawyers, there is no reason to doubt the authors' authority to speak for the Agency." Brief of Petitioners at 42. *See* Her Majesty the Queen v. EPA, 286 U.S. App. D.C. 171, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990); Natural Resources Defense Council, Inc. v. Thomas, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988).

[11] We have also used "legislative rule" to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking. *See, e.g.*, American Mining Congress v. Department of Labor, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1110 (D.C. Cir. 1993). In this case, by "rule" we mean the following:

> ... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....
>
> **5 U.S.C. § 551(4).**

[12] HN4[↑] **5 U.S.C. § 552(a)(1)(D)** requires publication in the Federal Register of all "interpretations of general applicability." HN5[↑] *Compare* **5 U.S.C. § 552(a)(2)(B)**, requiring agencies to make available for inspection and copying "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

APA and the Clean Air Act, although neither type of "rule" has to be promulgated through notice and comment rulemaking. *See* 42 U.S.C. § 7607(d)(1), referring to 5 U.S.C. § 553(b)(A) & (B). [13] **[**19]** EPA claims, on the one hand, that the Guidance is a policy statement, rather than an interpretative rule, and is not binding. [14] On **[*1022]** the other hand, EPA agrees with petitioners that "the Agency's position on the central legal issue here--the appropriateness of a sufficiency review of all Title V monitoring requirements--indeed is settled. **[**18]** ..." Brief of Respondent at 32. In other words, whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.

Of course, an agency's action is not necessarily final merely because it is binding. [15] **[**22]** Judicial orders can be binding; a temporary restraining order, for instance, compels compliance but it does not finally decide the case. **HN7**[⬆] In the administrative setting, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)--it **[**20]** must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,' *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 27 L. Ed. 2d 203, 91 S. Ct. 203 (1970)." *Bennett v. Spear*, 520 U.S. 154, 178, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997). The first condition is satisfied here. The "Guidance," as issued in September 1998, followed a draft circulated four years earlier and another, more extensive draft circulated in May

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[13] We quoted, in *Panhandle Eastern Pipeline Co. v. FERC*, 339 U.S. App. D.C. 94, 198 F.3d 266, 269 (D.C. Cir. 1999), the statement in *Pacific Gas & Electric Co. v. Federal Power Commission*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974), that a policy statement is not a "rule," apparently within the meaning of 5 U.S.C. § 551(4). Dicta in *Syncor International Corp. v. Shalala*, 326 U.S. App. D.C. 422, 127 F.3d 90, 94 (D.C. Cir. 1997), suggests the same without referring to § 551(4). *See also Hudson v. FAA*, 338 U.S. App. D.C. 194, 192 F.3d 1031 (D.C. Cir. 1999).

On the other hand, in *Batterton v. Marshall*, 208 U.S. App. D.C. 321, 648 F.2d 694, 700 (D.C. Cir. 1980), we interpreted the term "rule" in § 551(4) as "broad enough to include nearly every statement an agency may make...." Quoting this language, we held in *Center for Auto Safety v. National Highway Safety Administration*, 228 U.S. App. D.C. 331, 710 F.2d 842, 846 (D.C. Cir. 1983), that agency policy statements accompanying the withdrawal of a notice of proposed rulemaking fell within the definition of a "rule." A few years later, then-Judge Scalia--citing *Batterton*--wrote for the court that under APA § 551(4), it is "clear" that "the impact of an agency statement upon private parties is relevant only to whether it is the sort of rule that is ... a general statement of policy." *Thomas v. New York*, 256 U.S. App. D.C. 49, 802 F.2d 1443, 1447 n.* (D.C. Cir. 1986). *See also National Tank Truck Carriers, Inc. v. Federal Highway Admin.*, 335 U.S. App. D.C. 166, 170 F.3d 203, 207 n.3 (D.C. Cir. 1999).

There is no need for us to try to reconcile these two lines of authority. Nothing critical turns on whether we initially characterize the Guidance as a "rule."

[14] EPA is under the impression that policy statements can never be "rules" within the meaning of APA **§ 551(4)**: "even if the Guidance were somehow deemed to be a 'rule' (a conclusion that would, in EPA's view, be erroneous due to the non-binding nature of the Guidance), Petitioners' procedural challenge would still fail because the Guidance undoubtedly would be an interpretive (not legislative) rule...." Brief of Respondent at 43-44 n.40. We should note that the Guidance itself states that it "interprets" § 70.6(a)(3) of the regulations. GUIDANCE at 4 n.1.

[15] We add that agency action does not necessarily have binding effect--that is, does not necessarily alter legal rights and obligations--merely because it is final. Denials of petitions for rulemaking, for instance, may be final although no private person is required to do anything. In the past, when this court examined the binding effect of agency action, we did so for the purpose of determining whether the non-legislative rule should have undergone notice and comment rulemaking because it was, in effect, a regulation. *See, e.g., Florida Power & Light Co. v. EPA*, 330 U.S. App. D.C. 344, 145 F.3d 1414, 1418-19 (D.C. Cir. 1998); *American Portland Cement Alliance v. EPA*, 322 U.S. App. D.C. 99, 101 F.3d 772, 776 (D.C. Cir. 1996); *Kennecott Utah Copper Corp. v. Dep't of Interior*, 319 U.S. App. D.C. 128, 88 F.3d 1191, 1207 (D.C. Cir. 1996); *National Solid Waste Mgmt. Ass'n v. EPA*, 276 U.S. App. D.C. 207, 869 F.2d 1526,

1998. This latter document bore the title "*EPA Draft Final Periodic Monitoring Guidance*." [16] On the question whether States must review their emission standards and the emission standards EPA has promulgated to determine if the standards provide enough monitoring, the Guidance is unequivocal--the State agencies must do so. *See* GUIDANCE at 6-8. On the question whether the States may supersede federal and State standards and insert additional monitoring requirements as terms or conditions of a permit, the Guidance is certain--the State agencies must do so if they **[**21]** believe existing requirements are inadequate, as measured by EPA's multi-factor, case-by-case analysis set forth in the Guidance. *See* GUIDANCE at 7-8.

EPA may think that because the Guidance, in all its particulars, is subject to change, it is not binding and therefore not final action. There are suggestions in its brief to this effect. *See, e.g.,* Brief of Respondent at 3, 33 n.30. But all laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. **HN8**[↑] The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment. *See McLouth Steel Prods. Corp. v. EPA*, 838 F.2d at 1320.

On the issue whether the challenged portion of the Guidance has legal consequences, EPA points to the concluding paragraph of the document, which contains **[*1023]** a disclaimer: "The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." GUIDANCE at 19. This language is boilerplate; since 1991 EPA has been placing it at the **[**23]** end of all its guidance documents. *See* Robert A. Anthony, *supra*, 41 DUKE L.J. at 1361; Peter L. Strauss, Comment, *The Rulemaking Continuum,* 41 DUKE L.J. 1463, 1485 (1992) (referring to EPA's notice as "a charade, intended to keep the proceduralizing courts at bay"). Insofar as the "policies" mentioned in the disclaimer consist of requiring State permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit, "rights" may not be created but "obligations" certainly are-obligations on the part of the State regulators and those they regulate. At any rate, the entire Guidance, from beginning to end--except the last paragraph--reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line, as all have done, save perhaps Florida and Texas. *See Natural Resources Defense Council, Inc. v. Thomas*, 269 U.S. App. D.C. 343, 845 F.2d 1088, 1094 (D.C. Cir. 1988); *Community Nutrition Inst. v. Young*, 260 U.S. App. D.C. 294, 818 F.2d 943, 947-48 (D.C. Cir. 1987). **[**24]**

Petitioners tell us, and EPA does not dispute, that many of them are negotiating their Title V permits, that State authorities, with EPA's Guidance in hand, are insisting on continuous opacity monitors [17] for determining compliance with opacity limitations although the applicable "standard specifies EPA Method 9 (a visual observation method) as the compliance method (and, in some cases, already provides for periodic performance of that method)." Brief of Petitioners at 43-44. *See Natural Resources Defense Council, Inc. v. EPA*, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1133 (D.C. Cir. 1994).

[25]** The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for

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1534 (D.C. Cir. 1989).

[16] In the title to the Guidance we have before us, EPA dropped the word "final."

[17] A continuous opacity monitor employs "a calibrated light source that provides for accurate and precise measurement of opacity at all times." *See* Credible Evidence Revisions, 62 Fed. Reg. 8319 (1997). In contrast, "Method 9 requires that a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume" to determine the opacity of the plume released. *Id.*

companies like those represented by petitioners who must obtain Title V permits in order to continue operating. [18]

[26]** B.

As to the validity of the Guidance, petitioners' arguments unfold in the following sequence. First, they contend that the Guidance amended the "periodic monitoring rule" of § 70.6(a)(3)(i)(B). Although the rule only allowed State authorities to fill in gaps, that is, to require periodic monitoring when the applicable State emission standard contained no monitoring requirement, a one-time startup test, or provided no frequency for monitoring, the Guidance applies across the board, charging State authorities with the duty of assessing the sufficiency of all State and federal standards. [19] With the Guidance in **[*1024]** place, regional EPA offices have solid legal grounds for objecting to State-issued permits if the State authorities refuse to bend to EPA's will. Therefore, as petitioners see it, the Guidance is far more than a mere interpretation of the periodic monitoring rule and it is far more than merely a policy statement. In practical effect, it creates a new regime, a new legal system governing permits, and as such it should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures. Petitioners say that if they are wrong about this, if the Guidance **[**27]** represents a valid interpretation of the periodic monitoring rule in § 70.6(a)(3)(i)(B), then the rule itself is invalid. Congress did not authorize EPA to require States, in issuing Title V permits, to make revisions to monitoring requirements in existing federal emission standards.

The case is presented to us in pure abstraction. Neither side cites any specific federal or State emission standard. Although petitioners complain that State officials will revise federal standards promulgated before November 1990, petitioners' briefs identify no specific federal standard potentially subject to revision. Which, if any, federal standards are susceptible to State revision in a permit for lack of periodic monitoring is thus something about which we can only guess. **[**28]** The same is true regarding State emission standards.

Perhaps petitioners should not be faulted. They disagree with EPA's general principle, with the agency's position that it can give State permit officials the authority to substitute new monitoring requirements in place of existing State or federal emission standards already containing some sort of monitoring requirements. The validity of that general principle does not turn on the specifics of any particular emission standard, although its application does. Besides, EPA is currently developing even more detail in far more extensive "guidance" using concrete examples of what would, and would not, constitute "periodic monitoring" in EPA's opinion. *See* Draft--Periodic Monitoring Technical Reference Document (Apr. 30, 1999).

HN9[↑] It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607 (d)) by labeling a major substantive legal addition to a rule a mere interpretation. *See* *Paralyzed Veterans v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. MSHA*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993). **[**29]** "We must still

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[18] EPA also claims that the Guidance is not ripe for review because the court's review would be more focused in the context of a challenge to a particular permit. We think there is nothing to this. Whether EPA properly instructed State authorities to conduct sufficiency reviews of existing State and federal standards and to make those standards more stringent if not enough monitoring was provided will not turn on the specifics of any particular permit. Furthermore, EPA's action is national in scope and Congress clearly intended this court to determine the validity of such EPA actions. *See* 42 U.S.C. § 7607. A challenge to an individual permit would not be heard in this court. (Petitioners contend that only state courts could adjudicate such cases. We express no view about that.)

[19] Petitioners also claim that the Guidance revised EPA's "Compliance Assurance Monitoring" rule, sustained in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130 (D.C. Cir. 1999), an argument we find unnecessary to consider.

look to whether the interpretation itself carries the force and effect of law, ... or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." (citations and internal quotations omitted). *See Paralyzed Veterans*, 117 F.3d at 588. With that in mind, we will deal first with petitioners' claim that the Guidance significantly expanded the scope of the periodic monitoring rule. Section 70.6(a)(3)(i)(B) tells us that "periodic monitoring" must be made part of the permit when the applicable State or federal standard does not provide for "periodic testing or instrumental or noninstrumental monitoring." [20] If "periodic" has its usual meaning, [21] this signifies that any State or federal standard requiring testing from time to time--that is yearly, monthly, weekly, daily, hourly--would be satisfactory. The supplementing authority in § 70.6(a)(3)(i)(B) therefore would not be **[*1025]** triggered; instead, the emission standard would simply be incorporated in the permit, as EPA acknowledged in the rule's preamble, *see supra* note 8. On the other hand, if the State or federal standard contained merely a **[**30]** one-time startup test, specified no frequency for monitoring or provided no compliance method at all, § 70.6(a)(3)(i)(B) would require the State authorities to specify that some testing be performed at regular intervals to give assurance that the company is complying with emission limitations.

So far, our parsing of the language of § 70.6(a)(3)(i)(B) corresponds with petitioners' view that the rule serves only a gap-filling **[**31]** function. If this is what the rule means, there is no doubt that it is much narrower than the Guidance issued in 1998. There, EPA officials stated that regardless whether an emission standard contained a "periodic testing" or monitoring requirement, additional monitoring "may be necessary" if the monitoring in the standard "does not provide the necessary assurance of compliance." [22] *E.g.*, GUIDANCE at 7-8. Petitioners describe that aspect of the Guidance this way: "The Guidance unequivocally directs state permitting authorities, as a minimum element of continued EPA program approval, to conduct wide-ranging sufficiency reviews and upgrade monitoring in nearly all individual permits or permit applications, even where the underlying applicable requirement incorporates 'periodic testing or instrumental or noninstrumental monitoring' in facial compliance with § 70.6(a)(3)(i)(B)." Reply Brief of Petitioners at 13.

[32]** EPA's view of the scope of the Guidance is about the same as petitioners'. But the agency thinks statements in the preamble to its 1992 rule and its responses to comments in the final rulemaking alerted interested onlookers to its current position and show that the Guidance issued in 1998 is no broader than the rule itself. EPA's strongest point is the following statement made in 1992: "To the extent commentators assert that Title V does not authorize EPA to require monitoring beyond that provided for in the applicable requirement, EPA disagrees with the commenters." EPA Response to Comments (hereinafter "RTC") at 6-3. On the face of it, this assertion of statutory

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[20] HN10[↑] EPA identified the source of its authority for § 70.6(a)(3) as 42 U.S.C. § 7661c(b). This provides that EPA "may by rule" set forth methods and procedures "for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance."

[21] Although EPA defined many terms in its regulations governing permits, 40 C.F.R. § 70.2, it provided no definition of "periodic" or of "monitoring."

[22] By measuring the adequacy of monitoring in this manner, EPA's position introduces circularity. The Guidance instructs permitting authorities that monitoring is sufficient if it provides "a reasonable assurance of compliance with requirements applicable to the source." GUIDANCE at 7. But some of the applicable requirements are themselves methods for testing a source's compliance with other standards. For instance, in the case of a requirement to conduct an annual stack test, EPA's methodology suggests that performance of the one-time test would be sufficient as it provides "a reasonable assurance of compliance" with the applicable requirement. The problem is this gives permitting authorities no assistance in evaluating the proper frequency of such tests.

authority may have reflected EPA's claim--which no one now disputes--that if an "applicable requirement" contained a one-time stack test, the federal agency could insist that the State authority insert in the permit a requirement that the test be performed at regular intervals. If that is all the EPA statement signified, it would be entirely consistent with petitioners' interpretation of the final rule. [23]

[33]** In its response to comments and in the preamble to the Title V regulations, EPA promised that if there is "any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement." 57 Fed. Reg. 32,278 (1992); RTC at 6-4. [24] The Guidance, **[*1026]** of course, charts a very different course. Now, it is initially up to the States to identify federal standards with deficient monitoring, doubtless with EPA's input, formal or informal. And it is the State and local agencies that must alter the standards by requiring permittees--such as petitioners--to comply with more stringent monitoring requirements. Needless to say, EPA's approach--delegating to State officials the authority to alter duly promulgated federal standards--raises serious issues, not the least of which is whether EPA possesses the authority it now purports to delegate. One would suppose, and EPA did in 1992, that if federal regulations proved inadequate for one reason or another, EPA would have to conduct a rulemaking to amend them. *See Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1203-04 (D.C. Cir. 1998).

[34]** EPA thinks two other statements in its response to comments alerted everyone that its new rule would set in motion an across-the-board review of the existing monitoring requirements contained in federal and State emission standards. The first of these statements is: "In many cases, the monitoring requirements in the underlying regulation will suffice for assessing compliance." RTC at 6-3. EPA treats the "in many cases" as a qualification. What does this tell the careful reader? Only that sometimes the State or federal emission standard will need to be supplemented. But the critical question is when--when the monitoring in the standard consists only of a one-time test? or when the yearly or monthly or weekly or daily testing specified in the standard is not enough, as determined by State authorities or EPA during the permit process?

The second statement is this:

> The EPA reiterates that permits must be enforceable, and must include periodic monitoring, which might involve the use of, or be based on, appropriate reference test methods.... Where EPA has not provided adequate guidance in regard to source testing or monitoring, permitting authorities are allowed to establish additional **[**35]** requirements, including requirements concerning the degree and frequency of source testing on a case-by-case basis, as necessary to assure compliance with Part 70 [Title V] permit terms or conditions. However, in no case may such frequency be less stringent than any frequency required by an underlying applicable requirement.

Id. at 6-5. If "periodic monitoring" means testing from time to time, the first sentence in this passage hardly advances EPA's current position. And the second sentence seems set against it. Only when "EPA has not provided adequate guidance in regard to source testing or monitoring," may State authorities provide additional monitoring. So what

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[23] According to EPA's response to comments:

> Examples of situations where Section 70.6(a)(3)(i)(B) would apply include a SIP provision which contains a reference test method but no testing obligation, or a NSPS which requires only a one time stack test on startup. Any Federal standards promulgated pursuant to the Act amendments of 1990 are presumed to contain sufficient monitoring and, therefore, only Section 70.6(a)(3)(i)(A) applies.

RTC at 6-4.

[24] Later in its response to comments, EPA repeated this promise: "... EPA will revise federal regulations that need additional specification of test methods, including specification of frequency and degree of testing." RTC at 6-5.

is "adequate guidance"? Once again the only concrete example EPA gave in 1992 was a one-time stack test, which rather makes petitioners' point.

The short of the matter is that the regulatory history EPA offers fails to demonstrate that § 70.6(a)(3)(i)(B) initially had the broad scope the Guidance now ascribes to it. Nothing on the face of the regulation or in EPA's commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide **[**36]** which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided. In fact, EPA's promise in the 1992 rulemaking--that if federal standards were found to be inadequate in terms of monitoring it would open rulemaking proceedings--is flatly against EPA's current position. (EPA makes no attempt to square this promise with the argument it makes today.)

Furthermore, we attach significance to EPA's recognition, in its 1992 permit regulations, that "Title V does not impose substantive new requirements," 40 C.F.R. **[*1027]** § 70.1(b). Test methods and the frequency of testing for compliance with emission limitations are surely "substantive" requirements; they impose duties and obligations on those who are regulated. Federal testing requirements contained in emissions standards are promulgated after notice and comment rulemaking. Testing requirements in emission standards in State standards are presumably adopted by the State's legislature or administrative agency, and approved by EPA as part of the State's implementation plan. We have recognized before that changing the method of measuring compliance with an emission limitation **[**37]** can affect the stringency of the limitation itself. *Portland Cement Ass'n v. Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F.2d 375, 396-97 (D.C. Cir. 1973), *discussed in Clean Air Implementation Project v. EPA*, 150 F.3d at 1203. In addition, monitoring imposes costs. Petitioners represent that a single stack test can "cost tens of thousands of dollars, and take a day or more to complete," which is why "stack testing is limited to once or twice a year (at most)." Brief of Petitioners at 22 n.75. If a State agency, acting under EPA's direction in the Guidance, devised a permit condition increasing a company's stack test obligation (as set forth in a State or federal standard) from once a year to once a month, no one could seriously maintain that this was something other than a substantive change. [25]

[38]** There is still another problem with EPA's position. Although its Guidance goes to great lengths to explain what is meant by the words "periodic monitoring," it almost completely neglects a critical first step. On the face of § 70.6(a)(3)(i)(B), "periodic monitoring" is required if and only if "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." While the Guidance is quick to say that all Title V permits must contain "periodic monitoring," it never explains what constitutes "periodic testing" or what constitutes "instrumental or noninstrumental monitoring." Instead, throughout the Guidance, EPA either yokes these three items together, or treats the terms as synonymous, without saying why. Yet if "periodic testing" and "instrumental or noninstrumental monitoring" mean the same thing as "periodic monitoring," there is no accounting for why § 70.6(a)(3)(i)(B) was written as it was. The regulation could simply have said "periodic monitoring" is required for all permits, period. [26]

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[25] The Guidance, at p. 8, provides a six-point bullet point list for permit-writers, making clear that EPA expects them to engage in an intricate regulatory trade off (often on a unit-by-unit basis), assessing the costs and benefits of available technologies for the particular pollutant. This six-part list has mutated into a complex flow chart in the Draft Periodic Monitoring Technical Reference Document, and is reprinted as an Addendum to this opinion.

[26] EPA argues that our opinion in *Natural Resources Defense Council, Inc. v. EPA*, 338 U.S. App. D.C. 340, 194 F.3d 130, 135-36 (D.C. Cir. 1999), reflects an understanding of § 70.6(a)(3) "nearly

[39]** **[*1028]** In sum, we are convinced that elements of the Guidance-those elements petitioners challenge--significantly broadened the 1992 rule. The more expansive reading of the rule, unveiled in the Guidance, cannot stand. **HN11**[↑] In directing State permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards even when those standards demand some sort of periodic testing, EPA has in effect amended § 70.6(a)(3)(i)(B). This it cannot legally do without complying with the rulemaking procedures required by 42 U.S.C. § 7607(d). [27] *See Alaska Professional Hunters Ass'n v. FAA*, 336 U.S. App. D.C. 197, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 176-78 (3d Cir. 1999); *Paralyzed Veterans*, 117 F.3d at 585-86.

[40]** For the reasons stated, we find setting aside EPA's Guidance to be the appropriate remedy. Though petitioners challenge only portions of the Guidance, **HN12**[↑] partial affirmance is not an option when, as here, "there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Management v. EPA*, 323 U.S. App. D.C. 425, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (quoting *North Carolina v. FERC*, 235 U.S. App. D.C. 28, 730 F.2d 790, 795-96 (D.C. Cir. 1984)). In view of the intertwined nature of the challenged and unchallenged portions of the Guidance, the Guidance must be set aside in its entirety. *See* 42 U.S.C. § 7607. **HN13**[↑] State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 C.F.R. § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

So ordered.

[SEE ADDENDUM IN ORIGINAL]

[Addendum not available electronically] **[**41]**

End of Document

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identical" to that contained in the Guidance. Supplemental Brief of Respondent at 4. The opinion stated:

> The 1990 Clean Air Act Amendments did not mandate that EPA fit all enhanced monitoring under one rule and EPA has reasonably illustrated how its enhanced monitoring program, when considered in its entirety, complies with § 114(a)(3). Specifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules, and if they are not, they are subject to the two residual rules: (1) "[The permit shall contain] periodic monitoring sufficient to yield reliable data ... that are representative of the source's compliance with the permit...." 40 C.F.R. § 70.6(a)(3)(i)(B); (2) "All part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, [and] monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." *Id.* § 70.6(c)(1).

Id. The bracketed portion of the quotation reads out of subsection (B) the conditions that "periodic monitoring" is required only when "the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping designed to serve as monitoring)." When that clause is reinserted, it becomes clear that the quotation does not speak to the situation of permits which already provide for periodic testing, addressed in 40 C.F.R. § 70.6(a)(3)(i)(A).

[27] Unless EPA certifies that the amendments to the Title V rule would not "have a significant economic impact on a substantial number of small entities," **5 U.S.C. § 605(b)**, it must also comply with the various procedural requirements of the Small Business Regulatory Enforcement Fairness Act, **5 U.S.C. §§ 601-612**.

City of Arcadia v. State Water Resources Control Bd.

Court of Appeal of California, Fourth Appellate District, Division One

January 26, 2006, Filed

D043877

Reporter
135 Cal. App. 4th 1392 *; 38 Cal. Rptr. 3d 373 **; 2006 Cal. App. LEXIS 92 ***; 2006 Cal. Daily Op. Service 797; 2006 Daily Journal DAR 1145; 36 ELR 20025

CITY OF ARCADIA et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

Subsequent History: Rehearing denied by City of Arcadia v. State Water Resources Control Board, 2006 Cal. App. LEXIS 221 (Cal. App. 4th Dist., Feb. 17, 2006)

Review denied by Arcadia, City of v. State Water Resources Control Board, 2006 Cal. LEXIS 4781 (Cal., Apr. 19, 2006)

Related proceeding at County of Los Angeles v. State Water Resources Control Bd., 143 Cal. App. 4th 985, 50 Cal. Rptr. 3d 619, 2006 Cal. App. LEXIS 1546 (Cal. App. 2d Dist., 2006)

Related proceeding at City of Arcadia v. State Water Resources Control Bd., 2010 Cal. App. LEXIS 2150 (Cal. App. 4th Dist., Dec. 14, 2010)

Prior History: [*1]** Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.

City of Arcadia v. United States EPA, 265 F. Supp. 2d 1142, 2003 U.S. Dist. LEXIS 9044 (N.D. Cal., 2003)

Core Terms

Trash, Cities, pollution, regional board, load, River, nonpoint, sources, Clean, zero, monitoring, compliance, regulation, waters, requirements, target, allocations, impaired, municipalities, Resources, Regional, costs, watershed, Basin, documentation, beneficial use, state board, provides, numeric, assimilative

Case Summary

Procedural Posture

Plaintiff cities alleged that defendants, regional and state water quality boards, violated the Clean Water Act, 33 U.S.C. § 1251 et seq., or the Porter-Cologne Act, Wat. Code, § 13000 et seq., by enacting a basin plan with the levels of permissible pollution, or total maximum daily loads (TMDLs), set at zero. The Superior Court of San Diego County (California) partially granted the cities' petition for writ of mandate. Both parties appealed.

Overview

The cities agreed that litter discharged from storm drains into a river had to be remedied but opposed the target of zero as unattainable and inordinately expensive. The court found that the regional board's environmental checklist was deficient and that there was sufficient evidence of a fair argument that the project might have a significant effect on the environment, thus necessitating an environmental impact report or its functional equivalent under the California Environmental Quality Act (CEQA). The trial court erred by granting declaratory relief on the cities' claim that the Trash TMDL did not apply to "nonwaters" and by substituting its own judgment for that of the boards on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the

assimilative capacity of the channel. The Trash TMDL sufficiently notified affected parties of its inclusion in the state's 1998 303(d) list as an impaired water body. The court rejected the cities' claim that the trial court should have invalidated the Trash TMDL on the additional ground that the boards failed to provide for deemed compliance with the target of zero trash through certain methods.

Outcome

The judgment was affirmed as to the Trash TMDL's violation of CEQA and as to the cities' appeal. The judgment was reversed insofar as it was based on the Trash TMDL's lack of an assimilative capacity study, inclusion on the impaired water body list, and a cost/benefit analysis or the consideration of economic factors, and also insofar as it granted declaratory relief regarding the purported inclusion of non-navigable waters in the Trash TMDL.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN1[] Clean Water Act, Water Quality Standards

The Clean Water Act places primary reliance for developing water quality standards on the states. It requires each state to develop such standards and review them at least once every three years for required modifications, pursuant to 33 U.S.C. § 1313(a), (c)(1). The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses, and an anti-degradation policy, pursuant to 40 C.F.R. §§ 131.6, 131.10-131.12 (2003). The water quality criteria can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means any discernable, confined and discrete conveyance such as a pipe, ditch, channel, tunnel, or conduit, as provided in 33 U.S.C. § 1362(14). The Clean Water Act does not define nonpoint source pollution, but it has been described as nothing more than a water pollution problem not involving a discharge from a point source.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Nonpoint Source Pollution

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

HN2[] Clean Water Act, Nonpoint Source Pollution

Congress has dealt with the problem of point source pollution using the National Pollution Discharge Elimination System (NPDES) permit process. Under this approach, compliance rests on technology-based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the Clean Water Act's specific requirements, pursuant to 33 U.S.C. § 1311(b)(1)(A). Nonpoint sources, because of their very nature, are not regulated under the NPDES program. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the Clean Water Act which encourages states to develop areawide waste treatment management plans.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality

Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

HN3[⬇] Clean Water Act, Water Quality Standards

When the National Pollution Discharge Elimination System (NPDES) system fails to adequately clean up certain rivers, streams or smaller water segments, the Clean Water Act requires use of a water-quality based approach. States are required to identify such waters and rank them in order of priority, and based on that ranking, calculate levels of permissible pollution called total maximum daily loads (TMDLs) under 33 U.S.C. § 1313(d)(1)(A) and 40 C.F.R. § 130.7(b) (2003). This list of substandard waters is known as the 303(d) list (§ 303 of the Clean Water Act having been codified as 33 U.S.C. § 1313). A TMDL defines the specified maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all combined sources. A TMDL must be established at a level necessary to implement the applicable water quality standards. A TMDL assigns a waste load allocation to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL. Under 33 U.S.C. § 1313(d)(1)(C), a TMDL requires a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > Federal Versus State Law > General Overview

HN4[⬇] Enforcement, Discharge Permits

The Environmental Protection Agency may allow states to adopt and administer National Pollution Discharge Elimination System permit programs, and it has authorized California to administer such a program.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN5[⬇] Clean Water Act, Water Quality Standards

California implements the Clean Water Act through the Porter-Cologne Act, Wat. Code, § 13000 et seq. Under the Porter-Cologne Act, nine regional water quality control boards regulate the quality of waters within their regions under the purview of the State Water Resources Control Board, pursuant to Wat. Code, §§ 13000, 13100, 13200, 13241, 13242. In accordance with Wat. Code, §§ 13050, subd. (j), 13240, regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area, as provided in Wat. Code, § 13050, subd. (h). The Environmental Protection Agency (EPA) must approve or disapprove a state's total maximum daily load (TMDL) within 30 days of its submission, pursuant to 33 U.S.C. § 1313(d)(2). If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval.

Administrative Law > Judicial Review > Remedies > Mandamus

HN6[] Remedies, Mandamus

Code Civ. Proc., § 1094.5, the administrative mandamus statute, applies when the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, pursuant to § 1094.5, subd. (a). Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus. Rather, review of a quasi-legislative action is limited to traditional mandamus.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Burdens of Proof > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN7[] Standards of Review, De Novo Review

Under Code Civ. Proc., § 1085, review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support, and the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. An appellate court reviews the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN8[] Administrative Proceedings & Litigation, Judicial Review

As to California Environmental Quality Act issues, an abuse of discretion standard applies. Abuse of discretion is established if an agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence, pursuant to Pub. Resources Code, § 21168.5. A reviewing court's task on appeal is the same as the trial court's. Thus, the court conducts its review independent of the trial court's findings.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN9[] Standards of Review, Deference to Agency Statutory Interpretation

Generally, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN10[] Clean Water Act, Water Quality Standards

A regional water quality control board is authorized to investigate the quality of waters in its region, pursuant to Wat. Code, § 13267, subd. (a), and when it requires a polluter to furnish technical or monitoring program reports, the burden, including costs, of these reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports, pursuant to § 13267, subd. (b)(1).

Governments > Legislation > Interpretation

HN11[↓] Legislation, Interpretation

A reviewing court's primary aim in construing any law is to determine the legislative intent. In doing so the court looks first to the words of the statute, giving them their usual and ordinary meaning.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN12[↓] Enforcement, Discharge Permits

A total maximum daily load (TMDL) does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual National Pollution Discharge Elimination System permits or establishing nonpoint source controls. A TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water bodies.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN13[↓] Clean Water Act, Water Quality Standards

Wat. Code, § 13241, provides that each regional water quality control board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance. In establishing water quality objectives a regional board is required to consider several factors, including economic considerations, pursuant to § 13241, subd. (d). Section 13241, subd. (d), does not define "economic considerations" or specify a particular manner of compliance. Thus, the matter is within a regional board's discretion.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN14[↓] Clean Water Act, Water Quality Standards

The Clean Water Act provides that each state shall identify those waters within its boundaries for which the effluent limitations are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters under 33 U.S.C. § 1313(d)(1)(A). Further, it provides in § 1313(d)(1)(C) that each state shall establish for the waters identified in § 1313(d)(1)(A), and in accordance with the priority ranking, the total maximum daily load (TMDL). These provisions do not prohibit a regional water quality control board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate that formal designation on a state's 303(d) list is a prerequisite to a TMDL. Further, § 1313(d)(2) provides that each state shall submit to the Environmental Protection Agency (EPA) Administrator from time to time, for his or her approval the waters identified and the loads established under § 1313(d)(1)(A) and (1)(C). The EPA Administrator shall either approve or disapprove such identification and load not later than 30 days after the date of submission. This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > Federal Versus State

Law > General Overview

HN15[⬇] Clean Water Act, Water Quality Standards

States remain at the front line in combating pollution, and so long as the State does not attempt to adopt more lenient pollution control measures than those already in place under the Clean Water Act, it does not prohibit state action.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN16[⬇] Assessment & Information Access, Environmental Assessments

The California Environmental Quality Act (CEQA) compels the government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. CEQA mandates that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN17[⬇] Environmental & Natural Resources, Environmental Impact Statements

The California Environmental Quality Act (CEQA) is implemented through initial studies, negative declarations, and environmental impact reports (EIR). CEQA requires a governmental agency to prepare an EIR whenever it considers approval of a proposed project that may have a significant effect on the environment. If there is no substantial evidence a project may have a significant effect on the environment or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. CEQA requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. Thus, if substantial evidence in the record supports a fair argument that significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN18[⬇] Environmental & Natural Resources, Environmental Impact Statements

"Significant effect on the environment," for purposes of the California Environmental Quality Act requirement for preparation of an environmental impact report, means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant, pursuant to Cal. Code Regs., tit. 14, § 15382.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN19[↓] Natural Resources & Public Lands, National Environmental Policy Act

State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from the California Environmental Quality Act's (CEQA) requirements for preparation of environmental impact reports, negative declarations, and initial studies. Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. Certified regulatory programs remain subject, however, to other CEQA requirements, pursuant to Pub. Resources Code, § 21080.5. Documents prepared by certified programs are considered the functional equivalent of documents CEQA would otherwise require. An agency seeking certification must adopt regulations requiring that final action on the proposed activity include written responses to significant environmental points raised during the decisionmaking process. The agency must also implement guidelines for evaluating the proposed activity consistently with the environmental protection purposes of the regulatory program. The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects, and be made available for review by other public agencies and the public.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN20[↓] Natural Resources & Public Lands, National Environmental Policy Act

The guidelines for implementation of the California Environmental Quality Act (CEQA), Cal. Code Regs., tit. 14, § 15000 et seq., do not directly apply to a certified regulatory program's environmental document. However, when conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. In a certified program, an environmental document used as a substitute for an environmental impact report must include alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, and a document used as a substitute negative declaration must include a statement that the agency's review of the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion, pursuant to Cal. Code Regs., tit. 14, § 15252, subd. (a).

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN21[↓] Environmental & Natural Resources, Environmental Impact Statements

A regional water quality control board's submission of a plan for State Water Resources Control Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the state board, and a written report addressing reasonable alternatives to the proposed activity and mitigation measures to minimize any significant adverse environmental impacts, pursuant to Cal. Code Regs., tit. 23, § 3777, subd. (a).

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information

Access > Environmental Impact Statements

HN22[] Environmental & Natural Resources, Environmental Impact Statements

"Tiering" refers to the coverage of general matters in broader environmental impact reports (EIRs) (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately site-specific EIRs incorporating by reference the general discussions and concentrating solely on the issues specific to the EIR subsequently prepared. Tiering is appropriate when the sequence of EIRs is from a general plan, policy, or program EIR to a site-specific EIR. Courts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN23[] Assessment & Information Access, Environmental Assessments

Pub. Resources Code, § 21159, which allows expedited environmental review for mandated projects, provides that an agency shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. The environmental analysis shall, at a minimum, include, all of the following: (1) an analysis of the reasonably foreseeable environmental impacts of the methods of compliance; (2) an analysis of reasonably foreseeable mitigation measures; and (3) an analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, pursuant to § 21159, subd. (a).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN24[] Reviewability of Lower Court Decisions, Preservation for Review

Issues not presented to the trial court are ordinarily waived on appeal.

Business & Corporate Compliance > ... > Environmental Law > Assessment & Information Access > Environmental Impact Statements

HN25[] Environmental & Natural Resources, Environmental Impact Statements

Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an environmental impact report.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN26[] Assessment & Information Access, Environmental Assessments

Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative or evidence which is clearly inaccurate or erroneous under Pub. Resources Code, § 21082.2 , subd. (c). However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities supports a fair argument that the project may have a significant environmental impact.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN27[↓] Case & Controversy Requirements, Actual Controversy

The fundamental basis of declaratory relief is the existence of an actual, present controversy.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

HN28[↓] Discharge Permits, Storm Water Discharges

33 U.S.C. § 1342(p)(3)(B)(iii), provides that a National Pollution Discharge Elimination System (NPDES) permit for a municipal discharge into a storm drain 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 Environmental Protection Act Administrator or the State determines appropriate for the control of such pollutants. Best management practices are generally pollution control measures set forth in NPDES permits.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN29[↓] Clean Water Act, Water Quality Standards

The statute applicable to establishing a total maximum daily load (TMDL), 33 U.S.C. § 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional water quality control board is required to establish a TMDL at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety, pursuant to § 1313(d)(1)(C).

Civil Procedure > Appeals > Appellate Briefs

HN30[↓] Appeals, Appellate Briefs

Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows an appellate court to treat an appellant's issue as waived.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN31[↓] Clean Water Act, Water Quality Standards

33 U.S.C. § 1342(p)(3)(B)(iii) does not divest a regional water quality control board's discretion to impose a National Pollution Discharge Elimination System permit condition requiring compliance with state water quality standards more stringent than the maximum extent practicable standard.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN32[↓] Clean Water Act, Water Quality Standards

When the Environmental Protection Agency makes a total maximum daily load or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the Clean Water Act and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Nonpoint Source Pollution

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN33[] Clean Water Act, Nonpoint Source Pollution

Although the Clean Water Act focuses on both point and nonpoint sources of pollution, the measure does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways. While the Clean Water Act requires states to designate water standards and identify bodies of water that fail to meet these standards, nothing in the Clean Water Act demands that a state adopt a regulatory system for nonpoint sources.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN34[] Clean Water Act, Water Quality Standards

Section 303(d)(1)(A) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(A), provides that in identifying impaired waters for its 303(d) list, states shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. Wat. Code, § 13241, subd. (a), requires regional water quality control boards to establish water quality objectives in water quality control plans by considering a variety of factors, including past, present, and probable future beneficial uses of water.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN35[] Clean Water Act, Water Quality Standards

See 33 U.S.C. § 1313(d)(1)(C).

Administrative Law > Agency Rulemaking > General Overview

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

HN36[] Administrative Law, Agency Rulemaking

The California Administrative Procedures Act (APA), Gov. Code, §§ 11340 et seq. and 11370, establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity. One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. The APA does not apply to the adoption or revision of state policy for water quality control unless the agency adopts a policy, plan, or guideline, or any revision thereof, pursuant to Gov. Code, § 11353, subds. (a), (b)(1).

Headnotes/Summary

Summary

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SUMMARY

Regional and state water quality boards sought to ameliorate the problem of litter discharged from municipal storm drains into a river through the adoption and approval of a planning document. Several cities alleged that the boards violated the Clean Water Act (33 U.S.C. § 1251 et seq.), or the Porter-Cologne Act (Wat. Code, § 13000 et seq.), by setting the levels of permissible pollution, known as total maximum daily loads (TMDL's), at zero. The cities agreed that trash pollution had to be remedied but opposed the target of zero as unattainable and inordinately expensive. The trial court partially granted the cities' petition for writ of mandate. (Superior Court of San Diego County, No. GIC803631, Wayne L. Peterson and Linda B. Quinn, Judges.)

The Court of Appeal affirmed as to the trial court's judgment that the TMDL violated the California Environmental Quality Act (CEQA) and as to the cities' appeal. However, the court reversed the judgment insofar as it was based on the TMDL's lack of an assimilative capacity study, inclusion on the impaired water body list, and consideration of economic factors, and also insofar as it granted declaratory relief regarding the purported inclusion of nonnavigable waters in the TMDL. The court found that the regional board's environmental checklist was deficient and that there was sufficient evidence of a fair argument that the project might have a significant effect on the environment, thus necessitating an environmental impact report or its functional equivalent under CEQA. The trial erred by substituting its own judgment for that of the boards on the issue of whether the adoption of the TMDL should have been preceded by a scientific study of the assimilative capacity of the river. Federal law did not require the regional board to conduct an assimilative capacity study before adopting the TMDL. By its plain terms, Wat. Code, § 13267, is inapplicable at the TMDL stage, and thus the trial court erred by invalidating the TMDL on that ground. The TMDL sufficiently notified affected parties of its inclusion in the state's 1998 "303(d) list" of substandard waters as an impaired water body. The court rejected the cities' claim that the trial court erred by not invalidating the TMDL on the additional ground that the boards **[*1393]** failed to provide for deemed compliance with the target through certain methods. (Opinion by McConnell, P. J., with McIntyre and Irion, JJ., concurring.)

Headnotes

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Classified to California Digest of Official Reports

CA(1)[⬇] **(1)**

Pollution and Conservation Laws § 5—Clean Water Act—Effect on States.

The federal Clean Water Act places primary reliance for developing water quality standards on the states. It requires each state to develop such standards and review them at least once every three years for required modifications, pursuant to 33 U.S.C. § 1313(a), (c)(1). The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses; and an antidegradation policy, pursuant to 40 C.F.R. §§ 131.6, 131.10–131.12 (2003). The water quality criteria can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means any discernable, confined and discrete conveyance such as a pipe, ditch, channel, tunnel, or conduit, as provided in 33 U.S.C. § 1362(14). The Clean Water Act does not define nonpoint source pollution, but

it has been described as nothing more than a water pollution problem not involving a discharge from a point source.

CA(2)[] (2)

Pollution and Conservation Laws § 5—Water—National Discharge Elimination System Permits—Total Maximum Daily Loads.

Congress has dealt with the problem of point source pollution using the National Pollution Discharge Elimination System (NPDES) permit process. Under this approach, compliance rests on technology-based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the Clean Water Act's specific requirements. Nonpoint sources, because of their very nature, are not regulated under the NPDES program. **[*1394]** Instead, Congress has addressed nonpoint sources of pollution in a separate portion of the Clean Water Act which encourages states to develop areawide waste treatment management plans. When the NPDES system fails to adequately clean up certain rivers, streams, or smaller water segments, the Clean Water Act requires use of a water-quality-based approach. States are required to identify such waters and rank them in order of priority, and based on that ranking, calculate levels of permissible pollution called total maximum daily loads (TMDL's). This list of substandard waters is known as the 303(d) list (§ 303 of the Clean Water Act having been codified as 33 U.S.C. § 1313). A TMDL defines the specified maximum amount of a pollutant which can be discharged or "loaded" into the waters at issue from all combined sources. A TMDL must be established at a level necessary to implement the applicable water quality standards. A TMDL assigns a waste load allocation to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the waste load allocations in the TMDL. Under 33 U.S.C. § 1313(d)(1)(C), a TMDL requires a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. The Environmental Protection Agency may allow states to adopt and administer NPDES permit programs, and it has authorized California to administer such a program.

CA(3)[] (3)

Pollution and Conservation Laws § 5—Water—Porter-Cologne Act—Regional Quality Control Boards and Plans.

California implements the Clean Water Act through the Porter-Cologne Act (Wat. Code, § 13000 et seq.). Under the Porter-Cologne Act, nine regional water quality control boards regulate the quality of waters within their regions under the purview of the State Water Resources Control Board, pursuant to Wat. Code, §§ 13000, 13100, 13200, 13241, 13242. In accordance with Wat. Code, §§ 13050, subd. (j), 13240, regional boards must formulate and adopt water quality control plans, commonly called basin plans, which **[*1395]** designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area, as provided in Wat. Code, § 13050, subd. (h). The Environmental Protection Agency (EPA) must approve or disapprove a state's total maximum daily load (TMDL) within 30 days of its submission, pursuant to 33 U.S.C. § 1313(d)(2). If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval.

CA(4)[] (4)

Administrative Law § 95—Judicial Review and Relief—Methods—Mandamus—Quasi-legislative

Acts.

Code Civ. Proc., § 1094.5, the administrative mandamus statute, applies when the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, pursuant to § 1094.5, subd. (a). Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus. Rather, review of a quasi-legislative action is limited to traditional mandamus.

CA(5)[⬇] (5)

Mandamus § 74—Rehearing and Appeal—Review; Scope—Petitioner's Burden of Proof.

Under Code Civ. Proc., § 1085, review of an administrative action is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support, and the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. An appellate court reviews the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence.

[*1396] CA(6)[⬇] (6)

Administrative Law § 10—Powers and Functions of Agencies—Deference to Construction of Laws.

Generally, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

CA(7)[⬇] (7)

Statutes § 21—Construction—Legislative Intent—Examination of Language.

A court's primary aim in construing any law is to determine the legislative intent. In doing so the court looks first to the words of the statute, giving them their usual and ordinary meaning.

CA(8)[⬇] (8)

Pollution and Conservation Laws § 5—Water—Total Maximum Daily Load and Pollutant Discharge Requirements.

A total maximum daily load (TMDL) does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual National Pollution Discharge Elimination System permits or establishing nonpoint source controls. A TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water bodies.

CA(9)[⬇] (9)

Pollution and Conservation Laws § 5—Water—Environmental Checklist Requirement—Regional Quality Control Board's Basin Plan to Incorporate Trash in Total Maximum Daily Load.

In an action challenging a regional water quality control board's basin plan, which set the levels of permissible pollution for a flood control channel, the trial court correctly concluded that an environmental impact report or its functional equivalent was necessary because the regional water board's environmental checklist and total maximum daily load were deficient and there was sufficient evidence of a fair argument that the project might have a significant effect on the environment.

[8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268; 12 Witkin, Summary of

Cal. Law (10th ed. 2005) Real Property, §§ 833, 893, 896; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817.]

CA(10)[↓] (10)

Pollution and Conservation Laws § 2.1—California Environmental Quality Act—Impact Reports—Necessity of Preparing; Requirements.

The California Environmental Quality Act (CEQA) compels the government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. CEQA mandates that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or **[*1397]** mitigation measures that can substantially lessen or avoid those effects. CEQA is implemented through initial studies, negative declarations, and environmental impact reports (EIR's). CEQA requires a governmental agency to prepare an EIR whenever it considers approval of a proposed project that may have a significant effect on the environment. If there is no substantial evidence a project may have a significant effect on the environment or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. CEQA requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. Thus, if substantial evidence in the record supports a fair argument that significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified. "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant, pursuant to Cal. Code Regs., tit. 14, § 15382.

CA(11)[↓] (11)

Pollution and Conservation Laws § 2.1—California Environmental Quality Act—Impact Reports—Necessity of Preparing; Exemptions.

State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from the California Environmental Quality Act's (CEQA) requirements for preparation of environmental impact reports, negative declarations, and initial studies. Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. Certified regulatory programs remain subject, however, to other CEQA requirements. Documents prepared by certified programs are considered the functional equivalent of documents CEQA would otherwise require. An agency seeking **[*1398]** certification must adopt regulations requiring that final action on the proposed activity include written responses to significant environmental points raised during the decisionmaking process. The agency must also implement guidelines for evaluating the proposed activity consistently with the environmental protection purposes of the regulatory program. The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects, and be made available for review by other public agencies and the public.

CA(12)[] (12)

Pollution and Conservation Laws § 2.1—California Environmental Quality Act—Impact Reports—Necessity of Preparing; Application to Certified Regulatory Program.

The guidelines for implementation of the California Environmental Quality Act (CEQA), Cal. Code Regs., tit. 14, § 15000 et seq., do not directly apply to a certified regulatory program's environmental document. However, when conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. In a certified program, an environmental document used as a substitute for an environmental impact report must include alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, and a document used as a substitute negative declaration must include a statement that the agency's review of the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion, pursuant to Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B). A regional water quality control board's submission of a plan for State Water Resources Control Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the state board, and a written report addressing reasonable alternatives to the proposed activity and mitigation measures to minimize any significant adverse environmental impacts, pursuant to Cal. Code Regs., tit. 23, § 3777, subd. (a).

CA(13)[] (13)

Pollution and Conservation Laws § 1—California Environmental Quality Act—Expedited Review for Mandated Projects—Analysis of Reasonably Foreseeable Impacts.

Pub. Resources Code, § 21159, which allows expedited environmental review for mandated projects, provides that an agency shall perform, at the time of the adoption of a **[*1399]** rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. The environmental analysis shall, at a minimum, include all of the following: (1) an analysis of the reasonably foreseeable environmental impacts of the methods of compliance; (2) an analysis of reasonably foreseeable mitigation measures; and (3) an analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, pursuant to § 21159, subd. (a). Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, or evidence which is clearly inaccurate or erroneous, as stated in Pub. Resources Code, § 21082.2, subd. (c). However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities supports a fair argument that the project may have a significant environmental impact.

CA(14)[] (14)

Declaratory Relief § 7—Actual Controversy; Fundamental Basis of Relief.

The fundamental basis of declaratory relief is the existence of an actual, present controversy.

CA(15)[] (15)

Pollution and Conservation Laws § 5—Water—National Discharge Elimination System Permit for Municipal Discharge into Storm Drain.

33 U.S.C. § 1342(p)(3)(B)(iii), provides that a National Pollution Discharge Elimination System (NPDES) permit for a municipal discharge into a storm drain 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 Environmental Protection Act Administrator or the state determines appropriate for the control of such pollutants. Best management practices are generally pollution control measures set forth in NPDES permits.

CA(16)[] (16)

Pollution and Conservation Laws § 5—Water—Regional Quality Control Board and Establishment of Total Maximum Daily Load.

The statute applicable to establishing a total maximum daily load (TMDL), 33 U.S.C. § 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary the statute requires a regional water quality control board to establish a TMDL at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety.

[*1400] CA(17)[] (17)

Appellate Review § 109—Briefs—Form and Requisites—Argument and Authority—Waiver.

Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows an appellate court to treat an appellant's issue as waived.

CA(18)[] (18)

Pollution and Conservation Laws § 5—Water—Requirements for Total Maximum Daily Load or Permitting Decisions.

When the Environmental Protection Agency makes a total maximum daily load or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the Clean Water Act and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation.

CA(19)[] (19)

Pollution and Conservation Laws § 5—Water—Clean Water Act and Effect on States.

Although the Clean Water Act focuses on both point and nonpoint sources of pollution, the measure does not require states to take regulatory action to limit the amount of nonpoint water pollution introduced into its waterways. While the Clean Water Act requires states to designate water standards and identify bodies of water that fail to meet these standards, nothing in the Clean Water Act demands that a state adopt a regulatory system for nonpoint sources.

CA(20)[] (20)

Administrative Law § 19—Actions—Legislation or Rulemaking—Practice and Procedure.

The California Administrative Procedure Act (APA) (Gov. Code, §§ 11340 et seq., 11370), establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity. One purpose of the APA is to ensure

that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. The APA does not apply to the adoption or revision of state policy for water quality control unless the agency adopts a policy, plan, or guideline, or any revision thereof, pursuant to Gov. Code, § 11353, subds. (a), (b)(1).

[*1401]

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Richards, Watson & Gershon and John J. Harris for The League of California Cities as Amicus Curiae on behalf of Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Marilyn H. Levin and Gregory J. Newmark, Deputy Attorneys General, for Defendants and Appellants.

Law Office of Michael R. Lozeau, Michael R. Lozeau; and Dana P. Palmer for Santa Monica Baykeeper, Inc., Heal the Bay, Inc., **[***2]** and Natural Resources Defense Council, Inc., as Amici Curiae on behalf of Defendants and Appellants.

Judges: McConnell, P. J., with McIntyre and Irion, JJ., concurring.

Opinion by: McConnell

Opinion

[378]** **McCONNELL, P. J.**—This case concerns the serious environmental problem of litter discharged from municipal storm drains into the Los Angeles River, and efforts of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) and the State Water Resources Control Board (State Board) [1] to ameliorate the problem through the adoption and approval of a planning document setting a target of zero trash discharge within a multi-year implementation period.

The Water Boards appeal a judgment partially granting a petition for writ of mandate brought by the City of Arcadia and 21 other cities (Cities), [2] who **[*1402]** agree trash pollution must be remedied but oppose the target of zero trash as unattainable and inordinately expensive. The Water Boards challenge **[***3]** the court's findings that an assimilative capacity study is a required element of its action; a cost-benefit analysis and consideration of economic factors are required under state law and are not met; the zero trash target is inapplicable to the Los Angeles River Estuary (Estuary) because it does not appear on the state's list of impaired waters; and, the Water Boards failed to comply with the California Environmental Quality Act (CEQA) by not preparing an environmental impact report (EIR) or its functional equivalent.

The Water Boards also contend the court erred by granting the Cities declaratory relief on their claim the trash total maximum daily load (TMDL) does not apply to "nonwaters," meaning areas that do **[***4]** not drain into navigable waters such as the Los Angeles River or tributaries, as the parties agreed during this proceeding that the trash TMDL

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[1] We refer to these entities together as the Water Boards.

[2] In addition to Arcadia the Cities include Baldwin Park, Bellflower, Cerritos, Commerce, Diamond Bar, Downey, Irwindale, Lawndale, Monrovia, Montebello, Monterey Park, Pico Rivera, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Vernon, West Covina and Whittier.

applies only to navigable waters.

The Cities also appeal, contending the trial court erred by not invalidating the trash TMDL on the additional grounds the Water Boards failed to provide for deemed compliance with the target of zero trash through certain methods; failed to implement load allocations for nonpoint sources of trash pollution; failed to adhere to the data collection and analysis required by federal and state law; relied on nonexistent, illegal and irrational uses to be made of the Los Angeles River; and, violated the Administrative Procedures Act (APA).

We conclude the Cities' appeal lacks merit. As to the Water Boards' appeal, we conclude the court properly invalidated the planning document on the ground of noncompliance with CEQA, and we affirm the judgment insofar as it is based on that ground. We reverse the judgment to the extent it is based on other grounds. Further, we hold the court erred by granting declaratory relief on the nonwaters issue as there was no controversy when the court ruled.

[**379] BACKGROUND INFORMATION

I

[***5] *Statutory and Regulatory Scheme*

The "quality of our nation's waters is governed by a 'complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities.' " (*City of Burbank v. State Water Resources Control Bd.* [*1403] (2005) 35 Cal.4th 613, 619 [26 Cal. Rptr. 3d 304, 108 P.3d 862] (*City of Burbank*).) An overview of applicable law is required to place the facts here in context.

A

Federal Law

In 1972 Congress enacted amendments to the Federal Water Pollution Control Act (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816; 33 U.S.C. § 1251 et seq.), which, as amended in 1977, is commonly known as the Clean Water Act. (*City of Burbank, supra,* 35 Cal.4th at pp. 619–620.) Its stated goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. (33 U.S.C. § 1251(a).)

CA(1)[↑] (1) HN1[↑] The Clean Water Act places "primary reliance for developing water quality standards on the states." (*Scott v. Hammond* (7th Cir. 1984) 741 F.2d 992, 994.) It requires each state to develop such standards [***6] and review them at least once every three years for required modifications. (33 U.S.C. § 1313(a), (c)(1).) The standards must include designated uses such as recreation, navigation or the propagation of fish, shellfish and wildlife; water quality criteria sufficient to protect the designated uses; and an antidegradation policy. (40 C.F.R. §§ 131.6, 131.10–131.12 (2003).) The water quality criteria "can be expressed in narrative form or in a numeric form, e.g., specific pollutant concentrations." (*Florida Public Interest Research Group v. E.P.A.* (11th Cir. 2004) 386 F.3d 1070, 1073.) "Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, 'no toxic pollutants in toxic amounts' would be a narrative description." (*City of Burbank, supra,* 35 Cal.4th at p. 622, fn. 4.)

The Clean Water Act focuses on two possible sources of pollution: point sources and nonpoint sources. "Point source" means "any discernable, confined and discrete conveyance" such as a pipe, ditch, channel, tunnel, or [***7] conduit. (33 U.S.C. § 1362(14).) The Clean Water Act does not define nonpoint source pollution, but it has been described as " ' "nothing more [than] a [water] pollution problem not involving a discharge from a point source." ' " (*Defenders of Wildlife v. U.S. Environ. Protec.* (10th Cir. 2005) 415 F.3d 1121,

1124.) [3]

[*1404] HN2[↑] CA(2)[↑] **(2)** "Congress dealt with the problem of point source **[***8]** pollution using the National Pollution Discharge Elimination System [NPDES] permit process. Under this approach, compliance rests on technology-**[**380]** based controls that limit the discharge of pollution from any point source into certain waters unless that discharge complies with the [Clean Water] Act's specific requirements." (*San Francisco BayKeeper v. Whitman* (2002) 297 F.3d 877, 880; see 33 U.S.C. § 1311(b)(1)(A).) " 'Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans.' " (*Pronsolino v. Marcus* (N.D.Cal. 2000) 91 F. Supp. 2d 1337, 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

HN3[↑] "When the NPDES system fails to adequately clean up certain rivers, streams or smaller water segments, the [Clean Water] Act requires use of a water-quality based approach. States are required to identify such waters ... [and] rank [them] in order of priority, and **[***9]** based on that ranking, calculate levels of permissible pollution called 'total maximum daily loads' or 'TMDLs.' " (*San Francisco BayKeeper v. Whitman, supra,* 297 F.3d at p. 880; see 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b) (2003).) "This list of substandard waters is known as the '303(d) list' (section 303 of the Clean Water Act having been codified as [title 33 United States Code] section 1313)." (*City of Arcadia v. U.S. Environmental* (9th Cir. 2005) 411 F.3d 1103, 1105 (*City of Arcadia II*).)

"A TMDL defines the specified maximum amount of a pollutant which can be discharged or 'loaded' into the waters at issue from all combined sources." (*Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520.) "A TMDL must be 'established at a level necessary to implement the applicable water quality standards ... .' [Citation.] A TMDL assigns a *waste load allocation* ... to each point source, which is that portion of the TMDL's total pollutant load, which is allocated to a point source for which an NPDES permit is required. [Citation.] Once a TMDL is developed, effluent limitations **[***10]** in NPDES permits must be consistent with the [waste load allocations] in the TMDL." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1095–1096 [1 Cal. Rptr. 3d 76]; see *Dioxin/Organochlorine Center v. Clarke*, at p. 1520.) [4] A TMDL requires a **[*1405]** "margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).)

HN4[↑] The EPA may allow states to adopt and administer NPDES permit programs (*Pronsolino v. Marcus, supra,* 91 F. Supp. 2d at p. 1347, fn. 10), and it has authorized California to administer **[***11]** such a program. (54 Fed.Reg. 40664 (Oct. 3, 1989).)

B

State Law

[3] According to the Environmental Protection Act (EPA), nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground, and includes excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas; oil, grease and toxic chemicals from urban runoff and energy production; sediment from improperly managed construction sites, crop and forest land, and eroding stream banks; salt from irrigation practices and acid drainage from abandoned mines; and bacteria and nutrients from livestock, pet wastes and faulty septic systems. (<http://www.epa.gov/owow/nps/qa.html> [as of Jan. 26, 2006].)

[4] The Clean Water Act "does not define total maximum daily load. EPA's regulations break it into a 'waste[]load allocation' for point sources and a 'load allocation' for nonpoint sources." (*Pronsolino v. Marcus, supra,* 91 F. Supp. 2d at p. 1344, fn. 8; see 40 C.F.R. § 130.2(g)–(i) (2005).)

HN5[↑] CA(3)[↑] **(3)** California implements the Clean Water Act through the Porter-Cologne Act (Wat. Code, § 13000 et seq.), which was promulgated in 1969. Under the Porter-Cologne Act, nine regional boards regulate the quality of waters within their regions under the purview of the State Board. (Wat. Code, §§ 13000, 13100, 13200, 13241, 13242.)

[381]** Regional boards must formulate and adopt water quality control plans, commonly called basin plans, which designate the beneficial uses to be protected, water quality objectives and a program to meet the objectives. (Wat. Code, §§ 13050, subd. (j), 13240.) " 'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (*Id.*, § 13050, subd. (h).)

The EPA must approve or disapprove a state's TMDL within 30 days of its submission. **[***12]** (33 U.S.C. § 1313(d)(2).) If the EPA disapproves a state's submission, it must establish its own TMDL within 30 days of the disapproval. (*Ibid.*)

II

Trash TMDL

The Los Angeles River is a 51-mile flood control channel, largely concrete-lined, which runs through the City of Los Angeles and surrounding municipalities in Los Angeles County and terminates at the Pacific Ocean. In 1990 the Regional Board issued an NPDES storm water permit to the Los Angeles County Department of Public Works as the principal permittee and 84 cities as copermittees, to address various chemical pollutants discharged into the region's water bodies (Municipal NPDES Permit).

[*1406] In 1994 the Regional Board adopted a revised water quality control plan, or basin plan (1994 Basin Plan), which includes narrative water quality objectives. It provides that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses." (Italics **[***13]** omitted.) Beneficial uses of the Los Angeles River and surrounds include wildlife and marine habitat, including habitat for endangered species, and recreational activities such as fishing, walking, hiking, jogging, bicycling, horseback riding, bird watching and photography.

In 1996 and 1998 the Regional Board identified certain reaches of the Los Angeles River on the state's "303(d) list" as being impaired by trash, primarily through storm water runoff in thousands of municipal storm drains. [5] **[***14]** On September 19, 2001, the Regional Board adopted a resolution to amend its 1994 Basin Plan to incorporate a TMDL for trash in the Los Angeles River (Trash TMDL). Despite many objections from affected municipalities, the Trash TMDL sets a numeric target of zero trash as "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state." [6] "The numeric target is staff's interpretation of the narrative water quality objective [in **[**382]** the 1994 Basin Plan], including an implicit margin of safety."

The reduction of trash is to be phased over a 14-

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[5] The Regional Board defines "trash" as "man-made litter" within the meaning of Government Code section 68055.1, subdivision (g), which provides: " 'Litter' means all improperly discarded waste material, including, but not limited to, convenience food, beverage, and other produce packages or containers constructed of steel, aluminum, glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on the lands and waters of the state, but not including the properly discarded waste of the primary processing of agriculture, mining, logging, sawmilling, or manufacturing."

[6] The Regional Board adopted a Trash TMDL in January 2001, which also had a target of zero trash. It reconsidered the matter on September 19, 2001, "to provide clarifying language and greater flexibility in implementing the [Trash] TMDL."

year period, including an optional two-year baseline monitoring period. In lieu of baseline monitoring, cities may accept a default baseline allocation of "640 gallons of uncompressed trash per square mile per year," a value based on data the City of Calabasas provided. The Trash TMDL provides for a "review of the current target [of zero trash] ... once a reduction of 50% has been achieved and sustained," "based on the findings of future studies regarding the threshold levels needed for protecting beneficial uses."

Under the Trash TMDL, cities may use a variety of compliance methods, including "[e]nd-of-pipe full capture structural controls," "partial capture **[*1407]** control systems" and "[i]nstitutional controls." Cities using a full-capture system meeting certain criteria will be deemed in compliance with **[***15]** the zero target if the systems are properly maintained and maintenance records are available for the Regional Board's inspection.

On December 21, 2001, the Regional Board issued an order under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES Permit to submit baseline monitoring plans by February 1, 2002, and to monitor trash in the Los Angeles River between January 2002 and December 2003, with a final report due February 2004. [7] The Regional Board intends to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.

[*16]** In February and July 2002, the State Board and the Office of Administrative Law, respectively, approved the Trash TMDL. In August 2002 the EPA approved it and announced it supersedes an interim TMDL for trash the EPA adopted in March 2002 as a result of a consent decree in litigation between environmental groups and the EPA. (*City of Arcadia I, supra*, 265 F. Supp. 2d 1142, 1147.) [8]

III

Procedural History

The Cities are within the Regional Board's jurisdiction and are permittees under the 2001 Municipal NPDES Permit. In July 2002 the Cities filed a petition for writ of mandate and complaint for declaratory **[***17]** and injunctive relief against the Water Boards. They filed the action in the Los Angeles County Superior Court, but the parties stipulated to its transfer to the San Diego County Superior Court.

The second amended petition alleges numerous grounds on which the Trash TMDL violates the Clean Water Act or the Porter-Cologne Act, and the court adjudicated some issues in favor of each party. It found the **[*1408]** Water Boards improperly (1) failed to conduct an analysis of the Los Angeles River's assimilative capacity; (2) failed to conduct a cost-benefit analysis or **[**383]** consider economic factors under Water Code sections 13267 and 13241; (3) purported to apply the Trash TMDL to the Estuary even though it is not listed on the state's 1998 303(d) list as impaired; and (4) failed to prepare a required EIR or its functional equivalent under CEQA. The court issued a writ of mandate commanding the Water Boards to set aside the amendment to the 1994 Basin Plan and the Trash TMDL to the extent it was based on the above findings and to not take any

[7] In *City of Arcadia v. U.S. Environ. Protection Agency* (N.D.Cal. 2003) 265 F. Supp. 2d 1142, 1156 (*City of Arcadia I*), the court noted the Los Angeles County Department of Public Works has assumed responsibility for the baseline monitoring burden for all municipalities to which the Trash TMDL applies. The Trash TMDL states that "[e]ach of the permittees and copermittees are responsible for monitoring land uses within their jurisdiction," but "monitoring responsibilities may be delegated to a third-party monitoring entity such as the [Department of Public Works]."

[8] In *City of Arcadia I, supra*, 265 F. Supp. 2d at page 1153, the City of Arcadia and other cities unsuccessfully challenged the EPA's approval of the Trash TMDL on the ground it was unauthorized to do so after adopting its own TMDL. In *City of Arcadia II, supra*, 411 F.3d at pages 1106–1107, the court affirmed the lower court's dismissal of the case.

further steps to implement it. The court denied the Water Boards' motion to vacate the judgment or grant **[***18]** a new trial, and judgment was entered on December 24, 2003.

The Cities later moved for an order that the prohibitory terms of the writ of mandate and judgment not be stayed on appeal. (Code Civ. Proc., § 1110b.) The court granted the motion, and further ordered that "to preserve the status quo and prevent injustice to [the Cities], the ... implementation schedule and compliance dates, and all milestones contained in the [Trash TMDL] shall be tolled effective December 24, 2003, through and until a final determination has been rendered on the pending appeal." The Water Boards appealed that order, and in accordance with the parties' stipulation we consolidated it with the other appeals.

DISCUSSION

WATER BOARDS' APPEAL

I

Standard of Review

CA(4)[↑] **(4)** The Water Boards contend a deferential standard of review applies to our review of their action under Code of Civil Procedure section 1085, and the Cities claim an independent standard applies under Code of Civil Procedure section 1094.5. HN6[↑] Code of Civil Procedure section 1094.5, the administrative mandamus **[***19]** statute, applies when "the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." (Code Civ. Proc., § 1094.5, subd. (a).) "Acts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus." (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 268, pp. 1067–1068.) Rather, review of a quasi-legislative action is limited to traditional mandamus. (*Id.* at p. 1068.)

[*1409] CA(5)[↑] **(5)** The trial court correctly found this proceeding is for traditional mandamus because the Regional Board's adoption and the State Water Board's approval of the Trash TMDL was quasi-legislative. HN7[↑] Under Code of Civil Procedure section 1085, " ' "review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking **[***20]** in evidentiary support, ..." ' ... [and] [t]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. [Citation.] We review the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814 [13 Cal. Rptr. 3d 259], citations omitted.)

The Cities' reliance on Water Code section 13330 is misplaced. It provides that "[a]ny party aggrieved by a final decision or order of a regional board *for which the state board denies review* may obtain review of the decision or order of the regional **[**384]** board in the superior court" (*id.*, § 13330, subd. (b), italics added), and "[e]xcept as otherwise provided herein, Section 1094.5 of the Code of Civil Procedure shall govern proceedings for which petitions are filed pursuant to this section" (*id.*, § 13330, subd. (d)). Given the language italicized *ante*, Water Code section 13330 necessarily applies to an administrative appeal of a quasi-judicial action **[***21]** under Code of Civil Procedure section 1094.5. Here, an appeal to the State Board was unnecessary because the Trash TMDL was ineffective without its approval. (Wat. Code, § 13245.) Indeed, the State Board notified the Cities in March 2001 that it "lacks statutory authority to accept petitions for review of water quality control plan (basin plan) amendments adopted" by regional

boards.

HN8[↑] As to CEQA issues, the parties agree an abuse of discretion standard applies. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199 [24 Cal. Rptr. 3d 543].) Abuse of discretion "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) "Our task on appeal is 'the same as the trial court's.' [Citation.] Thus, we conduct our review independent of the trial court's findings." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602, fn. 3 [35 Cal. Rptr. 2d 470].)

II

Assimilative Capacity Study

The trial court **[***22]** invalidated the Trash TMDL based in part on the Cities' argument an "assimilative capacity study" is a required element of a TMDL and none was performed here. In its statement of decision, the court **[*1410]** explained "[i]t is unreasonable to conclude that the beneficial uses of the [Los Angeles] River could not be maintained with some 'target' other than zero. Of course, it is possible the River would not support a greater target, however, without a study it is yet undetermined."

The Water Boards contend the trial court erred by substituting its own judgment for that of the Water Boards on the issue of whether the adoption of the Trash TMDL should have been preceded by a scientific study of the assimilative capacity of the Los Angeles River. They assert the matter was best suited for their determination rather than the court's and the evidence adequately supports their decision. We agree with the Water Boards.

During the notice and comment period, the Regional Board received numerous complaints that a zero Trash TMDL is infeasible, or at least unwarranted without a scientific assimilative capacity study, or load capacity study, showing a zero limit is the only means of protecting beneficial **[***23]** uses. For instance, the City of Los Angeles worried that "[i]f there's one gum wrapper in the [Los Angeles] River, you can get sued."

The Regional Board responded to one complaint as follows: "For more typical pollutants, the loading parameters are flow and pollutant concentration. For this pollutant [trash], flow does not serve to dilute the pollutant, but merely serves as a transport mechanism. Therefore, the typical loading calculation does not apply to trash." The Regional Board took the position that since littering is unlawful, a target of zero trash in the Los Angeles River is the only defensible position. It also explained that its staff "found no study to document that there is an acceptable level of trash that will cause no harm to aquatic life," and absent such a study it was compelled to adopt a zero target.

[385]** At a Regional Board hearing, Dr. Mark Gold, executive director of Heal the Bay, testified he was unaware of any assimilative capacity study having been performed anywhere on trash. He explained, "Basically it's a physical object. It's trash. It's not something that breaks down and becomes part of the environment in many, many cases. And so honestly, it probably **[***24]** won't reach any sort of threshold of being a scientific study of any value."

At a State Board hearing Dave Smith, an EPA team leader working with the Regional Board on the trash issue, testified "it would be difficult to design [an assimilative capacity] study and come up with firm answers." He also explained that both the Regional Board and the State Board "have conducted pretty diligent efforts to find research studies, reports, that look at the affects of trash on the aquatic environment," and neither they nor the EPA could find any literature to support a target of more than zero trash.

[*1411] Alex Helperin, of the Natural Resources

Defense Council, testified at a Regional Board hearing that "[e]ven small quantities [of trash] can maim and kill wildlife, [which] becomes entangled in it or ingest[s] it. [Trash] [c]an obstruct and repel boaters and contract recreators and compromise the aesthetic quality that's essential to the recognized aspect of non-contact recreation beneficial use for the Los Angeles River."

The administrative record includes numerous photographs of copious amounts of trash deposited in the Los Angeles River watershed through storm water drains. Dennis **[***25]** Dickerson, the executive officer of the Regional Board, testified he took photographs of trash in the Long Beach area shortly after storms, and among them are photographs of "water birds foraging among the trash." One photograph is of a bird with a cigarette butt in its mouth and another is of a fish trapped in a plastic six-ring can holder.

In arguing an assimilative capacity study is required *before* adopting a TMDL, the Cities rely principally on an EPA document issued January 7, 2000, entitled "Guidance for Developing TMDLs in California" (2000 EPA Guidance). It states: "The TMDL document must describe the relationship between numeric target(s) and identified pollutant sources, and estimate total assimilative capacity (loading capacity) of the water[]body for the pollutant of concern ... . [¶] The loading capacity is the critical quantitative link between the applicable water quality standards (as interpreted through numeric targets) and the TMDL. Thus, a maximum allowable pollutant load must be estimated to address the site-specific nature of the impairment. ... [¶] The loading capacity section must discuss the methods and data used to estimate loading capacity. **[***26]** A range of methods can be used ... ." (Boldface omitted.)

The 2000 EPA Guidance, however, contains the following disclaimer: "[I]t does not impose legally-binding requirements on the EPA, the State of California, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate and consistent with the requirements of section 303(d) [of the Clean Water Act] and EPA's regulations."

CA(6)[↑] **(6)** Smith, of the EPA, testified at a Regional Board hearing that he wrote the 2000 EPA Guidance and the Trash TMDL "fully complies with the Clean Water Act, its regulations and [the 2000 EPA Guidance]." Smith explained the "TMDL process specifically contemplates making decisions under uncertainty," and "[i]t does so by providing that a margin of safety has to be **[**386]** incorporated in every TMDL to account for the uncertainty in the analysis." Smith said states are required "to move forward to make TMDL decisions **[*1412]** based on available information and data, not to wait again and again and again for better information to come forward." **[***27]** HN9[↑] Generally, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " (*United States v. Mead Corp.* (2001) 533 U.S. 218, 227–228 [150 L. Ed. 2d 292, 121 S. Ct. 2164].)

In *Natural Resources Defense Council v. Muszynski* (2d Cir. 2001) 268 F.3d 91 (*Muszynski*), the plaintiff asked the court to invalidate a TMDL that the EPA had approved to control phosphorus pollution in drinking water, on the ground a margin of safety of only 10 percent was insufficient to account for uncertainty regarding the effects of phosphorus on water quality. The plaintiff argued "that no scientific or mathematical basis prescribed this percentage as opposed to any other." (*Id.* at p. 102.) The EPA countered that "because 'there is no "standard" or guideline for choosing a specific margin of safety, best professional judgment and the available information are used in setting [it].' " (*Ibid.*) The *Muszynski* court agreed with the EPA, explaining: "While the [margin of safety] may ... be set with an uncomfortable degree of discretion, requiring that EPA [or authorized regional board]

show a rigorous **[***28]** scientific methodology *dictates one course of action as opposed to another and would effectively prevent the agency from acting in situations where action is required in the face of a clear public health or environmental danger but the magnitude of that danger cannot be effectively quantified.* '[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.' [Citation.] ... [S]imply to reject EPA's efforts to implement the [Clean Water Act] because it must respond to real water quality problems without the guidance of a rigorously precise methodology would essentially nullify the exercise of agency discretion in the form of 'best professional judgment.' " (*Muszynski, supra*, 268 F.3d at pp. 102–103, italics added.)

Further, in *Muszynski, supra*, 268 F.3d 91, 103, the court noted "that approval of the Phase I [margin of safety] was based, in part, on the limited information available. The EPA approval contemplates revision of the [margin of safety] as more information becomes available: 'As additional reservoir data and loading **[***29]** data become available, Phase I model assumptions are being reexamined under Phase II.' "

We conclude federal law does not require the Regional Board to conduct an assimilative capacity study before adopting the Trash TMDL. Moreover, the evidence amply shows that because of the nature of trash, including Styrofoam containers and other materials that are undiluted by water, in contrast to chemical pollutants, and the dangers to wildlife of even small amounts of trash, an assimilative capacity study would be difficult to conduct and of little value at the outset. For instance, given the ill effects of trash in a **[*1413]** water body it is unlikely such a study would determine the Los Angeles River may be loaded with a certain percentage of trash without affecting beneficial uses, particularly since a TMDL must include a margin of safety that "takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313(d)(1)(C).) In any event, the Trash TMDL requires the Regional Board to reconsider the zero trash target after a 50 percent reduction of trash is achieved, and no party suggests a trash reduction of **[***30]** at least 50 percent is unwarranted or unattainable. Because of **[**387]** this escape hatch, compliance with a zero trash target may never actually be mandated. The Water Boards' decision not to conduct or require an assimilative capacity study is within their expertise, not the court's, and we defer to them on the issue.

III

Cost-Benefit Analysis and Economic Considerations

The Water Boards next contend the court erred by finding the Trash TMDL is invalid because they violated state law by not conducting a cost-benefit analysis (Wat. Code, § 13267) or considering economic factors (*id.* at § 13241) before adopting and approving it.

A

Water Code Section 13267

HN10[↑] A regional board is authorized to investigate the quality of waters in its region (Wat. Code, § 13267, subd. (a)), and when it requires a polluter to furnish "technical or monitoring program reports," the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report[s] and the benefits to be obtained from the reports." (Wat. Code, § 13267, subd. (b)(1).) The court **[***31]** found the Regional Board adopted the Trash TMDL under the authority of Water Code section 13267, as the document mentions the statute several times and "expressly requires monitoring plans and submission of data to establish baselines for trash discharges."

The Water Boards persuasively contend Water

Code section 13267 is inapplicable, and references to that statute in the Trash TMDL are to contemplated future orders. For instance, the Trash TMDL states "[b]aseline monitoring will be required via [Water Code] Section 13267," and the submission of baseline monitoring plans will be due ?30 days after receipt of the Executive Officer's request as authorized by [Water Code] Section 13267." **[*1414]** It also states that "future storm water permits will be modified to incorporate the Waste Load Allocations and to address monitoring and implementation of this [Trash] TMDL."

Further, the Trash TMDL states "the permittee [under the Municipal NPDES permit] will submit a monitoring plan with the proposed monitoring sites and at least two alternative monitoring locations for each site. The plan must **[***32]** include maps of the drainage and storm drain data for each proposed and alternate monitoring location. The monitoring plan(s) will be submitted to the Regional Board within 30 days after receipt of the Executive Officer's letter requesting such a plan. Such a request is authorized pursuant to [Water Code] [s]ection 13267. ... The Regional Board's Executive Officer will have full authority to review the monitoring plan(s), to modify the plan, to select among the alternate monitoring sites, and to approve or disapprove the plan(s)."

Additionally, the Water Boards submit that the December 21, 2001 order the Regional Board issued under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES permit regarding baseline monitoring and reporting would have been "useless and unnecessary" had the Trash TMDL itself required monitoring and reporting, and since there was no appeal of the December 21 order to the State Board within 30 days (Wat. Code, § 13320, subd. (a)) the cost-benefit analysis issue is not subject to appellate review. We note that the December 21 order, but not the Trash TMDL, warns **[***33]** that under Water Code section 13268 the "failure to conduct the required monitoring and/or to provide the required information in a timely manner **[**388]** may result in civil liability imposed by the Regional Board in an amount not to exceed ... $ 1000."

CA(7)[↑] (7) **HN11**[↑] "Our primary aim in construing any law is to determine the legislative intent. [Citation.] In doing so we look first to the words of the statute, giving them their usual and ordinary meaning." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501 [247 Cal. Rptr. 362, 754 P.2d 708].) We agree that by its plain terms Water Code section 13267 is inapplicable at the TMDL stage, and thus the court erred by invalidating the Trash TMDL on this ground. The monitoring and reports are required by the December 21, 2001 order, not the Trash TMDL, and the reduction of trash will be implemented by other NPDES permits. "TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." (*Pronsolino v. Nastri* (9th Cir. 2002) 291 F.3d 1123, 1129.) **CA(8)**[↑] **(8) HN12**[↑] "A TMDL does not, by itself, **[***34]** prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source **[*1415]** controls." (*City of Arcadia I, supra*, 265 F. Supp. 2d at p. 1144.) A "TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and water[]bodies." (*Id.* at p. 1145.)

B

Water Code Section 13241

HN13[↑] Water Code section 13241 provides that "[e]ach regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." In establishing water quality objectives a regional board is required to consider several

factors, including "[e]conomic considerations." (Wat. Code, § 13241, subd. (d).)

The Water Boards contend Water Code section 13241 is inapplicable because the Trash TMDL does not establish water quality objectives, but **[***35]** merely implements, under Water Code section 13242, the existing narrative water quality objectives in the 1994 Basin Plan. It provides that waters shall not contain floating materials, including solids, or suspended or settleable materials in concentrations that adversely affect beneficial uses. The Cities counter that the Trash TMDL effectively establishes new water quality objectives, because when the 1994 Basin Plan was adopted a TMDL for trash was not contemplated and thus economic considerations of such a TMDL were not considered. Further, the Trash TMDL imposes for the first time a numeric limit for trash and significantly increases the costs of compliance.

We need not, however, decide whether the Trash TMDL adopts new or revised water quality objectives within the meaning of Water Code section 13241, because even if the statute is applicable, the Water Boards sufficiently complied with it. [9] Water Code section 13241, subdivision (d) does not define "economic considerations" or specify a particular manner of compliance, and thus, as the Water Boards assert, the matter is within a regional **[**389]** board's discretion. **[***36]** It appears there is no reported opinion analyzing the "economic considerations" phrase of this statute. In *City of Burbank, supra*, 35 Cal.4th at page 625, the court, without discussion, concluded that in adopting Water Code section 13241 the Legislature intended "that a regional board consider the *cost of compliance* [with numeric pollutant restrictions] when setting effluent limitations in a wastewater discharge permit." (Italics added.)

[*1416] The Trash TMDL discusses the costs of gathering and disposing of trash at the mouth of the Los Angeles River watershed during the rainy seasons between 1995 and 1999. It also states: "Cleaning up the river, its tributaries and **[***37]** the beaches is a costly endeavor. The Los Angeles County Department of Public Works contracts out the cleaning of over 75,000 catchments (catch basins) for a total cost of slightly over $ 1 million per year, billed to 42 municipalities. ... [¶] Over 4,000 tons of trash are collected from Los Angeles County beaches annually, at a cost of $ 3.6 million to Santa Monica Bay communities in fiscal years 1988–1989 alone. In 1994 the annual cost to clean the 31 miles of beaches (19 beaches) along Los Angeles County was $ 4,157,388."

The Trash TMDL also discusses the costs of various types of compliance measures, and explains the "cost of implementing this TMDL will range widely, depending on the method that the Permittees select to meet the Waste Load Allocations. Arguably, enforcement of existing litter ordinances could be used to achieve the final Waste Load Allocations at minimal or no additional cost. The most costly approach in the short-term is the installation of full-capture structural treatment devices on all discharges into the river. However, in the long term this approach would result in lower labor costs and may be less expensive than some other approaches."

The Trash TMDL **[***38]** defines catch basin inserts as "the least expensive structural treatment device in the short term," at a cost of approximately $ 800 each. It cautions, however, that because catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The Trash TMDL estimates that if the approximately 150,000 catch basins throughout the watershed were retrofitted with inserts, capital costs would be $ 120 million over 10 years, maintenance and operation costs would be $ 330 million over 10 years, and maintenance and operation costs after full implementation would be $ 60 million per year.

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[9] For the same reason, we are not required to reach the Water Boards' assertion that to any extent the California Supreme Court's recent opinion in *City of Burbank, supra*, 35 Cal.4th 613, applies to a TMDL, it precludes them from considering economic factors in establishing the Trash TMDL.

Further, the Trash TMDL discusses the full capture vortex separation system (VSS), which "diverts the incoming flow of storm[]water and pollutants into a pollutant separation and containment chamber. Solids within the separation chamber are kept in continuous motion, and are prevented from blocking the screen so that water can pass through the screen and flow downstream. This is a permanent device that can be retrofitted for oil separation as well. Studies have shown that VSS [units] remove virtually all of the trash contained **[***39]** in treated water. The cost of installing a VSS is assumed to be high, so limited funds will place a cap on the number of units which can be installed during any single fiscal year."

[*1417] The Trash TMDL estimates the retrofitting of the entire Los Angeles River watershed with low capacity VSS units would be $ 945 million in capital costs and $ 813 million in operation and maintenance costs over 10 years, and $ 148 million in annual operation and maintenance costs after full implementation. The installation of large capacity VSS units would run **[**390]** approximately $ 332 million in capital costs and $ 41 million in operation and maintenance costs over 10 years, and $ 7.4 million per year in operation and maintenance costs after full implementation. The yearly cost of servicing one VSS unit is estimated to be $ 2,000. The Trash TMDL explains that "outfitting a large drainage with a number of large VSS [units] may be less costly than using a larger number of small VSS [units]. Maintenance costs decrease dramatically as the size of the system increases." The Trash TMDL also contains a cost comparison of catch basin inserts and low capacity and large capacity VSS units.

Additionally, the Trash **[***40]** TMDL estimates the costs for end-of-pipe nets at between $ 10,000 and $ 80,000, depending on the length of the pipe network. It explains that " '[r]elease nets' are a relatively economical way to monitor trash loads from municipal drainage systems. However, in general they can only be used to monitor or intercept trash at the end of a pipe and are considered to be partial capture systems, as nets are usually sized at a 1/2&inches; to 1&inches; mesh."

The Cities assert that "a 'consideration' of economics should have included a discussion of the economic *impacts* associated with the vortex separation systems. Alternatively, the Water Boards could have analyzed other methods of compliance, such as a series of [best management practices], including increased street sweeping, catch basin inserts, release nets, or some other combination of [best management practices] that should have been evaluated for purposes of allowing the municipalities to be in deemed compliance with the zero [Trash] TMDL." (Italics added.) As stated, though, the Trash TMDL does include the estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance. **[***41]** The Cities cite no authority for the proposition that a consideration of economic factors under Water Code section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees.

Given the lack of any definition for "economic considerations" as used in Water Code section 13241, and our deference to the Water Boards' expertise, we conclude the Trash TMDL's discussion of compliance costs is adequate **[*1418]** and does not fulfill the arbitrary or capricious standard. Accordingly, the Trash TMDL is not invalid on this ground. [10]

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[10] The Cities also assert that under federal law an economic analysis is a prerequisite to the adoption of a TMDL. They rely on 40 Code of Federal Regulations, part 130.6(c)(4), but it pertains to nonpoint sources of pollution that need not be addressed in a TMDL, as discussed further *post*. The portion of the regulation covering TMDL's does not mention economics (*id.*, § 130.6(c)(1)). Parts 130.6(5) and (6) of 40 Code of Federal Regulations discuss economics, but in the context of the area wide planning process under section 208(b)(2) of the Clean Water Act (33 U.S.C. § 1288(b)(2)), which is inapplicable here. According to the Water Boards, the Southern California Association of Governments is the designated area-wide planning agency.

[*42]** IV

Los Angeles River Estuary

Additionally, the Water Boards challenge the court's finding they abused their discretion by attempting to include the Estuary in the Trash TMDL, as the Estuary is not on the state's 1998 303(d) list of impaired waters. The Water Boards contend a water body's formal listing on the state's 303(d) list is not a prerequisite to formulating a TMDL for it. Rather, an agency may simultaneously submit to the EPA the *identification* of a **[**391]** water body as impaired and a corresponding TMDL.

HN14[↑] The Clean Water Act provides: "Each state shall identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standards applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters." (33 U.S.C. § 1313(d)(1)(A).) Further, it provides that "[e]ach state shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load ... ." (*Id.* at § 1313(d)(1)(C).) **[***43]** These provisions do not prohibit a regional board from identifying a water body and establishing a TMDL for it at essentially the same time, or indicate that formal designation on a state's 303(d) list is a prerequisite to a TMDL.

Further, 33 United States Code section 1313(d)(2) provides: "Each State shall submit to the [EPA] Administrator from time to time, ... for his [or her] approval the waters identified *and* the loads established under paragraphs (1)(A) [and] ... (1)(C) ... of this subsection. The [EPA] Administrator shall either approve or disapprove such identification *and* load not later than thirty days after the date of submission." (Italics added.) This clarifies that a regional board may simultaneously identify an impaired water body and establish a TMDL for it.

[*1419] In *San Francisco BayKeeper v. Whitman, supra*, 297 F.3d 877, 884–885, the court held an agency has no *duty* to submit a TMDL at the same time it identifies an impaired water body, noting the development of a TMDL "to correct the pollution is obviously a more intensive and time-consuming project than simply identifying the polluted waters, as the **[***44]** EPA has indicated." (*Id.* at p. 885.) The Water Boards assert the case does not deprive an agency from exercising its *discretion* to simultaneously submit to the EPA the identification of an impaired water body and a TMDL for it. Given the plain language of 33 United States Code section 1313(d)(2), we agree. Moreover, **HN15**[↑] "[s]tates remain at the front line in combating pollution" (*City of Arcadia II, supra*, 411 F.3d at p. 1106), and "[s]o long as the [s]tate does not attempt to adopt more *lenient* pollution control measures than those already in place under the [Clean Water] Act, [it] does not prohibit state action." (*Id.* at p. 1107.)

Alternatively, the Cities complain the Regional Board did not sufficiently identify the Estuary as being impaired and included in the Trash TMDL until after its adoption and approval by the State Board and Office of Administrative Law and the completion of all public hearings. On July 29, 2002, the Regional Board sent the EPA a memorandum "to provide clarification on specific aspects" of the Trash TMDL. It stated that a "TMDL was established for the reaches of the Los **[***45]** Angeles River, tributaries and lakes listed on the [state's] 1998 303(d) list," and "[i]n addition, a TMDL was established for the Los Angeles River [E]stuary in the City of Long Beach. As described on page 12, paragraph 2 of the [staff] report, staff found that the impairment in the [E]stuary due to trash is 'even more acute in Long Beach where debris flushed down by the upper reaches collects.' [¶] The impairment in the [E]stuary was well documented during TMDL development," and it "would have been included in

the 1998 303(d) list if the attached photographic evidence had been available at the time of the listing."

The Trash TMDL lists the reaches of the Los Angeles River "that are impaired by trash, and listed on the [state's] 303(d) **[**392]** list." The list does not include the Estuary. The Water Boards assert that even so, it was always obvious the Estuary is impaired and included in the Trash TMDL. The Trash TMDL states it is "for the Los Angeles River Watershed," and "watershed" is defined as "a region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water." (Merriam-Webster's Collegiate Dict. (10th ed. 1996) p. **[***46]** 1336.) ?Estuary" is defined as "a water passage where the tide meets a river current," especially "an arm of the sea at the lower end of a river." (*Id.* at p. 397.)

The Trash TMDL describes the watershed as beginning at the "western end of the San Fernando Valley to the Queensway Bay and Pacific Ocean at Long Beach," and it also states the watershed continues from "Willow Street all **[*1420]** the way through the [E]stuary." An amici curiae brief by Santa Monica BayKeeper, Inc., Heal the Bay, Inc., and Natural Resources Defense Council, Inc. (collectively BayKeeper), asserts Queensway Bay is the site of the Estuary, and no party has challenged the assertion. Further, the Trash TMDL lists and discusses the beneficial uses of the Estuary, including habitat for many species of birds, some endangered, and fish. It also states beneficial uses "are impaired by large accumulations of suspended and settled debris throughout the river system," and in particular "estuarine habitat" is impaired. Further, the administrative record contains several pictures of trash deposited in the Estuary during high flows, depicting "the variety of ways through which trash ... becomes an integral part of wildlife, **[***47]** affecting all plant and animal communities in the process."

The Trash TMDL's identification of the Estuary as impaired could have been clearer, but we conclude it was sufficient to put all affected parties on notice, and does not meet the arbitrary-and-capricious standard. Further, although the identification of impaired water bodies requires a priority ranking (33 U.S.C. § 1313(d)(2)), and the Trash TMDL does not prioritize the Estuary's need for a TMDL, we agree with amici curiae BayKeeper that any error in the Water Boards' procedure was not prejudicial because the Trash TMDL shows amelioration of the trash problem in the entire Los Angeles River watershed is highly important, and it is unlikely the Water Boards would single out the Estuary for lower priority or that inclusion of the Estuary would disturb their existing priorities.

V

CEQA

CA(9)[↑] **(9)** The Water Boards challenge the sufficiency of the evidence to support the trial court's finding that the amendment adding the Trash TMDL to the 1994 Basin Plan does not comport with CEQA. The court found the Regional Board's environmental checklist was deficient and there is sufficient evidence of a fair argument that **[***48]** the project may have a significant effect on the environment, thus necessitating an EIR or its functional equivalent. We conclude the court was correct.

A

General Legal Principles

CA(10)[↑] **(10)** HN16[↑] "CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the **[*1421]** imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233 [32 Cal. Rptr. 2d 19, 876 P.2d 505].) CEQA mandates that public agencies refrain from approving projects with significant environmental

effects if **[**393]** there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 [65 Cal. Rptr. 2d 580, 939 P.2d 1280].)

HN17[↑] CEQA is implemented through initial studies, negative declarations and EIR's. (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1229.) "CEQA requires a governmental agency [to] prepare an [EIR] whenever it considers approval of a proposed project that *'may* have a *significant* effect on the environment.' " (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, supra*, 29 Cal.App.4th at p. 1601.) **[***49]** "If there is no substantial evidence a project 'may have a significant effect on the environment' or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citations.] Thus, if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at pp. 1601–1602.)

HN18[↑] " 'Significant effect on the environment? means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the **[***50]** environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Cal. Code Regs., tit. 14, § 15382.)

B

Certified Regulatory Program

HN19[↑] **CA(11)**[↑] **(11)** "State regulatory programs that meet certain environmental standards and are certified by the Secretary of the California Resources Agency are exempt from CEQA's requirements for preparation of EIRs, negative declarations, and initial studies. [Citations.] Environmental review documents prepared by certified programs may be used instead of environmental documents that CEQA would otherwise require. [Citations.] Certified regulatory **[*1422]** programs remain subject, however, to other CEQA requirements." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 21.2, p. 1076; see Pub. Resources Code, § 21080.5.) Documents prepared by certified programs are considered the "functional equivalent" of documents CEQA would otherwise require. (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 113; 2 Kostka & Zischke, Practice Under the Cal. Environmental **[***51]** Quality Act, *supra*, § 21.10, p. 1086 ["the documentation required of a certified program essentially duplicates" that required for an EIR or negative declaration].)

An "agency seeking certification must adopt regulations requiring that final action on the proposed activity include written responses to significant environmental points raised during the decisionmaking process. [Citation.] The agency must also implement guidelines for evaluating the proposed activity consistently with the **[**394]** environmental protection purposes of the regulatory program. [Citation.] The document generated pursuant to the agency's regulatory program must include alternatives to the proposed project and mitigation measures to minimize significant adverse environmental effects [citation], and be made available for review by other public agencies and the public [citation]." (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16

Cal.4th at p. 127.)

HN20[↑] CA(12)[↑] **(12)** The guidelines for implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.) do not directly apply to a certified regulatory program's environmental document. (2 Kostka & Zischke, **[***52]** Practice Under the Cal. Environmental Quality Act, *supra*, § 21.10, p. 1086.) However, "[w]hen conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." (*Ibid.*)

In a certified program, an environmental document used as a substitute for an EIR must include "[a]lternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment," and a document used as a substitute negative declaration must include a "statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B).)

The basin planning process of the State Board and regional boards is **[***53]** a certified regulatory program (Cal. Code Regs., tit. 14, § 15251, subd. (g)), and **[*1423]** the regulations implementing the program appear in the California Code of Regulations, title 23, sections 3775 to 3782. HN21[↑] A regional board's submission of a plan for State Board approval must be accompanied by a brief description of the proposed activity, a completed environmental checklist prescribed by the State Board, and a written report addressing reasonable alternatives to the proposed activity and mitigation measures to minimize any significant adverse environmental impacts. (*Id.*, § 3777, subd. (a).)

C

Environmental Documentation

The Regional Board's environmental documentation in lieu of documents CEQA ordinarily requires consists of a checklist and the Trash TMDL. The checklist asked a series of questions regarding whether implementation of the Trash TMDL would cause environmental impacts, to which the Regional Board responded "yes," "maybe" or "no." "Yes" or "maybe" answers required an explanation. The checklist described beneficial impacts pertaining to plant and animal life, water quality **[***54]** and recreation. The checklist denied the project would have any environmental impact on land, including soil displacement, air, noise, natural resources or traffic, and thus it included no discussion of those factors. The checklist concluded "the proposed Basin Plan amendment [adding the Trash TMDL] could not have a significant effect on the environment."

The Regional Board obviously intended its documentation to be the functional equivalent of a negative declaration. Nonetheless, on appeal the Water Boards claim for the first time that the Regional **[**395]** Board's environmental review process is tiered, and its documentation meets the requirements of a first tier EIR under Public Resources Code section 21159. They assert the court's criticism of the checklist is baseless "because it ignores the concept of tiered environmental review and specific provisions for pollution control performance standards."

HN22[↑] " 'Tiering' refers 'to the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately *site-specific* EIRs incorporating by reference the general discussions and concentrating solely **[***55]** on the issues specific to the EIR subsequently prepared. Tiering

is appropriate when the sequence of EIRs is: [¶] ... [f]rom a general plan, policy, or program EIR to a ... site-specific EIR.' " (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 285 [126 Cal. Rptr. 2d 615].) "[C]ourts have allowed first tier EIR's to defer detailed analysis to subsequent project EIR's." (*Friends of* **[*1424]** *Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 532 [98 Cal. Rptr. 2d 334].)

CA(13)[↑] **(13)** **HN23**[↑] Public Resources Code section 21159, which allows expedited environmental review for mandated projects, provides that an agency "shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. ... The environmental analysis shall, at [a] minimum, include, all of the following: [¶] (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance. [¶] (2) An analysis of reasonably foreseeable mitigation measures. **[***56]** [¶] (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation." (Pub. Resources Code, § 21159, subd. (a).) The Water Boards submit they complied with the statute, and the "tier two environmental review is the responsibility of the local agencies who will determine how they intend to comply with the performance standards" of the Trash TMDL.

HN24[↑] Issues not presented to the trial court are ordinarily waived on appeal. (*Royster v. Montanez* (1982) 134 Cal. App. 3d 362, 367 [184 Cal. Rptr. 560].) In any event, we conclude the checklist and Trash TMDL are insufficient as either the functional equivalent of a negative declaration [11] or a tiered EIR. Moreover, an EIR is required since the Trash TMDL itself presents substantial evidence of a fair argument that significant environmental impacts may occur. **HN25**[↑] "Because a negative declaration ends environmental review, the fair argument test provides a low threshold for requiring an EIR." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 399 [10 Cal. Rptr. 3d 451].)

[*57]** **[**396]** The Trash TMDL discusses various compliance methods or combinations thereof that permittees may employ, including the installation of catch basin inserts and VSS units. The Trash TMDL estimates that if the catch basin method is used exclusively, approximately 150,000 catch basins throughout the watershed would require retrofitting at a cost of approximately $ 120 million. It explains, however, that the "ideal way to capture trash deposited into a storm[]drain system would be to install a VSS unit. This device diverts **[*1425]** the incoming flow of storm[]water and pollutants into a pollution separation and containment chamber." Only VSS units or similar full-capture devices will be deemed fully compliant with the zero trash target. The Trash TMDL estimates the cost of installing low capacity VSS units would be $ 945 million and the cost of installing large capacity VSS units would be $ 332 million.

The checklist and the Trash TMDL, however, ignore the temporary impacts of the construction of these pollution controls, which logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation. Further, the Trash TMDL explains that

[11] A negative declaration may not be based on a " 'bare bones' " approach in a checklist. (*Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797, fn. 2 [88 Cal. Rptr. 2d 455], and cases cited therein.) A "certified program's statement of no significant impact must be supported by documentation *showing* the potential environmental impacts that the agency examined in reaching its conclusions," and "[t]his documentation would be similar to an initial study." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 21.11, pp. 1088–1089, italics added.) Because we conclude an EIR is required, we need not expand on how the checklist and Trash TMDL fail to satisfy negative declaration requirements or their functional equivalent.

since **[***58]** catch basin inserts "are not a full capture method, they must be monitored frequently and must be used in conjunction with frequent street sweeping." The checklist and the Trash TMDL also ignore the effects of increased street sweeping on air quality, and possible impacts caused by maintenance of catch basin inserts, VSS units and other compliance methods.

Indeed, the County of Los Angeles wrote to the Regional Board that "cleanout of structural controls, such as [catch basin inserts] and VSSs, naturally will increase existing noise levels due to vehicle and vacuuming noises." The City of Los Angeles advised that the Trash TMDL would result in increased maintenance vehicle traffic and "substantial air emissions or deterioration of ambient air quality," increased noise, increased use of natural resources and adverse impacts on existing transportation systems.

The Water Boards contend those comments are merely "unsubstantiated opinion and speculation by biased project opponents." **HN26**[↑] Substantial evidence is not "[a]rgument, speculation, unsubstantiated opinion or narrative [or] evidence which is clearly inaccurate or erroneous." (Pub. Resources Code, § 21082.2, subd. (c).) **[***59]** However, letters and testimony from government officials with personal knowledge of the anticipated effects of a project on their communities "certainly supports a fair argument that the project may have a significant environmental impact." (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal. App. 3d 531, 542 [230 Cal. Rptr. 867].) Again, however, the Trash TMDL itself satisfies the fair argument criterion.

Even if the Water Boards had relied on Public Resources Code section 21159 at the trial court, the environmental documents do not meet its minimum requirements. Neither the checklist nor the Trash TMDL includes an analysis of the reasonably foreseeable impacts of construction and maintenance of pollution control devices or mitigation measures, and in fact the Water Boards develop no argument as to how they ostensibly complied with the statute. While we agree a tiered environmental analysis is appropriate here, the Regional Board did not prepare a first-level EIR or its functional equivalent. We reject the Water Boards' argument the Regional Board did all it **[*1426]** could because there "is no way to examine project level **[***60]** impacts that are entirely dependent upon the speculative possibilities of how subsequent **[**397]** decision[]makers may choose to comply" with the Trash TMDL. Tier two project-specific EIR's would be more detailed under Public Resources Code section 21159.2, but the Trash TMDL sets forth various compliance methods, the general impacts of which are reasonably foreseeable but not discussed.

As a matter of policy, in CEQA cases a public agency must explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra*, 126 Cal.App.4th 1180, 1198.) The Water Boards' CEQA documentation is inadequate, and remand is necessary for the preparation of an EIR or tiered EIR, or functional equivalent, as substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the environment. The court correctly invalidated the Trash TMDL on CEQA grounds. [12]

[*61]** VI

Declaratory Relief

In its statement of decision, the trial court explained the Cities "contend [the Water Boards] improperly attempted to control the watershed including the 'entire 584 square miles' of incorporated and

[12] The Water Boards also contend the trial court erred by staying the implementation schedule for the Trash TMDL pending this appeal. The matter is moot given our holding on the CEQA issue.

unincorporated areas of the County [of Los Angeles], and nowhere in the [Trash] TMDL or the [1994] Basin Plan Amendment did [they] assert that the numeric Waste Load Allocations ... are to apply to the entire 584 square miles of watershed." The court, however, explained the Water Boards "concede the [Trash] TMDL only applies to navigable waters by asserting [they] didn't intend to control non-navigable waters," and it found "the parties are in agreement that the trash load allocations apply to the portion of the subject watershed as defined on pages 3575 and 3584 of the Administrative Record [pages of the Trash TMDL] and the Waste Load Allocations do not apply to non-waters."

The statement of decision nonetheless states the court granted the Cities' "relief as requested" as to "regulation of non-waters." In their third cause of action, the Cities sought a judicial declaration that the amendment to the 1994 Basin Plan and the Trash **[***62]** TMDL are invalid because they violate federal and state law. The judgment declared unenforceable a July 29, 2002, letter from **[*1427]** the Regional Board to the EPA that stated the "Waste Load Allocations apply to the entire urbanized portion of the watershed ... . The urbanized portion of the watershed was calculated to encompass 584 square miles of the total watershed."

CA(14)[↑] **(14)** HN27[↑] "The fundamental basis of declaratory relief is the existence of an *actual, present controversy.*" (5 Witkin, Cal. Procedure, *supra*, Pleadings, § 817, p. 273.) Because the parties agreed during this proceeding there was no *present* controversy, the judgment should not have included declaratory relief on the nonwaters issue.

CITIES' APPEAL

I

Concepts of "Maximum Extent Practicable" and "Best Management Practices"

CA(15)[↑] **(15)** The Cities contend a zero target for trash in the Los Angeles River is unattainable, **[**398]** and thus the Trash TMDL violates the law by not deeming compliance through the federal "maximum extent practicable" and "best management practices" standards, which are less stringent than the numeric target of zero. The Cities rely on HN28[↑] 33 United States Code section 1342(p)(3)(B)(iii), **[***63]** under which an NPDES permit for a municipal discharge into a storm drain "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 [EPA] Administrator or the State determines appropriate for the control of such pollutants." (Italics added.) [13] "Best management practices" are generally pollution control measures set forth in NPDES permits. (*BIA, supra*, 124 Cal.App.4th at p. 877.)

The Cities assert that "as the [r]ecord **[***64]** reflects, compliance with the 'zero' [Trash] TMDL ... is impossible," and the Water Boards "themselves recognize that 'zero' is an impossible standard to meet." Contrary to the Cities' suggestion, the Water Boards made no implied finding or concession of impossibility. Rather, the record shows that members of the Water Boards questioned whether a zero trash target is actually attainable. A zero limit on **[*1428]** trash within the meaning of the Trash TMDL *is* attainable because there are methods of deemed compliance with the limit. The record does not show the limit is unattainable, and the burden was on the Cities as opponents of the Trash TMDL to establish impossibility. Further, the impossibility issue is not germane at this juncture, as the matter is at the

[13] The Clean Water Act and applicable regulations do not define the maximum extend practicable standard. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889 [22 Cal. Rptr. 3d 128] (*BIA*).) In *BIA*, the NPDES permit at issue defined the standard as "a highly flexible concept that depends on balancing numerous factors." (*Ibid.*)

planning stage with an interim goal of a 50 percent reduction in trash, a goal everyone agrees is necessary and achievable.

In any event, the trial court found 33 United States Code section 1342(p)(3)(B)(iii) inapplicable to the adoption of a TMDL. The court also found state and federal laws authorize regional boards to "use water quality, and not be limited to practicability as the guiding principle for **[***65]** developing limits [in a TMDL] on pollution." Further, the court noted the Cities presented no authority for their proposition the Regional Board is required to adopt a storm water TMDL that is achievable.

CA(16)[↑] **(16)** We agree with the court's assessment. **HN29**[↑] The statute applicable to establishing a TMDL, 33 United States Code section 1313(d)(1)(C), does not suggest that practicality is a consideration. To the contrary, a regional board is required to establish a TMDL "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." (33 U.S.C. § 1313(d)(1)(C).) The NPDES permit provision, 33 United States Code 1342(p)(3)(B), is inapplicable because, again, we are only considering the propriety of the Trash TMDL, a precursor to NPDES permits implementing it. Under the Trash TMDL, the numeric target will be reconsidered after several years when a reduction in trash of 50 percent is achieved, and thus it is presently unknown whether compliance with a trash limit of zero will ever actually be mandated.

CA(17)[↑] **(17)** To bolster their position the Cities rely on 33 United States Code section 1329(a)(1)(C)). **[***66]** **[**399]** It provides, however, that in a state's assessment report for a *nonpoint* source management program, the state must "describe[] the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source." (*Ibid.*) In *BIA, supra,* 124 Cal.App.4th at page 887, we rejected the argument the statute shows Congress intended to apply a maximum extent practicable standard to point source discharges as well as nonpoint discharges. The Cities say they disagree with *BIA,* but they develop no argument revealing any flaw in the opinion. **HN30**[↑] "[P]arties are required **[*1429]** to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's ... issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [37 Cal. Rptr. 2d 126].)

The Cities' reliance **[***67]** on *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, for the proposition that municipalities, unlike private companies, may not be required to strictly comply with numeric discharge limits is likewise misplaced. *Defenders of Wildlife v. Browner* involves a challenge to an NPDES permit, not the adoption of a TMDL. Further, the court there rejected the argument that "the EPA [or authorized regional or state board] may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Id.* at p. 1166.) The court explained: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [section] 1342(p)(3)(B)(iii) [of United States Code, title 33] states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the* [*EPA*] *Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] Under that **[***68]** discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to

require less than strict compliance with state water-quality standards. ... Under 33 [United States Code section] 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion." (*Id.* at pp. 1166–1167.)

In *BIA,* this court similarly held that **HN31**[↑] 33 United States Code section 1342(p)(3)(B)(iii) does not divest a regional board's discretion to impose an NPDES permit condition requiring compliance with state water quality standards more stringent than the maximum-extent-practicable standard. (*BIA, supra,* 124 Cal.App.4th at pp. 871, 882–885; see also Wat. Code, § 13377 [waste discharge requirements shall meet federal standards and may also include "more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance"].) **[***69]** Thus, even if the analysis in *Defenders of Wildlife v. Browner* or *BIA* arguably has any application to a TMDL, the opinions do not help the Cities.

CA(18)[↑] **(18)** Additionally, the Cities' reliance on a November 2002 EPA memorandum on establishing TMDL's and issuing NPDES **[**400]** permits is misplaced, as it postdates the Regional Board's adoption of the Trash TMDL and its approval by the State Board and the EPA. Further, the memorandum states it **[*1430]** is not binding, and "indeed, there may be other approaches that would be appropriate in particular situations. **HN32**[↑] When EPA makes a TMDL or permitting decision, it will make each decision on a case-by-case basis and will be guided by applicable requirements of the [Clean Water Act] and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation."

II

Nonpoint Sources of Pollution

The Cities contend the court should have invalidated the Trash TMDL on additional grounds, including the Water Boards' failure to identify load allocations and implementation measures for nonpoint sources of trash discharge. **[***70]** The Cities assert the Water Boards are required to adopt implementation measures "for the homeless and aerial sources of trash, [and] also for the other nonpoint sources of trash consisting of State and federal facilities, and other facilities not yet subject to NPDES Permits." The Cities submit that the Clean Water Act does not allow the Water Boards "to effectively impose the burden of the load allocation from all nonpoint sources solely on municipalities."

The Cities further claim the Water Boards acted arbitrarily and capriciously by imposing a trash target of zero on municipalities, but imposing a " 'de minimus' requirement on non-point source discharges." The Cities cite the July 29, 2002, letter from the Regional Board to the EPA, clarifying that it identified nonpoint sources of trash pollution "as wind blown trash and direct deposit of trash into the water," but "as the non-point sources were determined to be de-minimus, we did not believe it necessary to outline a reduction schedule for non-point sources." Contrary to the Cities' position, the Regional Board did not adopt a "de minimus" load allocation for nonpoint sources. Rather, as the trial court found, the Regional **[***71]** Board found the trash pollution from nonpoint sources is de minimus compared to trash pollution from point sources. The TMDL states the "major source of trash in the [Los Angeles River] results from litter, which is intentionally or accidentally discarded in the watershed drainage areas."

In arguing the Trash TMDL is required to include a specific load allocation for nonpoint sources of pollution, the Cities rely on the 2000 EPA Guidance, which provides: "Load allocations for nonpoint sources *may* be expressed as specific allocations for specific discharges or as 'gross allotments' to nonpoint source discharger categories. Separate nonpoint source allocations

should be established for background loadings. Allocations may be based on a variety **[*1431]** of technical, economic, and political factors. The methodology used to set allocations *should* be discussed in detail." (Italics added.)

The 2000 EPA Guidance, however, states it does not impose legally binding requirements. Further, the load allocation for nonpoint sources is implicitly zero for trash. Federal regulations define a TMDL as the sum of waste load allocations for point sources, load allocations for nonpoint sources **[***72]** and natural backgrounds. (40 C.F.R. § 130.2(i) (2003).) Since "[a] TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined" (*American Wildlands v. Browner* (10th Cir. 2001) 260 F.3d 1192, 1194), **[**401]** and the Trash TMDL specifies a zero numeric target for trash in Los Angeles River, load allocations are necessarily zero as well as waste load allocations.

Additionally, the Cities cite no authority for the proposition the Water Boards are required to identify an implementation program for nonpoint pollution sources. Again, "[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal. App. 3d 768, 783 [86 Cal. Rptr. 906], disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3 [98 Cal. Rptr. 217, 490 P.2d 537]; see *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2 [44 Cal. Rptr. 2d 575].)

CA(19)[↑] (19) In any event, **HN33[↑]** although the Clean Water Act focuses on both point and nonpoint sources of pollution, it is settled that **[***73]** the measure "does not require states to take regulator[y] action to limit the amount of non-point water pollution introduced into its waterways. While the [Clean Water Act] requires states to designate water standards and identify bodies of water that fail to meet these standards, ' "nothing in the [Clean Water Act] demands that a state adopt a regulatory system for nonpoint sources." ' " (*Defenders of Wildlife v. U.S. Environ. Protec., supra*, 415 F.3d at pp. 1124–1125, citing *American Wildlands v. Browner, supra*, 260 F.3d 1192, 1197 ["In the [Clean Water] Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"]; *Appalachian Power Co. v. Train* (4th Cir. 1976) 545 F.2d 1351, 1373 ["Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"]; *City of Arcadia I, supra*, 265 F. Supp. 2d at p. 1145 ["For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced ... only to **[***74]** the extent that a state institutes such reductions as regulatory requirements pursuant to state **[*1432]** authority"].) "Nonpoint sources, because of their very nature, are not regulated under the NPDES [program]. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the [Clean Water] Act which encourages states to develop areawide waste treatment management plans." (*Pronsolino v. Marcus, supra*, 91 F. Supp. 2d at p. 1348, citing 33 U.S.C. § 1288; see also 33 U.S.C. § 1329.)

We conclude the court correctly ruled on this issue.

III

Uses To Be Made of Watershed

The Cities next contend the Trash TMDL is invalid because the Water Boards "improperly relied on nonexistent, illegal and irrational 'uses to be made' of the [Los Angeles] River." (Boldface and some capitalization omitted.) The Cities complain that the Trash TMDL states a purported beneficial use of one of numerous reaches of the river on the state's 303(d) list is "recreation and bathing, in particular by homeless people who seek shelter there," and the State Board chairman questioned the

legality of such uses. The Cities also assert there is no **[***75]** evidence to support the Trash TMDL's finding that swimming is an actual use of the river in any location.

The Cities rely on **HN34**[↑] section 303(d)(1)(A) of the Clean Water Act (33 U.S.C. § 1313(d)(1)(A)), which provides that in identifying impaired waters for its 303(d) list, states "shall establish a priority ranking for such waters, taking into account the severity of the pollution and the *uses to be made* of such waters." (Italics added.) **[**402]** The Cities assert "an 'illegal' use cannot be a 'use to be made' for the water body."

Additionally, the Cities cite Water Code section 13241, which requires regional boards to establish water quality objectives in water quality control plans by considering a variety of factors, including "[p]ast, present, and probable future beneficial uses of water." (Wat. Code, § 13241, subd. (a).) They assert the "Water Boards acted contrary to law by basing the [Trash] TMDL on any uses of the [Los Angeles] River other than the actual 'uses to be made' of the River." (Boldface omitted.)

The Cities, however, make no showing of prejudice. Swimming and bathing by the homeless are only **[***76]** two among numerous other beneficial uses that the Cities do not challenge, and there is no suggestion the numeric target of zero trash in the Los Angeles River would have been less stringent without consideration of the factors the Cities raise.

[*1433] IV

Scientific Methodology

Further, the Cities contend the Trash TMDL is invalid on the additional ground that before adopting and approving it the Water Boards failed to comply with the requisite data collection and analysis. The Cities rely on a federal regulation providing that "[s]tates must establish appropriate monitoring methods and procedures (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States and, to the extent practicable, ground-waters." (40 C.F.R. § 130.4(a) (2003).) "The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data" in developing, among other things, TMDL's. (*Id.*, § 130.4(b).)

The trial court rejected the Cities' position, finding they failed to establish the Water Boards' **[***77]** scientific data is inadequate or scientifically invalid. The court explained the Water Boards "have not failed to conduct ongoing studies, as they say, how else would [they] know the River is impaired by trash[?] And the Record reveals studies relied upon by the Boards."

This argument is a variation on the assimilative capacity study issue, and we similarly reject it. As the Water Boards point out, "trash is different than other pollutants. ... The complex modeling and analytical effort that may be necessary for typical pollutants that may be present in extremely low concentrations have no relevance to calculating a trash TMDL." Further, the Trash TMDL does discuss sources of trash in the Los Angeles River. It states the "City of Los Angeles conducted an Enhanced Catch Basin Cleaning Project in compliance with a consent decree between the [EPA], the State of California, and the City of Los Angeles. The project goals were to determine debris loading rates, characterize the debris, and find an optimal cleaning schedule through enhancing basin cleaning. The project evaluated trash loading at two drainage basins[.]" It goes on to discuss the amounts and types of trash collected **[***78]** in the drainage basins between March 1992 and December 1994. The Cities cite no authority for the notion the Water Boards may not rely on data collected by another entity.

The Trash TMDL also states "[s]everal studies conclude that urban runoff is the dominant source

of trash. The large amounts of trash conveyed by the urban storm water to the Los Angeles River is evidenced by the amount of ... trash that accumulates at the base of storm drains."

[*1434] **[**403]** Alternatively, the Cities contend a TMDL is not suitable for trash calculation. They rely on 33 United States Code section 1313(d)(1)(C), which provides: **HN35**[↑] "Each State shall establish for [impaired] waters ... the total maximum daily load, for those pollutants which the [EPA] Administrator identifies ... as *suitable for such calculation.* Such load shall be established at a level *necessary* to implement the applicable water quality standards with seasonal variations and a margin of safety." (Italics added.)

The Cities also cite a 1978 EPA regulation that states a TMDL is "suitable for ... calculation" only under "proper technical conditions." (43 Fed.Reg. 60662, 60665 (Dec. 28, 1978) **[***79]** (italics omitted).) "Proper technical conditions" require "the availability of the analytical methods, modeling techniques and data base necessary to develop a technically defensible TMDL." (*Id.* at p. 60662.) The Cities assert the proper technical conditions do not exist, referring to the Trash TMDL's comment that "[e]xtensive research has not been done on trash generation or the precise relationship between rainfall and its deposition in waterways."

The Cities ignore the EPA's determination that a TMDL *may* be calculated for trash as a pollutant. It approved the Regional Board's Trash TMDL, and had previously approved a trash TMDL for the East Fork of the San Gabriel River. (See Cal. Code Regs., tit. 23, § 3933.) Thus, the Cities' view that the 1978 EPA regulation prohibits a TMDL for trash is unfounded. TMDL's for trash are relatively new, and there is no evidence that in 1978 the EPA contemplated their establishment.

We find irrelevant the Cities' discussion of the EPA's proposed July 2000 TMDL "rule," as their federal register citation is not a regulation and merely concerns the 2003 withdrawal of a rule that never took effect. **[***80]** (68 Fed.Reg. 13608, 13609 (Mar. 19, 2003) ["The July 2000 rule was controversial from the outset"].) In August 2001 the EPA delayed implementation of the July 2000 rule for further consideration, noting that some local government officials argued "some pollutants are not suitable for TMDL calculation." (66 Fed.Reg. 41817, 41819 (Aug. 9, 2001).) Nothing is said, however, about whether a trash TMDL is unsuitable for calculation, and again, the EPA has approved such TMDL's. The withdrawal of the proposed July 2000 rule left the existing rule regarding the establishment of a TMDL in place. (33 U.S.C. § 1313(d)(1)(C).)

V

APA Requirements

Lastly, the Cities contend the trial court erred by finding the Water Boards did not violate the APA. They assert the July 29, 2002, "clarification **[*1435]** memorandum" from the Regional Board to the EPA makes substantive changes to the Trash TMDL regulation-the inclusion of the Estuary in the Trash TMDL and designating an allocation of zero for nonpoint pollution sources-violates the notice and hearing provisions of the APA. The Cities also contend the Trash TMDL and the clarification memorandum **[***81]** "establish[] a regulation in violation of the APA's elements of 'clarity,' 'consistency,' and 'necessity,' as defined in [Government] Code section 11349."

HN36[↑] **CA(20)**[↑] **(20)** The APA (Gov. Code, §§ 11340 et seq., 11370) "establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action [citations]; issue a complete text of the proposed regulation with a statement of the reasons for it [citation]; give interested parties an opportunity to comment on **[**404]** the proposed regulation [citation]; respond in writing to public comments [citations];

and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law [citation], which reviews the regulation for consistency with the law, clarity, and necessity [citations]." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 [59 Cal. Rptr. 2d 186, 927 P.2d 296].) "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so **[***82]** that they can conform their conduct accordingly [citation]." (*Id.* at pp. 568–569.)

The APA does not apply to "the adoption or revision of state policy for water quality control" unless the agency adopts a "policy, plan, or guideline, or any revision thereof." (Gov. Code, § 11353, subds. (a), (b)(1).) The Water Boards contend that while the Trash TMDL and amendment adding it to the 1994 Basin Plan are policies or plans covered by the APA, the clarification memorandum is not because it does not revise the terms of the Trash TMDL.

We are not required to reach the issue, because assuming the APA is applicable the Cities' position lacks merit. As to the Estuary, we have determined the Trash TMDL sufficiently notified affected parties of its inclusion in the document as an impaired water body. Further, we have determined the load allocation for nonpoint sources of trash pollution is also necessarily zero, and the Trash TMDL is not required to include implementation measures for nonpoint sources. Accordingly, the clarification memorandum is not germane. [14]

[*83]**

[*1436] DISPOSITION

The judgment is affirmed insofar as it is based on the Trash TMDL's violation of CEQA, and on a rejection of each of the issues the Cities raised in their appeal. The judgment is reversed insofar as it is based on the Trash TMDL's lack of an assimilative capacity study, inclusion of the Estuary as an impaired water body, and a cost-benefit analysis under Water Code section 13267 or the consideration of economic factors under Water Code section 13241, and also insofar as it grants declaratory relief regarding the purported inclusion of nonnavigable waters in the Trash TMDL.

The court's postjudgment order staying the Trash TMDL's implementation schedule is affirmed. The parties are to bear their own costs on appeal.

McIntyre, J., and Irion, J., concurred.

A petition for a rehearing was denied January 17, 2006, and the petition of plaintiffs and appellants for review by the Supreme Court was denied April 19, 2006, S141673.

End of Document

[14] We deny the Water Boards' June 16, 2005, request for judicial notice.

Arreola v. County of Monterey

Court of Appeal of California, Sixth Appellate District

June 25, 2002, Decided ; June 25, 2002, Filed

No. H021339.

Reporter

99 Cal. App. 4th 722 *; 122 Cal. Rptr. 2d 38 **; 2002 Cal. App. LEXIS 4319 ***; 2002 Cal. Daily Op. Service 5668; 2002 Daily Journal DAR 7131

JAMES ARREOLA et al., Plaintiffs and Respondents, v. COUNTY OF MONTEREY et al., Defendants and Appellants. [And five other cases. *]

Subsequent History: Order Modifying Opinion and Denying Petition for Rehearing July 23, 2002, Reported at: 2002 Cal. App. LEXIS 4423.

Review Denied September 18, 2002, Reported at: 2002 Cal. LEXIS 6194.

Prior History: Superior Court of Monterey County. Super. Ct. Nos. 105661, 106592, 106782, 106829, 107040 and 107041. Robert A. O'Farrell, Judge.

Disposition: The judgment is affirmed.

Core Terms

Counties, flooding, channel, highway, trial court, drainage, plaintiffs', levee, storm, river, inverse condemnation, deliberate, flood control, entity, cases, flood control project, public improvement, public entity, statement of decision, landowners, built, floodwater, vegetation, freeboard, damages, flows, factors, Fish, private property, obstruction

Case Summary

Procedural Posture

About 300 plaintiff businesses and individual were involved in six complaints filed against defendants, state, counties, and water agencies, over a flood. The Monterey County Superior Court (California) consolidated the matters and found the counties and agencies negligent, and, along with the state, liable for inverse condemnation, dangerous condition of public property, and nuisance. The state, counties, and agencies appealed.

Overview

A river formed the counties' border and was in a flood plain. A federal flood control act authorized construction of a project which local agencies would later maintain. Levees were built. Vegetation and sandbars were mechanically cleared from 1949 till 1972 when the state fish and game department demanded protection of the riparian habitat. Herbicides and other methods were used to try to clear the channel but it became more clogged and more costly to clear. The state built a highway embankment downriver. A 1995 flood overtopped the levee and it gave way. The appellate court found that the trial court properly assessed the reasonableness of the counties' policy to let the channel deteriorate. In the context of inverse condemnation, "maintenance" of the project was a species of "construction." Reasons for the counties' policy choices were irrelevant to the determination that their conduct was deliberate. The state was strictly liable for its conduct. Plaintiffs were not expected to have taken measures to protect their land from the downstream embankment obstruction. The state had a duty to avoid

* Baeza v. County of Monterey (No. 106592); Calcote v. County of Monterey (No. 106782); Clint Miller Farms, Inc. v. County of Monterey (No. 106829); Phoenix Assurance Co. v. County of Monterey (No. 107040); Allendale Mutual Ins. Co. v. County of Monterey (No. 107041).

obstructing floodwater regardless of the flood's cause. Flooding was foreseeable.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Real Property Law > Eminent Domain Proceedings > General Overview

HN1[] Real Property Law, Eminent Domain Proceedings

See Cal. Const. art. I, § 19.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Remedies

HN2[] Special Proceedings, Eminent Domain Proceedings

When a public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation."

Governments > Public Improvements > Sanitation & Water

Torts > Public Entity Liability > Liability > General Overview

HN3[] Public Improvements, Sanitation & Water

Where a public agency's design, construction, or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction, or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters. The public entity is not immune from suit, but neither is it strictly liable.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

Civil Procedure > ... > Eminent Domain Proceedings > Pleadings > General Overview

HN4[] Special Proceedings, Eminent Domain Proceedings

In California, the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) is a conditional privilege, subject to the Belair v. Riverside County Flood Control District rule of reasonableness. To determine reasonableness in such a case, a trial court must consider: (1) the overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the

project or is peculiar only to the plaintiff. Thus, in matters involving flood control projects, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiffs' property, and the unreasonable aspect of the improvement is a substantial cause of damage.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN5[⬇] Relief From Judgments, Motions for New Trials

See Cal. Civ. Proc. Code § 662.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN6[⬇] Special Proceedings, Eminent Domain Proceedings

To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of Cal. Const. art. I, § 19. "Public use" is the threshold requirement. The destruction or damaging of property is sufficiently connected with "public use" as required by the constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN7[⬇] Special Proceedings, Eminent Domain Proceedings

The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. That is why simple negligence cannot support the constitutional claim. This is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > ... > Elements > Just Compensation > Property Valuation

Real Property Law > Eminent Domain Proceedings > General Overview

HN8[↓] Special Proceedings, Eminent Domain Proceedings

Inadequate maintenance can support liability in inverse condemnation.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN9[↓] Special Proceedings, Eminent Domain Proceedings

In order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action -- or inaction -- in the face of that known risk.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN10[↓] Standards of Review, Substantial Evidence

In reviewing the sufficiency of the evidence to support the findings of a trial court, an appellate court considers the evidence in the light most favorable to the winning party, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

Governments > Local Governments > Claims By & Against

HN11[↓] Special Proceedings, Eminent Domain Proceedings

In order to establish a causal connection between a public improvement and a plaintiff's damages, there must be a showing of a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury. Where independently generated forces not induced by the public flood control improvement -- such as a rainstorm -- contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, that is, where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, that is, where the storm exceeded the project's design capacity. A project's capacity, therefore, bears upon the element of causation. This is true whether in considering inverse condemnation claims or tort causes of action.

Governments > Public Improvements > Sanitation & Water

Torts > ... > Elements > Causation > Concurrent Causation

HN12[↓] Public Improvements, Sanitation & Water

To the extent that a public project contributes to an injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN13[↓] Testimony, Expert Witnesses

Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. This rule does not apply to the personal opinions of an expert.

Civil Procedure > Trials > General Overview

HN14[↓] Civil Procedure, Trials

A tentative decision is not binding on a court and the court may instruct a party to prepare a proposed statement of decision. Cal. R. Ct. 232(a), (c). The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. Cal. R. Ct. 232(b), (d).

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Inverse Condemnation > Defenses

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

HN15[↓] Special Proceedings, Eminent Domain Proceedings

A public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. But a rule of reasonableness, rather than the extremes of strict liability or immunity, is appropriate in cases involving flood control projects.

Governments > Public Improvements > Sanitation & Water

Real Property Law > Water Rights > Riparian Rights

HN16[↓] Public Improvements, Sanitation & Water

Under the "natural watercourse" rule, a riparian landowner has a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, Cal. Const. art. I, § 19, mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

Governments > Public Improvements > Sanitation & Water

Torts > Strict Liability > Abnormally Dangerous Activities > Types of Activities

HN17[↓] Public Improvements, Sanitation & Water

Diversion of a watercourse is not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. Resolution of flood control cases involves a balancing of the public interest in encouraging flood control projects with the potential private harm they could cause. A public agency would not be strictly liable for damage resulting from a failed flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply.

Torts > ... > Elements > Duty > Foreseeability of Harm

Torts > ... > Elements > Duty > General Overview

HN18[↓] Duty, Foreseeability of Harm

Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. Cal. Gov't Code § 835. The question of whether a duty exists is one of law. A court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.

Real Property Law > Water Rights > Riparian Rights

Torts > Premises & Property Liability > General Premises Liability > General Overview

HN19[↓] Water Rights, Riparian Rights

Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater.

Torts > Products Liability > Types of Defects > Design Defects

Torts > Negligence > Defenses > General Overview

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN20[↓] Types of Defects, Design Defects

A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. Cal. Gov't Code § 835(a). However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity if there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or (b) a reasonable legislative body or other body or employee could have approved the plan or design. Cal. Gov't Code § 830.6. A public entity claiming design immunity must plead and prove three essential elements: (1) a causal relationship between the plan and the accident; (2) discretionary

approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design. Resolution of the third element is a matter for the court, not the jury. The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN21[↓] Standards of Review, Substantial Evidence

In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN22[↓] Judgment as Matter of Law, Directed Verdicts

A ruling or decision, itself correct in law, will not be disturbed on appeal merely because it was given for a wrong reason.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review

Real Property Law > Inverse Condemnation > Defenses

Torts > ... > Elements > Causation > Intervening Causation

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

Torts > ... > Elements > Causation > Causation in Fact

HN23[↓] Eminent Domain Proceedings, Appellate Review

Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. A defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, where the facts upon which a defendant bases its claim are materially undisputed, an appellate court applies independent review.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN24[↓] Special Proceedings, Eminent Domain Proceedings

Having the power and the duty to act and failure to do so, in the face of a known risk, is sufficient to support liability under Cal. Const. art. I, § 19. A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as plaintiffs can show substantial participation, it is immaterial which sovereign holds title or has the responsibility for operation of a project.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN25[] Special Proceedings, Eminent Domain Proceedings

In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct.

Torts > Public Entity Liability > Liability > General Overview

HN26[] Public Entity Liability, Liability

In tort cases, in identifying a defendant with whom control resides, location of the power to correct the dangerous condition is an aid. The ability to remedy the risk also tends to support a contention that the entity is responsible for it. Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Governments > Public Improvements > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

HN27[] Special Proceedings, Eminent Domain Proceedings

A public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that the project would result in some damage to private property, or that it took the calculated risk that damage would result.

Governments > Local Governments > Employees & Officials

HN28[] Local Governments, Employees & Officials

Monterey County, California employees are considered ex officio employees of the Monterey County Water Resources Agency (MCWRA) and are required to perform the same duties for MCWRA that they perform for Monterey. Cal. Water Code App. § 52-16 (former Cal. Water Code App. §§ 52-2, 52-8).

Torts > Public Entity
Liability > Liability > General Overview

HN29[↓] Public Entity Liability, Liability

Common governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry of whether an agency is under county control.

Real Property Law > Eminent Domain
Proceedings > General Overview

HN30[↓] Real Property Law, Eminent Domain Proceedings

An owner of private property ought not to contribute more than his or her proper share to a public undertaking.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Individuals who had suffered property damage brought an action against the state, a county and its flood control and water conservation district, and a second county and its water resources agency, seeking damages in inverse condemnation, and tort damages for nuisance, dangerous condition of public property, and negligence, arising from flood damage caused when a river levee project failed during a heavy rainstorm and the flood waters were further obstructed by a state highway. Plaintiffs alleged that the flooding occurred due to reduced water capacity in the levee project channel, caused by the failure of the county defendants to keep that channel clear, and that the state defendant failed to design the highway with adequate provision for flooding. The jury found all defendants liable on the tort claims, and the court found all defendants liable on the inverse condemnation claims and entered a judgment for plaintiffs. (Superior Court of Monterey County, Nos. 105661, 106592, 106782, 106829, 107040 and 107041, Robert A. O'Farrell, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly found the county defendants were liable to plaintiffs in inverse condemnation based on their failure to properly maintain the levee project, since their knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger. The court held that the trial court did not err in defining the levee project's water capacity, and that substantial expert evidence supported the jury's finding, pertinent to plaintiffs' tort claims against the county defendants, that peak flows during the storm did not exceed the project's design capacity. The court held that the trial court did not err in finding the state defendant liable in inverse condemnation based on its unreasonable design of the highway, which failed to account for a foreseeable flood, and that design immunity (Gov. Code, § 830.6) failed to provide this defendant with a defense to plaintiffs' tort claims. The court held that both the county defendant and its water resources agency were properly found liable to plaintiffs, since the county was directly, and not derivatively, liable. (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)

Appellate Review § 145—Scope of Review—Questions of Law and Fact.

--When arguments on appeal are related to facts

that are materially undisputed, the appellate court independently reviews the trial court's findings and conclusions.

CA(2)[↓] (2)

Eminent Domain § 132—Inverse Condemnation—Nature and Purpose of Action—Against Public Entity—Policy—Limitations on Claim.

--When a public use results in damage to private property without having been preceded by just compensation, the property owner may bring an inverse condemnation action against the public entity to recover it. The fundamental policy for the constitutional requirement of just compensation (Cal. Const., art. I, § 19) is based on a consideration of whether the owner of the damaged property if uncompensated would contribute more than his or her proper share to the public undertaking. Any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable whether foreseeable or not. The only limits to a claim are that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned.

CA(3)[↓] (3)

Waters § 93—Protection Against Surface Waters—Public Improvements—Common Enemy Doctrine—Natural Watercourse Rule—Immunity Limited by Rule of Reasonableness.

--In certain circumstances particular to water law, a landowner has a right to inflict damages upon the property of others for the purpose of protecting his or her own property. These circumstances include the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). However, a public entity is not immunized from liability under these rules, but rather is subject to a rule of reasonableness. When a public agency's design, construction, or maintenance of a flood control project poses an unreasonable risk of harm to the plaintiffs, and the unreasonable aspect of the improvement is a substantial cause of the damage, the plaintiffs may recover regardless of the fact that the project's purpose is to contain the common enemy of floodwaters. The public entity is not immune from suit, but neither is it strictly liable. A public entity's privilege to discharge surface water into a natural watercourse is also a conditional privilege, subject to a rule of reasonableness.

CA(4)[↓] (4)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability in Inverse Condemnation—Rule of Reasonableness—Determination of Reasonableness.

--In matters involving flood control projects, a public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff, and the unreasonable aspect of the improvement is a substantial cause of the damage. To determine reasonableness, a trial court must consider the following factors: (1) the overall public purpose being served by the improvement project, (2) the degree to which the plaintiff's loss is offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership, and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

CA(5)[↓] (5)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—

Inverse Condemnation—Trial Court's Determination of Reasonableness.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court properly analyzed the reasonableness of defendants' actions in finding they were liable to plaintiffs. The court balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to plaintiffs' property in finding that defendants acted unreasonably. In so doing, the court properly considered (1) the overall public purpose being served by the improvement project, (2) the degree to which plaintiffs' loss was offset by reciprocal benefits, (3) the availability to the public entity of feasible alternatives with lower risks, (4) the severity of plaintiffs' damage in relation to risk-bearing capabilities, (5) the extent to which damage of the kind plaintiffs sustained was generally considered as a normal risk of land ownership, and (6) the degree to which similar damage was distributed at large over other beneficiaries of the project or was peculiar only to plaintiffs. Based on these considerations, the court found that defendants' long-standing negligent operation of the project served no legitimate purpose, that feasible alternatives were available, and that the flood would not have occurred had defendants properly maintained the project.

CA(6a)[⬇] (6a) CA(6b)[⬇] (6b) CA(6c)[⬇] (6c)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Liability Based on Improper Maintenance of Public Project.

--In an inverse condemnation action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who had suffered property damage when a river levee project failed during a heavy rainstorm, the trial court did not err in basing defendants' liability on their failure to properly maintain the project. Inadequate maintenance can support a finding of a public entity's liability in inverse condemnation. The deliberateness required for inverse condemnation liability is satisfied by a finding that the public improvement, as designed, constructed, and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. In this case, the trial court expressly found that the manner in which the levee project channel was maintained for over 20 years was a deliberate policy. Further, substantial evidence supported the trial court's finding that defendants' maintenance plan was unreasonable and deliberate. Defendants' knowing failure to clear the project channel, in the face of repeated warnings and complaints, was not mere negligent execution of a reasonable maintenance plan, but rather a long-term failure to mitigate a known danger.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 1057.]

CA(7)[⬇] (7)

Eminent Domain § 132—Inverse Condemnation—Liability of Public Entity—Relation to Public Use—Whether Negligence Can Support Claim.

--To be subject to liability in inverse condemnation, the governmental action at issue must relate to the public use element of Cal. Const., art. I, § 19. The destruction or damaging of property is sufficiently connected with public use if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. A public entity's maintenance of a public improvement constitutes the constitutionally required public use, so long as the entity deliberately acts to undertake the particular plan or manner of maintenance. The necessary finding is that the wrongful act be part of

the deliberate design, construction, or maintenance of the public improvement. The fundamental justification is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. Simple negligence cannot support a constitutional claim. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed.

CA(8)[⬇] (8)

Appellate Review § 155—Scope of Review—Sufficiency of Evidence—Inferences.

--In reviewing the sufficiency of the evidence to support the findings of the trial court, the appellate court considers the evidence in the light most favorable to the prevailing parties, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment.

CA(9a)[⬇] (9a) CA(9b)[⬇] (9b)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability—Design Capacity of Levee—Water Capacity Plus Freeboard.

--In an action against two counties, a county flood control and water conservation district, and a county water resources agency, by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, the trial court did not err in defining the project's water capacity, and substantial expert evidence supported the jury's finding that peak flows during the storm did not exceed that capacity. When an independently generated force, such as a rainstorm, contributes to the injury, proximate cause is established when the injury occurred in substantial part because the public improvement failed to function as it was intended. Causation is not established, however, when the storm exceeds the project's design capacity. In this case, it would have been improper to fail to include the three-foot freeboard, which was the distance from the top of the levee to the surface of the water at maximum capacity, within the design capacity, since the extra room the freeboard was intended to provide was eliminated by defendants' ineffective maintenance. Thus, it was appropriate to permit the finder of fact to decide if the flood occasioned by the rainstorm exceeded the protection the project was intended to provide, including the freeboard, which was part of that protection.

CA(10)[⬇] (10)

Appellate Review § 41—Presenting and Preserving Questions in Trial Court—Witnesses—Objection to Expert Evidence.

--When a party fails to make a record of its objection to expert evidence at trial, that party fails to preserve the issue for appeal.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394.]

CA(11)[⬇] (11)

Evidence § 81—Opinion Evidence—Expert Witnesses.

--Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. However, this rule does not apply to the personal opinions of an expert.

CA(12a)[⬇] (12a) CA(12b)[⬇] (12b)

Waters § 96—Protection Against Floodwaters—State's Liability for Design of Highway Embankment That Captured Floodwaters: Government Tort Liability § 9.2—Dangerous Condition of Public Property.

--In an action against the state by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in finding defendant liable based on its design of the highway, which provided for a raised embankment that acted to dam the floodwaters. Public policy does not necessarily require a reasonableness calculus in all contexts in which a trial court determines the inverse condemnation liability of a public entity. In this case, public policy favored strict liability rather than reasonableness, since defendant was bound not to obstruct the flow of water from plaintiffs' upstream land. Further, defendant had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood. The traditional rule applicable to riparian landowners, according to which both upstream and downstream landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other, was applicable to defendant. Further, the harm that resulted was unquestionably foreseeable, since the state's highway planning manual required that a highway's drainage structures be able to accommodate a 100-year storm, and defendant was aware that the levee project on the same floodplain as the highway would not accommodate such a storm.

CA(13)[↓] (13)

Negligence § 92—Actions—Questions of Law and Fact—Duty of Care.

--The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. All persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. Duty is usually determined based upon a number of considerations; foreseeability of a particular kind of harm is one of the most crucial.

CA(14a)[↓] (14a) CA(14b)[↓] (14b) CA(14c)[↓] (14c) CA(14d)[↓] (14d)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required Showing—Reasonableness of Design: Nuisances § 9—Liability of Public Entities.

--In an action against the state by individuals who sought tort damages arising from damage to plaintiffs' property from floodwaters that were obstructed by a state highway, the trial court did not err in denying defendant's motion for a directed verdict based on design immunity (Gov. Code, § 830.6). Defendant failed to present evidence of a basis upon which a reasonable state official could have approved the highway design. The culverts installed through the highway embankment were not designed to accommodate floodwater. Defendant knew that the river levee project that was located in the same floodplain as the highway could not accommodate a 100-year storm, that flooding was foreseeable, and that the drainage design should have taken that into account. Defendant did not offer any evidence indicating that a reasonable public employee would have approved a design that did not take flooding into account. Further, the failure of the river levee project in a heavy rainstorm, which caused the flood, was not a superseding cause that extinguished defendant's liability, since the flooding was foreseeable. Thus, the flooding, whether caused by the levee failure or a 100-year storm, was not so extraordinary an event that defendant should have been relieved of liability.

CA(15)[↓] (15)

Government Tort Liability § 10—Grounds for Relief—Defense of Design Immunity—Required

Showing—Reasonableness of Design—Trial Court Determination.

--A public entity is immune from liability for a dangerous condition of public property under Gov. Code, § 830.6, if the injury was caused by a public improvement that was constructed pursuant to a plan or design approved in advance by the entity, and the entity can plead or prove three essential elements: (1) a causal relationship between the plan and the accident, (2) discretionary approval of the plan prior to construction, and (3) substantial evidence supporting the reasonableness of the design. Resolution of the reasonableness of the design is a matter for the court, not the jury. The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity that approved the design. The trial court must apply the deferential substantial evidence standard to determine whether any reasonable state official could have approved the challenged design. If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence.

CA(16)[⬇] (16)

Appellate Review § 135—Scope of Review—Presumptions—Where Ruling Correct, but Reasoning Not.

--A ruling or decision that is correct in law will not be disturbed on appeal merely because it was issued by the trial court for the wrong reason.

CA(17)[⬇] (17)

Negligence § 19—Actions—Trial—Questions of Law and Fact—Proximate Cause—Superseding Cause: Eminent Domain § 131—Inverse Condemnation—Defense.

--Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen, and, therefore, not foreseeable. Similar considerations may apply in the context of inverse condemnation. The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. The question is usually one for the trier of fact. However, when the facts are materially undisputed, the appellate court applies its independent review.

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975.]

CA(18)[⬇] (18)

Waters § 96—Protection Against Floodwaters—Public Entity's Liability: Eminent Domain § 132—Inverse Condemnation—Concurrent Liability of County and County Water Resources Agency.

--In an action against a county and the county water resources agency by individuals who sought damages in inverse condemnation and tort damages arising from damage to plaintiffs' property that resulted from the failure of a river levee project during a heavy rainstorm, both defendants were properly found liable to plaintiffs. The record was clear that the judgment against the county was based on its direct liability. In an inverse condemnation action, so long as the plaintiffs can show a public entity's substantial participation in a public project that proximately caused injury, it is immaterial which entity had the ultimate responsibility for operation of the project. The basis for liability is that the public entity had the power to control or direct the aspect of the improvement that is alleged to have caused the injury. In this case, the county expressly assumed responsibility

for the project's operation and maintenance, and also exercised control by virtue of its financial control of the agency. In addition, the county board of supervisors was aware of the project's maintenance needs, and of the risk of flooding it posed. In failing to expend funds on the project, the county took the risk that plaintiffs would be harmed. Therefore, it was proper to require the county to bear its share of plaintiffs' loss.

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Morrison & Foerster, James P. Bennett, George C. Harris, Andrew D. Muhlbach, John A. Pacheco; Law Offices of Haselton & Haselton, Joseph G. Haselton; Carlson, Calladine & Peterson, Randy W. Gimple; Johnson & James, Omar F. James and Robert K. Johnson for Plaintiffs and Respondents.

Judges: (Opinion by Premo, Acting P. J., with Elia and Wunderlich, JJ., concurring.)

Opinion by: Premo

Opinion

PREMO, Acting P. [*730] J.

[44]** Defendants, County of Santa Cruz, Santa Cruz County Flood Control and Water Conservation District (collectively Santa Cruz), Monterey County Water Resources Agency (MCWRA), and County of Monterey (Monterey), were found liable in tort and inverse condemnation for extensive damage caused when the Pajaro River Levee Project (the Project) failed during a heavy rainstorm in 1995. Defendant State of California (State) was also found liable in tort and inverse condemnation for damage caused when Highway 1 obstructed the path of the floodwater on its way to the sea. For reasons we shall explain, we affirm.

[*731] A. INTRODUCTION

This action commenced with the filing of six different complaints on behalf of approximately 300 plaintiffs. The essence of plaintiffs' claims against Santa Cruz, MCWRA, and Monterey was that their failure to keep the Project channel clear diminished its capacity and ultimately caused a levee to fail during the storm. As against State, plaintiffs alleged that the drainage culverts under Highway 1 were too small to drain the flood and the resultant damming effect caused higher flood levels and destructive ponding of the floodwater.

[*3]** The individual matters were consolidated, and the liability and damages phases were bifurcated for trial. The tort causes **[**45]** of action were tried to a jury. The inverse condemnation claims were simultaneously tried to the court. The jury found all defendants liable for dangerous condition of public property and nuisance. The counties and the water agencies were also found liable for negligence, and, with the exception of Monterey, for violation of mandatory duty. The trial court found all defendants liable on the inverse condemnation claims.

In order to obtain review of the liability issues prior to trial of the damages phase the parties selected Tony's Auto Center as a representative plaintiff and stipulated to damages as to that plaintiff only. Judgment in favor of Tony's Auto Center was filed January 6, 2000. The county and water agency defendants jointly moved for a new trial and that motion was denied. All defendants filed timely

notice of appeal. [1]

[***4] B. FACTS

1. *The Project*

The Pajaro River is formed by the union of several smaller tributaries in the Counties of San Benito and Santa Clara. It flows through Chittenden Pass in the Santa Cruz Mountains and emerges into the Pajaro Valley, eventually emptying into Monterey Bay. The river forms the border between the Counties of Santa Cruz on the north and Monterey on the south. The Pajaro Valley is an historic floodplain. Today, most of the valley is devoted to agriculture. Its two population centers are the City of Watsonville on the Santa Cruz side of the river, and the small town of Pajaro just across the river from Watsonville on the Monterey side.

[*732] The federal Flood Control Act of 1944 (Pub.L. No. 78-534, ch. 665 (Dec. 22, 1944) 58 Stat. 887) authorized the United States Army Corps of Engineers (the Corps) to construct the Project upon receipt of assurances from the responsible local agencies that they would, among other things, operate and maintain the Project as the Corps required. The California Water Resources Act authorized the State's portion of the project and directed the four affected counties (Santa Clara, San Benito, Santa Cruz, and Monterey) to give the required written [***5] assurances. (Stats. 1945, ch. 1514, p. 2827.) Before the counties took any action, the California Legislature created the Monterey County Flood Control and Water Conservation District, and the new district replaced Monterey for purposes of the Water Resources Act. (Stats. 1947, ch. 699, §§ 2, 4, p. 1739.) MCWRA succeeded to the responsibilities of the Monterey County Flood Control and Water Conservation District in 1990. (Stats. 1990, ch. 1159, p. 4831.)

In 1947, the three counties and Monterey County Flood Control and Water Conservation District signed a resolution giving the assurances required by the federal Flood Control Act. Shortly thereafter, Monterey joined the other three counties in executing an indemnity agreement under which each county accepted responsibility for the portion of the Project located within its borders, and guaranteed as to each other the assurances that had been given to the Corps.

2. *Maintenance of the Project*

The Project design consisted primarily of clearing the river channel and constructing earthen levees along both sides of the river, beginning near Murphy's Crossing [**46] east of Watsonville and extending westward to the mouth of the river. The [***6] Corps completed the Project in 1949 and transferred responsibility for its maintenance to the local interests. The Corps provided an "Operation and Maintenance Manual" to guide maintenance efforts. One goal of maintenance was to maintain the Project's capacity. Federal regulations, which were incorporated into the manual, specified that the channel be kept clear of shoals, weeds and wild growth. (See 33 C.F.R. § 208.10(g)(1) (2001).) Vegetation and shoals in the channel decrease its capacity. Therefore, it was important to keep the channel clear in order to maintain the capacity it was intended to have.

The Corps had designed the Project to have a capacity of 19,000 cubic feet per second (c.f.s.). The Corps' 1946 "Definite Project Report" stated that the Project would be built to "contain a two-per-cent-chance flood within a 3-foot freeboard." The "freeboard" to which the report refers is the distance from the top of the levee to the surface of the water at the level the project [*733] is designed to carry. Freeboard is included as a safety feature. It provides additional capacity to take care of unforeseen factors, although it is not intended to contain water for long periods [***7] of time. The Corps' report explained: "The channel capacity will be 19,000 c.f.s. above the mouth of Corralitos Creek [the point at which the Project failed in 1995

[1] Although appeal is taken only from the judgment in favor of the single representative plaintiff, our decision is applicable to the entire action. The following discussion refers to "plaintiffs" as a reflection of that practical reality.

[2]] . . . ."2 The Corps' documents pointed out that by encroaching on the freeboard the Project would hold 23,000 c.f.s. at the pertinent location and still have one foot of freeboard remaining. That means that the Project was designed to contain 19,000 c.f.s. at the point at which the Project ultimately failed, and, if unaccounted factors had not diminished the channel's capacity, there would still be room to safely carry, at least for a short period of time, an additional 4,000 c.f.s.

From 1949 until 1972, the vegetation and sandbars were removed with a tractor and a bulldozer. The effectiveness of these channel clearing efforts was demonstrated by the Project's performance during two storms in the 1950's. In a 1955 storm, the **[***8]** Chittenden [3] gauge reported flows of 24,000 c.f.s. Even with such a high flow there remained over two feet of freeboard near the point where the levee failed in 1995. In 1958 the Project contained flows of 23,500 c.f.s., although with slightly less freeboard remaining.

The continuous mechanized clearing of the channel stopped around 1972. The California Department of Fish and Game (Fish and Game) had demanded a halt to mechanical clearing of the channel in order to protect the riparian habitat. In an apparent attempt to conform to both the demands of Fish and Game and the Corps' Project maintenance **[***9]** requirements, Santa Cruz began using herbicides to kill the vegetation in the channel. Without regular mechanized clearing, however, vegetation and sandbars built up, impeding the flow of winter runoff. As the Project deteriorated, it reverted more and more to riparian habitat, which in turn encouraged the claim of Fish and Game to jurisdiction over the Project. Although Fish and **[**47]** Game had procedures by which the local agencies could appeal the department's decisions, the local agencies never appealed.

In addition to Fish and Game, local environmental interests made thorough maintenance of the channel more challenging by actively supporting efforts to preserve the river's habitat. In 1976, Supervisor Gary Patton wrote **[*734]** to the Legislature on behalf of the Santa Cruz County Board of Supervisors to support Fish and Game policies and to encourage strong legislation to protect river habitat and regulate streambed alteration. In 1977, Santa Cruz adopted an ordinance designed to "preserve, protect and restore riparian corridors." In 1980, the county fish and game commission was given authority to restore fishery habitat in the Pajaro River, and to review public works projects **[***10]** that involved any alteration of the streambed or of streamside vegetation.

As the channel became more clogged, thorough clearing became more expensive. The passage of Proposition 13 in 1978 made funding more of a problem in general so that through the 1980's the Santa Cruz County Department of Public Works did not have funds to remove trees and other vegetation in the channel. MCWRA [4] had no significant funds to participate in channel clearing efforts, and since 1974 had concentrated almost exclusively on levee maintenance. Although Supervisor Marc Del Piero asked his colleagues several times to approve allocations to MCWRA from Monterey's general fund, with one minor exception, he was never successful.

The presence of vegetation and sandbars within the channel proliferated and posed an acknowledged risk of flooding. By 1977 **[***11]** area farmers had become concerned about the lack of mechanized clearing and expressed their concerns to supervisors in both counties. Watsonville officials wrote to the

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[2] Corralitos Creek is also known as Salsipuedes Creek. It joins the Pajaro River just east of the City of Watsonville.

[3] The Chittenden gauge, which is located on the river several miles east of the Project, continuously measures the depth of the water. Hydrologists periodically measure the width and velocity of the stream. By graphing the periodic measurements they can estimate the volume of the discharge at any given depth. The data from the Chittenden gauge is used to estimate the water flow further down the river in the Project channel.

[4] Unless the context requires a distinction, we shall hereafter refer to MCWRA and its predecessor, Monterey County Flood Control and Water Conservation District, simply as MCWRA.

Santa Cruz County Department of Public Works in 1985, 1987 and 1988, asking that something be done. The agencies responsible for Project maintenance were also worried about the condition of the channel. By 1988, Joseph Madruga, chief engineer for MCWRA, had come to the conclusion that vegetation and sandbars in the channel had reduced its capacity by at least 50 percent. John Fantham, director of the Santa Cruz County Department of Public Works, had recognized the risk of flooding as early as 1983. Later, both agencies acknowledged that the 1995 flood was due in substantial part to the failure to clear the channel.

Meanwhile, the Corps had been performing inspections of the Project about twice a year. Although the Corps issued only one notice that the Project was in an unacceptable condition, the majority of the semiannual evaluations expressed concern that dense vegetation in the channel posed a serious constriction on the flow. Many of the Corps' evaluations included notice to both the MCWRA board and the Santa **[***12]** Cruz County Board of **[*735]** Supervisors that lack of maintenance could disqualify the Project for future federal assistance in the event of a flood. The Corps actually did temporarily disqualify the Project for that reason in 1992.

By 1988, the issue had come to the attention of Congressman Leon Panetta. Congressman Panetta convened the Pajaro River Task Force to determine what was to be done about the conflicting concerns of flood control and habitat restoration. The task force was made up of representatives **[**48]** from all the responsible and affected agencies, Fish and Game, and the Corps. Supervisor Del Piero and Mr. Madruga represented the Monterey interests. Mr. Fantham and Supervisor Robley Levy represented Santa Cruz. After over two years of work, the task force produced the "Pajaro River Corridor Management Plan," which called for the hand clearing of vegetation. Both Mr. Fantham and Mr. Madruga felt that the plan was inadequate, and would do no more than maintain the status quo. Mr. Madruga voiced his objection at the task force meeting and in a letter to Mr. Fantham in which he advocated a program of thinning and removal of selected vegetation using heavy equipment. **[***13]** According to Mr. Madruga, this was the "only method that can accomplish the flood protection necessary to protect the citizens of the Pajaro Valley at a reasonable cost and in a reasonable time frame." Notwithstanding these reservations, the task force unanimously approved the plan in October 1991, although there is no evidence it was ever formally adopted by the agencies charged with implementing it.

Finally, beginning in the early 1990's, the agencies on both sides of the river began more aggressive efforts to clear the channel. In 1991, at the urging of Supervisor Del Piero, MCWRA applied for a permit to use a backhoe and bulldozer to clear the channel. Fish and Game issued the permit, but limited its permission to hand clearing and then later halted the work. In 1993, at the invitation of area farmers, then Director of Fish and Game, Boyd Gibbons toured the Project. Gibbons was sufficiently concerned with the condition of the channel that he instructed his staff to work with the counties to get the necessary work done as soon as possible. Thereafter, Santa Cruz obtained permits to do some mechanized clearing of the channel. However, the work that was done was not enough to entirely **[***14]** clear the vegetation and sediment that had been allowed to collect over the preceding 20 years.

3. *Highway 1*

Highway 1 runs north to south and crosses the Pajaro River at the lower end of the Pajaro Valley, west of Watsonville. State began planning the construction of the subject portion of the highway in the 1950's. At the time, **[*736]** Highway 1 ran through Watsonville. The new section was to bypass the city. The bypass required the construction of a new bridge over the river and an earthen embankment elevating the highway at the south end of the bridge. Trafton Road today runs under Highway 1 on the southern side of the river.

Before State built the bypass, water passed through this area along a path in the vicinity of Trafton Road. The planned embankment would obstruct the existing drainage in that area. To compensate, State needed to design a drainage system for the embankment.

Investigation, design and construction of the embankment continued through the late 1960's. State's design criteria required that drainage through embankments be able to discharge a 100-year flood without causing water to back up over adjacent private property. State's engineers explained that this **[***15]** criterion did not require the drainage system in this case to accommodate flows escaping from the Project channel. According to State, the drainage needed only to pass rainwater runoff from a 700-acre area immediately adjacent to the highway. Using those guidelines, State engineers approved plans for two 48-inch culverts that could accommodate 98 c.f.s. The design documents showed that this design actually anticipated that "[s]hallow flooding on peak flow **[**49]** can be expected for some distance outside the [right of way]."

4. *The Flood*

The Project protected the valley for over 45 years until the storm of March 1995. On the night of March 10-11, 1995, the river overtopped the levee on the Monterey side, upriver from its junction with Corralitos (Salsipuedes) Creek. The resultant rush of water over the levee eroded the back side of the levee and it gave way, inundating the surrounding valley.

The vegetation and sediment that had been allowed to accumulate in the channel caused the river flow to be higher than it would have been had it been properly cleared. On the night of the storm, the maximum flow at the Chittenden gauge was estimated to have been 21,300 c.f.s. Plaintiffs' **[***16]** expert, Dr. Robert Curry, testified that in his opinion the 21,300 c.f.s. overestimated the flow because it did not take into account a number of factors taking place within the channel or downriver from the gauge. According to Dr. Curry, these factors served to reduce the actual flow at the break site to 16,000 to 18,500 c.f.s., most likely around 17,500 c.f.s.

When the levee failed, the floodwaters ran onto the historically flooded valley floor until they reached the Highway 1 embankment. The Highway 1 culverts were quickly overwhelmed, so that the water backed up on the east **[*737]** side of the highway, flooding more acreage than it otherwise would have flooded, and standing in many places for an extended period of time. The standing water exacerbated the flood damage because it caused the deposition of vast amounts of destructive sediment, all of which had to be removed when the floodwaters finally receded.

C. DISCUSSION

1. *Summary of Issues and Scope of Review*

The two counties and their related water agencies contend: (1) the trial court did not make the determination of unreasonableness that is necessary to support inverse condemnation liability, (2) inverse condemnation **[***17]** liability may not be based on shoddy maintenance of a public improvement, (3) the trial court used an erroneous definition of the Project's "design capacity," (4) there was insufficient evidence to support a finding that the Project did not perform within its capacity, and (5) the trial court erred in adopting the plaintiffs' proposed statement of decision.

MCWRA separately contends that the trial court erred in failing to apportion among the defendants the damages of the single plaintiff, Tony's Auto Center. Since MCWRA stipulated to the judgment in the form it was entered, MCWRA is estopped to complain of error, if any there was. (*Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 420 [185 Cal. Rptr. 654, 650 P.2d 1171].)

State contends: (1) the trial court applied an improper standard of unreasonableness in ruling on the inverse condemnation claim, (2) State could not

be liable in tort because it had no duty to protect plaintiffs from failure of the Project, (3) State is immune from tort liability under Government Code section 830.6 (design immunity), and (4) the breach of the levee was a superseding cause.

Monterey argues separately that it is not liable because it did not have any responsibility for the Project.

CA(1)[↑] **(1)** Except where noted, defendants' arguments relate to facts that are materially undisputed. We therefore apply our independent review. (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799, [35 Cal. Rptr. 2d 418, 883 P.2d 960].)

2. *Inverse Condemnation--Legal Background*

CA(2)[↑] **(2)** **HN1**[↑] "Private property may be taken or damaged **[***18]** for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, hereafter article I, section 19.) **HN2**[↑] When a **[**50]** public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated "inverse condemnation." (*Breidert v. Southern Pac. Co.* (1964) 61 Cal. 2d 659, 663, fn. 1, [39 Cal. Rptr. 903, 394 P.2d 719].)

[*738] Early inverse condemnation cases presumed that article I, section 19 (then § 14) merely provided an exception to the general rule of governmental immunity and that a public entity could only be liable in inverse condemnation if a private party could be held liable for the same injury. (*Archer v. City of Los Angeles* (1941) 19 Cal. 2d 19, 24, [119 P.2d 1] (*Archer*).) *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250, [42 Cal. Rptr. 89, 398 P.2d 129] (*Albers*) explained that the constitutional provision actually provided a broader basis for governmental liability. *Albers* confirmed that the **[***19]** fundamental policy basis for the constitutional requirement of just compensation is a consideration of " 'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' " (*Id.* at p. 262.) According to *Albers*, "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under [article I, section 19] of our Constitution whether foreseeable or not." (*Id.* at pp. 263-264.) The only limits to the claim were that (1) the injuries must be physical injuries of real property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned. (*Holtz v. Superior Court* (1970) 3 Cal. 3d 296, 304, [90 Cal. Rptr. 345, 475 P.2d 441] (*Holtz*).)

CA(3)[↑] **(3)** Although *Albers* had held that the inverse condemnation plaintiff was entitled to compensation without regard to fault, *Albers* left open two exceptions to that rule--the *Gray* exception, which is not pertinent here, and the *Archer* exception. (*Albers, supra*, 62 Cal. 2d at p. 263, **[***20]** and see *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 163 P. 1024; *Archer, supra*, 19 Cal. 2d at p. 24.) In brief, the so-called *Archer* exception involved the circumstances, peculiar to water law, in which a landowner had a right to inflict damage upon the property of others for the purpose of protecting his or her own property. Such circumstances included the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). Under private water law analysis, these rules immunized the landowner from liability for resulting damage to downstream property. (See *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal. 3d 550, 563-564, [253 Cal. Rptr. 693, 764 P.2d 1070] (*Belair*); *Archer, supra*, 19 Cal. 2d at pp. 24-26; *Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327, 350, [27 Cal. Rptr. 2d 613, 867 P.2d 724] (*Locklin*).) Presumably, under the *Archer* exception, a public entity would be completely immune from liability if the entity's conduct were of the type that would have been immune under these water law principles.

Like this [***21] case, *Belair* involved flood damage that occurred after a levee failed. *Belair* modified *Albers* and adopted a rule of reasonableness to be [*739] applied in the context of flood control litigation. *Belair* determined that application of the *Albers* rule of strict liability would discourage needed flood control projects by making the entity the insurer of the property the project was designed to protect. (*Belair, supra,* 47 Cal. 3d at p. 565 [**51] .) On the other hand, to apply the *Archer* exception would unfairly burden the private landowner by requiring the landowner to bear a disproportionate share of the damage caused by failure of the public project. To balance these conflicting concerns *Belair* held: HN3[↑] "[W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the projects purpose is to contain the 'common enemy' of floodwaters." (*Ibid.*) Under *Belair*, the public entity is not immune from suit, but neither [***22] is it strictly liable.

Belair left open the question of how to determine reasonableness in the inverse condemnation context. That question was answered in *Locklin*. The *Locklin* plaintiffs had alleged that increased runoff from creek side public works caused erosion damage to their property downstream. *Locklin* held that HN4[↑] the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) was a conditional privilege, subject to the *Belair* rule of reasonableness. CA(4)[↑] (4) *Locklin* explained that to determine reasonableness in such a case, the trial court must consider what are now commonly referred to as the "*Locklin* factors." THEY ARE: "(1) [t]he overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at [***23] large over other beneficiaries of the project or is peculiar only to the plaintiff." (*Locklin, supra,* 7 Cal. 4th at pp. 368-369.)

Thus, in matters involving flood control projects, or in circumstances such as those before the court in *Locklin*, the public entity will be liable in inverse condemnation if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage. In those circumstances, unreasonableness is determined by balancing the factors set forth in *Locklin*.

[*740] 3. *Counties' Issues* [5]

a. *The Trial Court Properly Balanced the "Locklin Factors."*

CA(5)[↑] (5) Counties contend [***24] that the trial court did not analyze the reasonableness of their actions according to the requirements of *Locklin*. The plaintiffs' proposed statement of decision referred specifically to the six *Locklin* factors and the trial court's consideration of each of them. The trial court acknowledged that the balancing analysis in the proposed statement of decision was correct, but felt that the discussion was not necessary for a statement of decision and had it stricken. The trial court instead stated, "The Court has balanced the public need for flood control against the gravity of the harm caused by the unnecessary damage to the plaintiffs' property, and finds that the County defendants acted unreasonably. *See* [**52] *Belair,* 47 Cal.3d at

[5] In this section we address the issues raised in briefs filed by Santa Cruz and MCWRA. Monterey joins the arguments raised in both briefs. To simplify our discussion, we shall refer in this section to both counties and their related water agencies as "Counties."

[pp.] 566-67, [253 Cal. Rptr. 693, 764 P.2d 1070]."

Counties brought the absence of the *Locklin* factors to the trial court's attention in connection with the hearing on the motion for new trial. Plaintiffs, therefore, moved to amend the statement of decision to include the previously stricken analysis. In response, the court ruled, "In fact, I did make those findings. And the reason for deleting them from the proposed statement was a disposition for brevity. I think they were there. **[***25]** I did consider them. I will grant the motion to insert them back into the statement of decision of the court for clarity." As permitted by Code of Civil Procedure section 662, [6] the trial court amended the statement of decision to include the *Locklin* analysis. We reproduce that portion in the margin. [7]

[*26]** Counties now argue that the trial court came to a final decision without the necessary balancing and then merely plugged the hole by inserting the **[*741]** previously stricken language into the statement of decision. We will not second-guess the trial court's subjective reasoning. The trial court specifically stated that it had considered the factors and made the findings. The statement of decision that is before us includes the appropriate analysis and we have no reason to reject it.

Counties also contend that the reasonableness calculus must be made as of the time the public entity is making the decision to approve the project, and that the trial court incorrectly focused on conduct that took place after adoption of the federal maintenance regulations. This contention **[**53]** confuses the purpose of the balancing analysis. The balancing analysis required by *Locklin* applies to the public entities' action that results in the injury. In *Belair*, *supra*, 47 Cal. 3d 550, it was the design of the levee system that resulted in the injury so that the reasonableness of the design would have been the proper consideration. Here, the trial court applied the analysis to the Counties' long-standing policy of allowing the Project **[***27]** channel to deteriorate. (See fn. 7, *ante*.) As we explain in more detail in the following section, it was that long-standing policy that caused the damage. We find that the trial court appropriately assessed the reasonableness of that policy according to the factors set forth in *Locklin, supra*, 7 Cal. 4th at page 369. (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal. 4th 432, 454, [63 Cal. Rptr. 2d 89, 935 P.2d 796] (*Bunch II*).)

b. *Inadequate Project Maintenance Supports Inverse Condemnation Liability.*

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[6] Code of Civil Procedure section 662 reads in pertinent part: HN5[↑] "In ruling on [a new trial] motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues . . . ."

[7] "The court considered each of the following factors in making its determination that the Counties acted unreasonably when the public benefit is balanced against the private damage: (i) The overall public purpose being served by the improvement project; (ii) the degree to which the plaintiffs' loss is offset by reciprocal benefits; (iii) the availability to the public entities of feasible alternatives with lower risks; (iv) the severity of the plaintiffs' damage in relation to risk-bearing capabilities; (v) the extent to which damage of the kind the plaintiffs sustained is generally considered as a normal risk of land ownership; and (vi) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiffs. The Court finds that the efforts of the Counties to prevent foreseeable damage to plaintiffs were not reasonable in light of the potential for damage posed by the Counties' conduct, the cost to the Counties of reasonable measures to avoid such damage, and the availability of and the cost to the plaintiffs of means of protecting their property from damage. [P] The Court's determination is supported by the following: First, the 'purpose' of the improvement project involved--a flood control project--militates strongly in favor of liability in light of the enormous 'damage potential of a defective flood control project.' Second, the longstanding negligent operation of a flood control project, such as is documented here, serves no legitimate purpose, nor does it promote any 'reciprocal benefit' which offsets or justifies the damage that was caused by the failure of the Project. Third, 'feasible alternatives' which would have prevented the March 1995 floods were available to the defendants--i.e., continuous maintenance of the Project, including the type of maintenance that was in fact performed through the early 1970's. Fourth, the damage inflicted upon the populace of the Pajaro Valley as a result of the March 1995 flood was in fact 'enormous.' Finally, these damages were not a 'normal risk' of land ownership or of the sort that any of the intended 'beneficiaries' of the Project should be expected to bear. On the contrary, the flood of March 1995 would not have occurred had the Counties maintained the Project in the manner required by law."

CA(6a)[↑] **(6a)** Counties next contend that the trial court incorrectly based liability upon a finding of negligence, which is not the type of government action to which inverse condemnation applies. Counties also contend that the Corps' prescribed maintenance was the only "plan" of maintenance Counties ever adopted and that there is insufficient evidence to support a contrary finding. We find no merit in either contention.

[*742] CA(7)[↑] **(7)** HN6[↑] To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of article I, section 19. "Public use" is the threshold requirement. (Cal. Const., art. I, § 19.) "The destruction or damaging **[***28]** of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." (*House v. L. A. County Flood Control Dist.* (1944) 25 Cal. 2d 384, 396, [153 P.2d 950] (conc. opn. of Traynor, J.).) A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. (*Bauer v. County of Ventura* (1955) 45 Cal. 2d 276, 284-285, [289 P.2d 1] (*Bauer*).)

The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement. HN7[↑] "The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged." (*Yee v. City of Sausalito* (1983) 141 Cal. App. 3d 917, 920, [190 Cal. Rptr. 595], disapproved on other grounds in *Bunch II, supra*, 15 Cal. 4th **[***29]** at pp. 447-451.) That is why simple negligence cannot support the constitutional claim. For example, in *Hayashi v. Alameda County Flood Control* (1959) 167 Cal. App. 2d 584, [334 P.2d 1048] the appellate court held that the plaintiffs had not stated a cause of action for inverse condemnation because, although the defendant's failure to repair a levee within 10 to 21 days was negligence, it was not "a deliberate plan with regard to the construction of public works." (*Id.* at pp. 590-592.) That is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed. (See Van Alstyne, **[**54]** *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 489-490 (Van Alstyne).)

The leading case on the issue is *Bauer*. In *Bauer*, a drainage ditch ran along the downhill border of the plaintiffs' property. As originally constructed, any overflow **[***30]** from the ditch would have run downhill and away from the plaintiffs' property. As time went on, the downhill side of the ditch was built up higher and higher with dirt and debris so that when the ditch later overflowed, it flooded the plaintiffs' land. The county argued that the change in the ditch was a result of its maintenance and negligent maintenance was not the "public use" to which inverse condemnation liability **[*743]** would attach. The Supreme Court disagreed, explaining: "The rather obscure line between the concepts of 'construction' and 'maintenance' is disclosed by any attempt to define them in mutually exclusive terms and to characterize the raising of a bank of an existing ditch as one or the other. If the 'maintenance' consists of an alteration of the ditch by raising one of the banks, then in a material sense 'maintenance' becomes a species of 'construction.' Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule . . . . The defendants' argument that damage from maintenance is beyond the purview of [article I,] section [19] invites an artificial distinction which would turn simply upon the passage of time **[***31]** between the original construction and

the subsequent alteration and must therefore be rejected." (*Bauer, supra*, 45 Cal. 2d at p. 285.)

CA(6b)[↑] **(6b)** Other cases have also found that **HN8**[↑] inadequate maintenance can support liability in inverse condemnation. Two such cases involved damage to property caused by broken water pipes that the public entities had failed to properly maintain. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal. App. 3d 683, 696-698, [194 Cal. Rptr. 582] (*McMahan's*), disapproved on other grounds, *Bunch II, supra*, 15 Cal. 4th at pp. 447-451; *Pacific Bell v. City of San Diego* (2000) 81 Cal. App. 4th 596, [96 Cal. Rptr. 2d 897] (*Pacific Bell*).) In both *McMahan's* and *Pacific Bell* the defendants argued that the city's negligent maintenance of its water system was not the type of deliberate government action that could support liability in inverse condemnation. (*McMahan's, supra*, 146 Cal. App. 3d at p. 693; *Pacific Bell, supra*, 81 Cal. App. 4th at p. 607.) In neither case had the city affirmatively passed a resolution or otherwise enacted a plan that was facially inadequate. But in both cases the city knew that **[***32]** the maintenance program being applied to its water system was inadequate and did not take action to remedy the inadequacy. In *Pacific Bell*, the city repeatedly denied requests for water rate increases to fund repair and replacement of the water system. (*Pacific Bell, supra*, 81 Cal. App. 4th at p. 607.) In *McMahan's*, the city did not accelerate its program of water main replacement in spite of a water rate study showing that such a program was necessary to prevent a continued deterioration of the system. (*McMahan's, supra*, 146 Cal. App. 3d at p. 695.)

The *Pacific Bell* court found that the deliberateness required for inverse condemnation liability was satisfied by a finding that the public improvement, as designed, constructed and maintained, presented an inherent risk of danger to private property and the inherent risk materialized and caused damage. (*Pacific Bell, supra*, 81 Cal. App. 4th at p. 607; and see *House v. L.A. County Flood Control Dist., supra*, 25 Cal. 2d at p. 396.) The **[**55]** court pointed out that the damage to private property that resulted from such an inherent **[*744]** risk was a direct cost of the public improvement. In **[***33]** *Pacific Bell*, the city could have incurred the cost in advance by monitoring and replacing the system before a failure caused damage. When it chose not to do so, article I, section 19 required that the cost be absorbed by the taxpayers as a whole, and not by the individual landowner. (*Pacific Bell, supra*, 81 Cal. App. 4th at pp. 607-608, citing *Holtz, supra*, 3 Cal. 3d at pp. 310-311.)

The *McMahan's* court used the same rationale to reject the defendant's contention that its conduct could only be characterized as negligence. Relying on *Bauer, supra*, 45 Cal. 2d 276, *McMahan's* determined that "whether the City's program of water main installation and replacement is characterized as 'construction' or 'maintenance,' the fact remains that it was inadequate and contributed to the break due to corrosion of the [broken] main. The City's knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers, supra*, 62 Cal. 2d 250." (*McMahan's, supra*, 146 Cal. App. 3d at p. 696.)

We conclude that **HN9**[↑] in order to prove the type of governmental conduct that will support liability **[***34]** in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action--or inaction--in the face of that known risk.

i. *The Trial Court Found That Counties Adopted an Unreasonable Plan.*

During trial, neither side raised the issue of deliberate action. The heart of plaintiffs' case was that Counties had failed to maintain the project as required by the Corps, allowing silt and vegetation to build up and diminish the capacity of the Project. Counties defended by attempting to show, among other things, that their conduct was reasonable in light of regulatory and fiscal restrictions. The trial court's statement of decision referred to the litany

of maintenance deficiencies and concluded, "[T]he evidence is persuasive that the County defendants did not act reasonably with regard to their maintenance obligation. Moreover the trial record refuted the Counties' arguments that they acted reasonably in light of regulatory impediments and funding limitations. The Counties' maintenance duties required that certain necessary steps be taken to effectively keep the channel clear. If those 'necessary steps' **[***35]** required greater efforts in the face of funding and regulatory obstructions, then a reasonable course of conduct required a more aggressive approach to overcoming these claimed impediments."

About three months after the statement of decision was filed, the Third District Court of Appeal filed **[*745]** Paterno v. State of California (1999) 74 Cal. App. 4th 68, [87 Cal. Rptr. 2d 754] (*Paterno*). *Paterno*, like this case, was an appeal from a judgment for the plaintiff on an inverse condemnation claim arising from a broken levee. The *Paterno* court held that the trial court's statement of decision was deficient because it based liability "almost entirely on the violation of standards for levee maintenance, in other words, *departures from the lawful plan*, rather than on an unreasonable plan." (*Id.* at p. 90.) The appellate court reversed and remanded the case for retrial, noting that Paterno would have to identify upon what plans he relied and then prove **[**56]** that the plan caused his injury. (*Id.* at p. 91, [87 Cal. Rptr. 2d 754].)

After judgment was entered in favor of the test plaintiff in this case, Counties filed a new trial motion. (Code Civ. Proc., § 657 **[***36]** .) Relying upon *Paterno*, they argued that the trial court's decision was against law because the court had based liability on negligent maintenance, not on adoption of an unreasonable plan of maintenance. The trial court denied the new trial motion, but amended the statement of decision to include the finding: "[T]he maintenance deficiencies which the Court's Statement of Decision summarized all resulted from plans or policies which defendants adopted and implemented over a twenty-year period." Thus, the trial court's statement of decision, as amended, found that Counties had adopted and implemented unreasonable plans or policies by failing, over a 20-year period, to take a more aggressive approach to maintenance of the Project.

Paterno does not affect our conclusion. In *Paterno*, the appellate court determined that the trial court had adopted the view that unreasonable conduct, as required by *Belair*, meant ordinary negligence, and therefore, that the trial court had not made the necessary finding. (*Paterno, supra*, 74 Cal. App. 4th at pp. 86, 88.) Unlike the trial court in *Paterno,* the trial court in this case expressly found that the manner **[***37]** in which the channel was maintained for over 20 years was a deliberate policy of the local public agencies responsible for the Project. Such a determination is a finding of the deliberate government action necessary for inverse condemnation liability.

ii. *There Is Substantial Evidence of an Unreasonable Plan of Maintenance.*

Counties insist that the only evidence of a "plan" of maintenance was the Corps' maintenance requirements. **CA(8)[↑] (8) HN10[↑]** In reviewing the sufficiency of the evidence to support the findings of the trial court, we apply the basic principle of appellate practice and consider the evidence in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal. 3d 1130, 1133, [275 Cal. Rptr. 797, 800 P.2d 1227].)

[*746] **CA(6c)[↑] (6c)** The record is replete with evidence to support the finding that Counties' maintenance of the Project was conducted pursuant to Counties' deliberate policies. Counties were aware of the maintenance program being applied to the Project and knew that the buildup of vegetation and sand bars diminished the protection the Project **[***38]** was intended to provide. Area

farmers, Watsonville officials, and the highest ranking people in both Counties' water agencies alerted county officials to the risk of flooding and to that which needed to be done to remedy the problem. In spite of that knowledge, Counties did not take any action to correct the situation until 1991 or later. Instead, Counties allowed Fish and Game regulations and perceived funding limitations to drive the actual program of maintenance. Thus, Counties' knowing failure to clear the Project channel, in the face of repeated warnings and complaints was not mere negligent execution of the Corps' reasonable plan of maintenance. The "plan" was the long-term failure to mitigate a known danger. That failure persisted for 20 years.

MCWRA argues that it was only Santa Cruz that affirmatively supported the Fish and Game policies of habitat restoration and, therefore, any unreasonable plan or policy of maintenance should be attributable to Santa Cruz, alone. We disagree. It is not necessary to find that **[**57]** Counties expressly endorsed or enacted a contrary policy in order to find that the actual maintenance of the Project was conducted pursuant to deliberate governmental **[***39]** action. It is sufficient that Counties were aware of the risk of failing to adequately clear the channel and chose to tolerate that risk. The reason for the choice is irrelevant to the determination that the action was deliberate. MCWRA indisputably had the obligation, knew the risk, and did not act. Moreover, MCWRA made other, deliberate policy decisions relating to Project maintenance. Among other things, MCWRA's Assistant General Manager and Chief Engineer testified that he had regularly been successful in preventing Fish and Game from interfering with his use of mechanized equipment to maintain other flood control projects in his jurisdiction, and that he chose not to challenge Fish and Game decisions in connection with the Project because he feared jeopardizing the department's cooperation with future permit applications.

Counties also argue that the Corps' semiannual evaluations, which, with one exception, never found Project maintenance to be categorically unacceptable, show that Counties' actual maintenance program was reasonable. The Corps' evaluations are not dispositive. Since the Corps' declaration of unacceptability would have cut off Corps assistance in the event of an emergency, we may **[***40]** infer that such declarations were made only sparingly. Moreover, it is undisputed that the Corps regularly pointed out the problem of vegetation growing in the channel, and that the water agency personnel believed that the maintenance program did not conform to Corps requirements and that it compromised the Project's capacity.

[*747] In sum, the record demonstrates that Counties' policy makers made explicit and deliberate decisions with unfortunate but inevitable results. Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance.

c. *The Trial Court Did Not Err in Defining "Design Capacity."*

CA(9a)[↑] (9a) Counties argued at trial that they could not be liable if the storm had generated more water than the Project had been designed to handle. Counties' evidence was that the peak flow during the storm was 21,300 c. **[***41]** f.s. and the Project's capacity was only 19,000 c.f.s. Plaintiffs' evidence was that the peak flow was somewhere between 16,000 c.f.s. and 18,500 c.f.s., but in any event, less than 19,000 c.f.s. Plaintiffs also argued that by considering the freeboard built into the Project's design, the Project's functional capacity was something more than 19,000 c.f.s. At the close of trial, the court defined the Project's capacity as "19,000 c.f.s. with 3 feet of freeboard." Counties

now argue that this definition was erroneous and affects both the inverse condemnation and tort results.

Counties insist that design capacity is a question of law to be determined from the design documents, and that the trial court was obligated to define capacity as 19,000 c.f.s. *within*, not *with*, three feet of freeboard. As we understand the argument, the Corps' Definite Project Report uses "within" and that means that the capacity was 19,000 c.f.s. and no more. By changing "within" to "with," the finder of fact was incorrectly allowed to add the freeboard to the design capacity, which in this **[**58]** case would increase the total capacity to 23,000 c.f.s. [8] The definition was appropriate if it was correct in law **[***42]** and supported by the evidence. (Code Civ. Proc., §§ 607a, 609; and see *LeMons v. Regents of University of California* (1978) 21 Cal. 3d 869, 875, [148 Cal. Rptr. 355, 582 P.2d 946], and *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 335, [145 Cal. Rptr. 47].) We find that it was.

The concept of "design capacity" comes from the *Belair* case. The appellate court in *Belair* had decided that because the plaintiffs' land had been historically subject to flooding, the levee failure **[***43]** could not be the proximate **[*748]** cause of the damage because it had not increased that historical risk. (*Belair, supra*, 47 Cal. 3d at p. 558.) The Supreme Court disagreed. *Belair* determined that a flood control project serves the public good by preventing damage that would otherwise be expected to occur in the normal course of events. The flood control project could be a concurring cause of flood damage because adjoining landowners rely on the protection it was built to provide. However, as *Belair* acknowledged, the flood control project could only be a concurring cause if the flood was one the Project was designed to accommodate.

Specifically, *Belair* held: "Thus, **HN11**[↑] in order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of ' "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury." [Citations.]' (*Souza v. Silver Development Co.* [(1985)] 164 Cal. App. 3d [165] at p. 171, fn. omitted.) Where independently generated forces not induced by the public flood control improvement--such as a rainstorm--contribute **[***44]** to the injury, proximate cause is established where the public improvement constitutes a *substantial concurring cause of the injury*, i.e., where the injury occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity." (*Belair, supra*, 47 Cal. 3d at pp. 559-560.)

A project's capacity, therefore, bears upon the element of causation. This is true whether we are considering the inverse condemnation claims or the tort causes of action. Counties understandably focus on the dictum in the latter half of *Belair*'s discussion quoted above, in which the court posits, by way of example, that if a storm exceeded the project's "design capacity" the project would no longer be a substantial factor in causing the damage. By narrowing the focus to the phrase "design capacity," Counties have constructed the argument that the relevant level of protection the Project was designed to provide is the single number **[***45]** linked to the term "design capacity" in the Corps' Definite Project Report. According to Counties, freeboard does not count.

In our view, *Belair* did not intend the bright-line

[8] Plaintiffs argue that Counties have waived objection to the court's use of the word "with" by affirmatively acquiescing to its use below. Although we agree that Counties did not object below to the use of the word "with" versus "within," the record as a whole makes it quite clear that Counties consistently urged a definition of design capacity that would exclude consideration of freeboard. We will, therefore, treat the merits of the issue.

rule Counties seek to apply. Such a rule is inconsistent with traditional **[**59]** concepts of causation, and would not advance the just compensation requirement of the Constitution. That is especially true on the facts of this case. As the *Belair* court stated, the issue is whether there is a " ' "substantial" cause-and-effect relationship **[*749]** [between the public project and the injury] which excludes the probability that other forces *alone* produced the injury.' (Van Alstyne, *supra*, 20 Hastings L.J. at p. 436, italics added.)" (*Belair*, *supra*, 47 Cal. 3d at p. 559.) **HN12**[↑] To the extent that the public project contributes to the injury, then it remains a concurring cause. Like any other determination of causation, it must be made on the facts of each case. (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 572, fn. 6, [224 Cal. Rptr. 664, 715 P.2d 624].)

Keeping in mind that the issue is one of causation, we find that it would have been improper to cut off Counties' liability, **[***46]** as a matter of law, at the Project's design capacity of 19,000 c.f.s. because there was evidence to show that the Project was able to hold more than that. The Corps' documents specified that the freeboard could be encroached to allow the Project to carry 23,000 c.f.s. at the point in the channel where the breach ultimately occurred. That means that, with 19,000 c.f.s. in the channel, unless something had occurred to diminish capacity, there would still be room for an additional 4,000 c.f.s. Of significance in this case is the evidence that the extra room the freeboard was intended to provide was eliminated by Counties' ineffective maintenance. For these reasons, it was appropriate to permit the finder of fact to decide if the flood exceeded the protection the Project was intended to provide by permitting a finding that the freeboard was part of that protection. This is the definition the trial court gave. Accordingly, there was no error.

d. *There Was Substantial Evidence to Support the Findings of Liability.*

Counties next argue that there was insufficient evidence to support a finding that flows exceeded Project capacity. Applying the deferential standard of substantial evidence **[***47]** review, we find no merit to the argument. (*In re Marriage of Arceneaux, supra*, 51 Cal. 3d at p. 1133.)

The trial court found that if properly maintained the Project would have "safely conveyed well over 21,000 c.f.s. without overtopping." The jury was not asked to make a finding of capacity. The jury found only that peak flows did not exceed the design capacity of the Project. Even if we assume the jury chose 19,000 c.f.s. as the relevant capacity, there was sufficient evidence to support a finding that the flood did not exceed that. Plaintiffs' expert, Dr. Robert Curry, is a geologist with a specialty in geomorphology. He estimated that the range of likely flows at the site of the Project failure was 16,000 c.f.s. to 18,500 c.f.s., most likely around 17,500 c.f.s. Counties argue that Dr. Curry's scientific techniques were not proven reliable or generally accepted by others in his field, and his opinions should not have been **[*750]** admitted. **CA(10)**[↑] **(10)** Counties did not make a record of their objection below and, therefore, have not preserved the issue for appeal. **CA(11)**[↑] **(11)** (See fn. 9.) (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal. 3d 180, 184, fn. 1, [151 Cal. Rptr. 837, 588 P.2d 1261]; and **[***48]** see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.) [9] **CA(9b)**[↑] **(9b)** Dr. **[**60]** Curry's testimony provides substantial evidence to support a finding that the peak flows did not exceed

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[9] Having reviewed the evidence in detail, we find that the objection, had it been recorded, would have properly been overruled. **HN13**[↑] Evidence of scientific techniques that have not proven reliable and generally accepted by others in the field is not admissible as evidence. (*People v. Kelly* (1976) 17 Cal. 3d 24, [130 Cal. Rptr. 144, 549 P.2d 1240].) The *Kelly* rule does not apply to the personal opinions of an expert. (*People v. McDonald* (1984) 37 Cal. 3d 351, 372-373, [208 Cal. Rptr. 236, 690 P.2d 709]; *Wilson v. Phillips* (1999) 73 Cal. App. 4th 250, 254-256, [86 Cal. Rptr. 2d 204].) Counties' challenge to Dr. Curry's testimony is that he "theorized" and "hypothesized" about the factors that he believed affected the level of the flood. Counties' objection relates only to the credibility of his opinion, and thus was not subject to exclusion under the *Kelly* rule.

19,000 c.f.s.

[*49]** e. *The Parties Are Expected to Draft the Statement of Decision.*

Counties finally challenge the trial court's statement of decision on the ground it reflects plaintiffs' reasoning, analysis and decision and not that of the trial court. Counties acknowledge there is no authority for their challenge, but argue that in this case the statement of decision was so plainly a rehashing of plaintiffs' closing argument that it simply cannot reflect the trial court's decision. According to Counties, it is hard to believe that the trial judge agreed so wholeheartedly with the other side.

The California Rules of Court provide that **HN14**[↑] the tentative decision is not binding on the court and that the court may instruct a party to prepare a proposed statement of decision. (Cal. Rules of Court, rule 232(a) & (c).) The rules provide ample opportunity for all parties to make proposals as to the content of the statement of decision or to raise objections to a proposed statement. (Cal. Rules of Court, rule 232(b) & (d).) Those procedures were followed here, and we can find no basis in the record or in law to warrant further comment on the issue.

4. *State's Issues*

a. *State's Liability [***50] for Inverse Condemnation Does Not Require a Showing of Unreasonableness.*

CA(12a)[↑] **(12a)** The trial court's statement of decision refers to State's liability in a single paragraph: "The State of California, Department of Transportation, acted unreasonably in its design and construction of Highway 1 where it **[*751]** crosses the Pajaro River flood plain. [State] failed to follow its own manual's design criteria for that section of highway. This failure resulted in a dangerous condition of public property. The raised highway embankment functioned as a dam that caused some properties to suffer flood damage and others to be damaged more severely than they would have if the highway design had allowed proper drainage." State contends that the trial court did not use the proper measure of reasonableness in finding State liable, and that State's actions were reasonable in any event. Plaintiffs argue, among other things, that the rule of reasonableness does not apply to State. According to plaintiffs, State is strictly liable and the trial court's application of a reasonableness analysis was unnecessary. We agree with plaintiffs.

The rule of reasonableness was developed in a series of cases beginning with *Belair* **[***51]** . The general rule is that **HN15**[↑] a public entity is liable for inverse condemnation regardless of the reasonableness of its conduct. (*Albers, supra,* 62 Cal. 2d at pp. 263-264.) *Belair* modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects. (*Belair, supra,* 47 Cal. 3d at p. 565.) *Locklin* applied *Belair*'s rule of reasonableness where the defendants were alleged to have drained surface water into a natural watercourse, increasing the volume and velocity of the **[**61]** watercourse, and causing erosion of plaintiffs' downstream property. (*Locklin, supra,* 7 Cal. 4th at p. 337.) **HN16**[↑] Under the "natural watercourse" rule, a riparian landowner had a privilege to drain surface water into a natural watercourse, regardless of the effect of that drainage on downstream landowners. (*Id.* at pp. 346-347.) Like *Belair*, *Locklin* declined to impose strict liability, and held: "Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, **[***52]** article I, section 19 of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners." (*Id.* at p. 367.)

Both *Belair* and *Locklin* applied the reasonableness rule to conduct that was at one time privileged

under traditional water law principles. Predictably, the plaintiffs in the next case argued that conduct that had not been so privileged was subject to the general rule of strict liability. (*Bunch II, supra*, 15 Cal. 4th 432.) *Bunch II*, like *Belair*, involved the failure of a flood control project. However, in *Bunch II* the injury was caused by the defendants' having diverted and rechanneled a natural watercourse. **HN17**[↑] Diversion of a watercourse was not subject to a common law privilege like the common enemy doctrine or the natural watercourse rule. *Bunch II* confirmed that resolution of flood control cases involved a balancing of the public interest in encouraging flood control projects with the potential private harm they **[*752]** could cause. *Bunch II* held that the public agency would not be strictly liable for damage resulting from a failed **[***53]** flood control project, whether or not the offending conduct would have been privileged under traditional water law doctrine. Instead, a rule of reasonableness was to apply. (*Id.* at p. 451)

Although these three cases suggest a trend toward incorporating reasonableness into the inverse condemnation analysis, that trend does not extend to State's conduct in this case because of the public policy considerations to which the reasonableness requirement is tethered. The 1969 article by Professor Van Alstyne provides some insight. (Van Alstyne, *supra*, 20 Hastings L.J. 431.) Van Alstyne noted that the state of inverse condemnation law at the time was very unpredictable due to the courts' application of a variety of conflicting legal principles. Van Alstyne encouraged the courts to abandon reliance upon private law principles and to apply principles of public policy to all inverse condemnation claims arising from unintended physical damage to private property. According to Van Alstyne, public policy does not necessarily require a reasonableness calculus in all contexts. For example, in cases of environmental pollution, a rule of strict liability might provide **[***54]** incentive for the development of antipollution programs. (*Id.* at p. 503.) On the other hand, in what Van Alstyne termed "water damage" cases, a rule that balanced the conflicting concerns of public benefit and private harm would better serve the public in the long run. (*Id.* at p. 502.).

Our Supreme Court adopted the balancing analysis suggested by Van Alstyne in the *Belair*, *Bunch II*, and *Locklin* cases. In *Locklin*, the offending conduct (discharge of surface water into a natural watercourse) would have been privileged under traditional water law principles. The corresponding burden of that privilege fell on the downstream landowners who had to take steps to protect their land from such **[**62]** upstream discharges or suffer the consequences. (*Locklin, supra*, 7 Cal. 4th at pp. 351-352, [27 Cal. Rptr. 2d 613, 867 P.2d 724].) Therefore, since the watercourse naturally subjected the downstream property to flooding and erosion, it would have been unfair to apply a strict liability analysis to public entity landowners upstream. The decisive constitutional consideration of ensuring equitable allocation of the cost of the public undertaking was best advanced in such **[***55]** a case by requiring the downstream owner to show that the public agency had exceeded its privilege by acting unreasonably. (*Id.* at p. 367.)

Policy considerations also favored application of a reasonableness analysis in *Belair* and *Bunch II*, which were both flood control cases. In *Belair* and *Bunch II,* the public improvement had been erected to protect the land that was ultimately injured when the project failed. The project's purpose, to protect private property from the flooding that it could otherwise expect to **[*753]** suffer periodically, was an important policy reason to apply the balancing analysis. Without requiring the plaintiff to make a showing of unreasonableness, the public agency that built or operated the project would become the guarantor of the land it had undertaken to protect.

An appellate opinion decided after *Belair*, *Bunch II*, and *Locklin* illustrates a situation where public policy favored strict liability rather than reasonableness. (*Akins v. State of California* (1998) 61 Cal. App. 4th 1, [71 Cal. Rptr. 2d 314].) In *Akins* the defendants had intentionally diverted

floodwater onto the plaintiffs' lands for the purpose of protecting **[***56]** other property from flooding. There was no evidence that the project was erected to protect the plaintiffs' property or that the plaintiffs' property had historically been subject to flooding. Since the public improvement involved flood control, *Belair* and *Bunch II* arguably mandated application of a reasonableness analysis. However, the appellate court found that the reasonableness standard did not apply, reasoning that regardless of the importance of flood control, "[u]sing private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from those owners whose properties are flooded a contribution in excess of their proper share to the public undertaking. We see no reason to put such property owners to the task of proving the governmental entities acted unreasonably in order for the owners to recover in inverse condemnation." (*Id.* at p. 29.)

The policy reasons for applying a rule of reasonableness in *Belair*, *Bunch II*, and *Locklin* do not apply in this case. The conduct of which plaintiffs complain is that State caused Highway 1 to obstruct the path of the floodwater. Such conduct was not **[***57]** privileged under traditional water law precepts. (*Los Angeles C. Assn v. Los Angeles* (1894) 103 Cal. 461, 467-468, [37 P. 375]; *Conniff v. San Francisco* (1885) 67 Cal. 45, [7 P. 41].) Therefore, State does not enjoy a conditional privilege as it would under the facts of *Locklin*, and plaintiffs' property would not have been subject to a corresponding burden. In fact, the reverse is true. It is plaintiffs, as the upstream owners, who likely would have had a privilege in this case. And State, as the downstream owner, was bound not to obstruct the flow of water from the plaintiffs' upstream land. (*Locklin*, *supra*, 7 Cal. 4th at p. 350; and see *Smith v. City of Los Angeles* (1944) 66 Cal. App. 2d 562, 572, [153 P.2d 69].) Therefore, the consideration that controlled the result in *Locklin* (fair apportionment of the loss) is not present here because plaintiffs would not have been expected to take measures **[**63]** to protect their land from a downstream obstruction like the Highway 1 embankment.

The policy reasons for applying reasonableness in *Belair* and *Bunch II* are not present here, either. Highway 1 was not a flood control project **[***58]** and was **[*754]** not built to protect the plaintiffs' land. The damming effect of the highway created a risk to which those properties would not have been subject if the highway had not been built. The public benefit of the highway extends well beyond the landowners in the Pajaro Valley. While the same may be said of a flood control project, such a project directly benefits the owners of the land in the floodplain, and only indirectly benefits the public as whole. Highway 1, on the other hand, benefits the traveling public as a whole. The owners of the adjacent lands derive no greater benefit from the highway than any other member of the public.

"[T]he underlying purpose of our constitutional provision in inverse--as well as ordinary--condemnation is 'to distribute throughout the community the loss inflicted upon the individual . . . .' " (*Holtz, supra*, 3 Cal. 3d at p. 303.) State, in furtherance of the larger public purpose (transportation) has caused injury to a discrete group of private landowners. Those landowners received no more benefit from State's project than did any other user of the State highway system. Plaintiffs ought not to be required to prove unreasonableness **[***59]** in order to recover just compensation for their damage. We hold, therefore, that *Belair*'s rule of reasonableness does not apply to State in this case. In light of our holding, the trial court was not required to undertake the reasonableness analysis required by *Locklin.* The court's conclusion that State's conduct was unreasonable was unnecessary to its determination that State is liable in inverse condemnation, but does not affect its correctness.

b. *State Had a Duty to Avoid Obstructing the Floodplain.*

The jury found State liable for nuisance and for maintaining a dangerous condition of public

property. (Civ. Code, § 3479; Gov. Code, § 835.) State argues that it cannot be liable for these torts because it does not have a duty to protect plaintiffs' property from the failure of a flood control project over which it had no control. State assumes that plaintiffs' claim is premised upon the theory that State should have designed its drainage anticipating that the Project would fail. State misses the point. Plaintiffs do not allege that State is responsible for the failure of the Project or the resulting flood. Plaintiffs allege **[***60]** only that State is responsible for that portion of the damage that can be attributed to the highway's obstruction of the floodplain. Whether the flood occurred because the Project failed to function as intended, or because the rainstorm exceeded the Project's capacity, plaintiffs' claim against State would be the same. As we interpret plaintiffs' position, State had a duty to avoid obstructing escaping floodwater, regardless of the cause of the flood.

CA(13)[↑] (13) HN18[↑] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be **[*755]** imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 434, [131 Cal. Rptr. 14, 551 P.2d 334].) In California, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 112, [70 Cal. Rptr. 97, 443 P.2d 561].) Duty is usually determined based upon a number of **[**64]** considerations. The foreseeability of a particular kind of harm is one of the most crucial of those. (See *Dillon v. Legg* (1968) 68 Cal. 2d 728, 739, [69 Cal. Rptr. 72, 441 P.2d 912]; **[***61]** Gov. Code, § 835.)

The question of whether a duty exists is one of law. The court's task in determining duty is to evaluate generally whether the conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. (*Ballard v. Uribe, supra*, 41 Cal. 3d at p. 573, fn. 6.) **CA(12b)[↑] (12b) HN19[↑]** Under ordinary rules applicable to riparian landowners, both upper and lower riparian landowners have a duty to avoid altering the natural system of drainage in any way that would increase the burden on the other. (*Locklin, supra*, 7 Cal. 4th at pp. 337, 354-356; *Keys v. Romley* (1966) 64 Cal. 2d 396, 409, [50 Cal. Rptr. 273, 412 P.2d 529].) Traditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from the obstruction. (*Mitchell v. City of Santa Barbara* (1941) 48 Cal. App. 2d 568, 571, [120 P.2d 131].) The rule applies even if the damaging flow in the obstructed watercourse is seasonal floodwater. (*Ibid.*) This common law allocation of duty is appropriate here.

The harm of which plaintiffs complain is that the highway obstruction caused **[***62]** the floodwater to rise higher and stand on the land longer than it would have done if unobstructed. This harm was unquestionably foreseeable. State's "1989/90 Training Course Manual" POINTS OUT: "A primary cause of flooding in highway and bridge construction is the blocking of a normal drainage flow pattern. Construction of fills, drainage structures and appurtenant structures such as retaining walls all have the potential for blocking the normal flow of drainage water and thus causing flooding. The blocked flow does not necessarily have to be a watercourse; blockage of an existing flood plain may result in flooding of previously untouched areas. [P] In either case, watercourse or flood plain, blockage will result in liability for any damages arising from consequent flooding."

In fact, the harm that State's project ultimately caused was actually foreseen before the highway bypass was ever built. State designed the drainage culverts around 1960. The 1960 design documents presumed that peak flows would result in shallow flooding "for some distance outside the [right of way]." According to State's engineers, these peak flows were **[*756]** presumed to consist only of rainwater runoff from **[***63]** the surrounding area, not floodwater. Thus, even in the absence of a flood, State's design presumed that some water

would back up behind the highway during the heaviest rains.

State's "Design Planning Manual" required that its highway drainage structures be able to accommodate a 100-year storm. In 1963, the Corps reported that a 100-year storm was expected to generate flows within the Project channel of 43,500 c.f.s., a significantly greater volume than it had previously estimated. State concedes that it was aware of the Corps' 1963 estimate of the size of a 100-year storm, and that it knew there was no chance the Project, as it then existed, could contain that volume. Thus, State was aware before it began building the highway bypass in the late 1960's that in the event of a 100-year storm, flooding was virtually certain to occur.

State argues that it had no duty to consider the possibility of a flood because in its correspondence with State engineers the Corps told State that it should assume a Project expansion was going forward. This assurance, however, did not have any bearing on the drainage design or whether **[**65]** that design should consider the risk of flooding. The acknowledged **[***64]** purpose of the Corps' assurance was to assist State's engineers in designing the bridge. In light of the information it received from the Corps, State designed its bridge over the river so that the Corps could make improvements under the bridge without the need to revise the bridge structure. Those improvements were, at best, years away. (And, so far as we can ascertain from the record, no such improvements were ever made.)

It is undisputed, therefore, that when State built the highway bypass in the late 1960's it knew that the Project would not contain a 100-year storm and that no enlargement of the Project had been approved or commenced at that point. A 100-year storm was just as likely to occur in 1970 as it was at any later time. Having built an embankment across the historic floodplain, State also must have known that its embankment would block the flow of floodwater unless it designed the drainage to accommodate a flood.

State cannot avoid liability for the 1995 flood because the Project failed rather than because the storm overwhelmed it. State was expected to design its drainage for a 100-year storm. Since a flood was almost certain to occur in the event of a **[***65]** 100-year storm, State, as a downstream riparian landowner, had a duty to design the highway bypass to avoid obstructing the geologic floodplain. Therefore, it does not matter that the storm that generated the flood in this case was of a lesser magnitude and should have been contained by the Project. State had a duty to anticipate the consequences of a 100-year storm and design accordingly.

[*757] c. Government Code Section 830.6*Government Code* Section 830.6 *Is Not a Defense.*

CA(14a)[↑] **(14a)** At the close of all the evidence State moved for a directed verdict on the basis of Government Code section 830.6, design immunity. The trial court denied the motion and the jury ultimately found State liable for a dangerous condition of public property and nuisance. State contends the court erred in denying its directed verdict motion. We disagree.

CA(15)[↑] **(15)** **HN20**[↑] A public entity is liable for negligently creating a dangerous condition of public property or for failing to cure a dangerous condition of which it has notice. (Gov. Code, § 835, subd. (a).) However, the entity is immune from such liability if the injury was caused by a public improvement that was constructed pursuant to a **[***66]** plan or design approved in advance by the entity if "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design . . . or (b) a reasonable legislative body or other body or employee could have approved the plan or design." (Gov. Code, § 830.6.) "The rationale behind design immunity is to prevent a jury from reweighing the same factors considered by the governmental entity

which approved the design." (*Bane v. State of California* (1989) 208 Cal. App. 3d 860, 866, [256 Cal. Rptr. 468].) A public entity claiming design immunity must plead and prove three essential elements: " '(1) [a] causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; [and] (3) substantial evidence supporting the reasonableness of the design.' [Citation.]" (*Higgins v. State of California* (1997) 54 Cal. App. 4th 177, 185, [62 Cal. Rptr. 2d 459].)

The elements of causation and approval are not contested. The focus of State's challenge is the third element of the design immunity defense, substantial evidence of the reasonableness of the culvert design. **[***67]** Government Code section 830.6 **[**66]** makes the resolution of this element a matter for the court, not the jury. (*Cornette v. Department of Transportation* (2001) 26 Cal. 4th 63, 66, [109 Cal. Rptr. 2d 1, 26 P.3d 332].) The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable State official could have approved the challenged design. (*Morfin v. State of California* (1993) 12 Cal. App. 4th 812, 815, [15 Cal. Rptr. 2d 861].) If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. (*Higgins v. State of California, supra*, 54 Cal. App. 4th at p. 185.) **HN21**[↑] In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. (*People v. Bassett* (1968) 69 Cal. 2d 122, 139, [70 Cal. Rptr. 193, 443 P.2d 777]; *Grenier v. City of Irwindale* (1997) 57 Cal. App. 4th 931, 940, [67 Cal. Rptr. 2d 454].) **CA(14b)**[↑] **(14b)** Keeping that standard in mind, we review the evidence to determine whether **[*758]** there is a basis upon which a reasonable State official could have approved the culvert design.

State installed **[***68]** two 48-inch culverts through the embankment on the southern side of the bridge it built over the Pajaro River. There is no dispute that the culverts were not designed to accommodate floodwater. They were designed to accommodate only the rainwater runoff from the adjacent 700 acres. The span beneath the bridge itself provided plenty of clearance for highwater flows down the river channel. However, if the water escaped the channel, it would follow the contour of the floodplain toward the embankment at the southern end of the bridge. The floodwater would have to pass through whatever drainage was installed in the new embankment in order to reach the sea. Plaintiffs point out that since State knew before it built the Highway 1 bypass that the Project could not accommodate more than about 26,000 c.f.s., and that a 100-year storm would generate flows well above that, flooding was foreseeable and the drainage design should have taken it into account. [10]

[*69]** State's expert, Steve Price, testified that the culverts conformed to the requirements of State's Design Planning Manual and the design itself was "reasonable." He stated that it was not in conformance with the best engineering practices to design the drainage for Project failure and that State did not evaluate the Corps' projects at the time the drainage in this case was installed. Plaintiff's expert, Dr. Curry, had testified that the actual Pajaro River watershed consisted of 1,100 square miles. Price testified, however, that it was appropriate to consider only the 700 acres in calculating runoff because "[t]here are other drainage systems and facilities that are taking care of that water."

State's engineer, Lance Gorman, testified that a reasonable drainage design would accommodate flooding only if the river had not incorporated man-made flood control improvements. According to both Price and Gorman, because there was an

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[10] Plaintiffs also claim that the culverts' gradient flowed upriver rather than down, the opposite of the way they were designed. Arguably, this defect could also defeat the design immunity defense. (*Cameron v. State of California* (1972) 7 Cal. 3d 318, 326, [102 Cal. Rptr. 305, 497 P.2d 777].) In light of our conclusion that there is insufficient evidence to support the reasonableness of the design, we need not reach this issue.

existing flood control project, the highway drainage design did not have to consider floodwater. Gorman testified that State worked only within its own area and that it would expect the Corps to provide for flooding, noting that State had expected the Corps to improve **[***70]** the Project to accommodate **[**67]** a 100-year storm. Another reason State never considered flooding, according to Gorman, was that it had never been asked to do so.

[*759] The chronology of the State's project is significant. The Corps' flood control project was built in 1949 and, according to Gorman, up until at least 1958 it was reasonable to presume it would hold a 100-year flood. The Highway 1 drainage was designed in 1959 and revised in 1960. In June 1963, the Corps published its "Interim Report," showing that it expected a 100-year storm would generate 43,500 c.f.s. This volume greatly exceeded the Project's capacity. Nevertheless, in September 1963, State engineers approved the 1960 drainage design without reconsidering it in light of the Corps' Interim Report. Mr. Gorman conceded that by 1964, given the Corps' reevaluation of a 100-year storm, it would have been "questionable" to continue to assume the Project would hold such a flood. Thus, according to State's own engineer it "probably would have been better" to design for the Corps' new analysis.

The purpose of the design immunity statute is to avoid having the finders of fact "reweighing the same factors considered by the governmental **[***71]** entity which approved the design." (*Bane v. State of California, supra,* 208 Cal. App. 3d at p. 866.) Since State's engineers never took flooding into consideration, it is questionable whether the immunity applies at all. Presuming that it does, we find that State has not offered substantial evidence of reasonableness.

Although State offered evidence that its original design was reasonable, we are troubled by the conclusory nature of that evidence. State's engineers testified that the design was reasonable, but the only foundation offered for their conclusion was the presumption that someone or something else would take care of flooding. Such evidence lacks the solid value necessary to constitute substantial evidence. Moreover, State effectively concedes that under the circumstances that existed at the time the design was approved in 1963, it was no longer reasonable to rely on the Project to contain a 100-year flood. The unreasonableness of the design is further demonstrated by the design documents themselves, which in 1960 presumed that peak flows would cause some shallow flooding. Logic tells us that once it was determined that a 100-year storm was certain to **[***72]** overtop the Project, more extensive flooding would occur. Under these circumstances, we find that State has not offered any substantial evidence upon the basis of which a reasonable public employee could have approved a design that did not take flooding into account.

The trial court's ruling on State's motion for a directed verdict suggests that the court incorrectly intended to allow the jury to determine the reasonableness of the design. It is clear from the record, however, that the jury was not asked to make that determination. **CA(16)[↑] (16) HN22[↑]** A ruling or decision, itself **[*760]** correct in law, will not be disturbed on appeal merely because it was given for a wrong reason. (*D' Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 18-19, [112 Cal. Rptr. 786, 520 P.2d 10].) **CA(14c)[↑] (14c)** Because our independent examination of the record leads us to conclude that State had not offered substantial evidence of the reasonableness of the drainage design, the trial court did not err in denying State's motion for directed verdict.

d. *Failure of the Project Was Not a Superseding Cause.*

State argues that the breach of the levee was an intervening force that was so extraordinary that it operates as **[***73]** a **[**68]** superseding cause of plaintiffs' injury, cutting off its own liability on all

claims. CA(17)[↑] (17) HN23[↑] Under traditional negligence analysis, an intervening force is one that actively operates to produce harm after the defendant's negligent act or omission has been committed. (Rest.2d Torts, § 441, subd. (1), p. 465.) A defendant's conduct is superseded as a legal cause of an injury if, among other things, the intervening force is highly unusual or extraordinary, not reasonably likely to happen and, therefore, not foreseeable. (Rest.2d Torts, § 442, subds. (b) & (c), p. 467; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975, p. 366; *Akins v. County of Sonoma* (1967) 67 Cal. 2d 185, 199, [60 Cal. Rptr. 499, 430 P.2d 57].) Similar considerations may apply in the context of inverse condemnation. (*Belair, supra,* 47 Cal. 3d at pp. 559-560.) The defendant has the burden to prove the affirmative defense of superseding cause, that is, that the intervening event is so highly unusual or extraordinary that it was unforeseeable. (*Maupin v. Widling* (1987) 192 Cal. App. 3d 568, 578, [237 Cal. Rptr. 521].) The question is usually one for the trier of fact. **[***74]** (*Ballard v. Uribe, supra,* 41 Cal. 3d at p. 572, fn. 6.) However, since the facts upon which State bases its claim are materially undisputed, we apply our independent review. (*Ghirardo v. Antonioli, supra,* 8 Cal. 4th at p. 799.)

CA(14d)[↑] **(14d)** State argues that the chain of causation between State's project and the harm that plaintiffs sustained is broken by the extraordinary volume of floodwater flowing from the breach of the levee. Other than to note that the 1995 event was the first time its culverts had been overwhelmed, State does not explain in what way the flooding was not foreseeable, and has not carried its burden on this issue. On the other hand, we find ample evidence that flooding was within the scope of human foresight. The Highway 1 bypass was built across a floodplain. State knew at the time it built the culverts that the Project channel could not hold a 100-year storm so that in the event of a 100-year storm, flooding was almost certain to occur. And a 100-year storm was, indisputably, foreseeable. Thus, the flooding, whether caused by the failure of the levee or by the size of the storm, was not so extraordinary an event that State should **[***75]** be relieved of its liability.

[*761] 5. *Monterey Liability*

a. *Monterey's Liability Is Not Derivative.*

CA(18)[↑] **(18)** Monterey attacks the judgment against it on the ground that the trial court disregarded the separateness of Monterey and MCWRA and incorrectly determined that Monterey could be derivatively liable for MCWRA's inadequate maintenance of the Project. We reject this argument because the record is clear that the judgment against Monterey was based on Monterey's direct liability.

The jury received no instruction on vicarious liability, nor was the verdict form drafted to accommodate a vicarious liability theory. The special verdict identified each of the defendants separately, and the jury apportioned damages separately, assigning 30 percent to MCWRA and 23 percent to Monterey. The trial court expressly found that "Monterey County, while a separate legal entity from [MCWRA], concurrently exercised dominion and control over the Project," and concluded that Monterey and MCWRA were "jointly responsible." Therefore, both finders of fact determined that Monterey's liability was joint or concurrent, but not derivative.

[69]** b. *Monterey Substantially Participated in the Project.*

[*76]** Monterey contends that since it did not do anything about the maintenance of the Project channel, and because, it claims, it had no authority to do anything, it cannot be liable for inverse condemnation. We find that Monterey HN24[↑] had the power and the duty to act and that its failure to do so, in the face of a known risk, is sufficient to support liability under article I, section 19.

A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that

proximately caused injury to private property. (*Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal. App. 3d 976, 979-980, [283 Cal. Rptr. 13].) So long as the plaintiffs can show substantial participation, it is immaterial "which sovereign holds title or has the responsibility for operation of the project." (*Stoney Creek Orchards v. State of California* (1970) 12 Cal. App. 3d 903, 907, [91 Cal. Rptr. 139].)

In the majority of cases that apply the substantial participation test, the public entity has defended an inverse condemnation claim on the grounds that the **[***77]** improvement was private, not public. There is no dispute here that **[*762]** the Project was a public project. Thus, the holding in these cases is not directly applicable. However, the rationale is instructive. One such case is *Frustuck v. City of Fairfax* (1963) 212 Cal. App. 2d 345, [28 Cal. Rptr. 357] (*Frustuck*). In that case the city approved a subdivision and drainage plans for private property upstream from the plaintiffs' property. The subdivision increased runoff that ultimately harmed the plaintiff's property. The appellate court agreed that the harm had been caused by the drainage system's upstream diversion of water and that the city, in approving the plans for the subdivision, had substantially participated in that diversion. The court explained, "The liability of the City is not necessarily predicated upon the doing by it of the actual physical act of diversion. The basis of liability is its failure, in the exercise of its governmental power, to appreciate the probability that the drainage system from [the private subdivision] to the Frustuck property, functioning as deliberately conceived, and as altered and maintained by the diversion of waters from their normal channels, **[***78]** would result in some damage to private property." (*Id.* at p. 362; accord, *Sheffet v. County of Los Angeles* (1970) 3 Cal. App. 3d 720, 734-735, [84 Cal. Rptr. 11].)

HN25[↑] In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project, as Monterey contends, but may include the situation where the public entity has deliberately chosen to do nothing. For example, a public entity is liable in inverse condemnation for damage resulting from broken water pipes when the entity responsible for the pipes has deliberately failed to maintain them. (*McMahan's, supra,* 146 Cal. App. 3d 683; *Pacific Bell, supra,* 81 Cal. App. 4th 596.) Of course, the entity must have the ability to control the aspect of the public improvement at issue in order to be charged with deliberate conduct. **HN26**[↑] In tort cases, it has been held, "in identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid." (*Low v. City of Sacramento* (1970) 7 Cal. App. 3d 826, 832, [87 Cal. Rptr. 173].) **[***79]** The ability to remedy the risk also tends to support a contention that the entity is responsible for it. "Where the public entity's relationship to the dangerous **[**70]** property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition . . . ." (*Id.* at pp. 833-834; accord, *Fuller v. State of California* (1975) 51 Cal. App. 3d 926, 946-948, [125 Cal. Rptr. 586].)

The rule we draw from these cases is that **HN27**[↑] a public entity is a proper defendant in a claim for inverse condemnation if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of its governmental power the entity either failed to appreciate the probability that **[*763]** the project would result in some damage to private property, or that it took the calculated risk that damage would result. (See *Frustuck, supra,* 212 Cal. App. 2d at p. 362.)

Returning to the instant matter, although Monterey contends that it had no obligation or any power to control the **[***80]** Project maintenance, the contention does not withstand scrutiny. In December 1947, Monterey entered into an indemnity agreement with Santa Cruz, San Benito

and Santa Clara Counties. Just two months before Monterey executed that agreement, MCWRA's predecessor, the Monterey County Flood Control and Water Conservation District, had given its assurance to the federal government that it, along with the other local interests, would maintain and operate the Project as the Corps required. This assurance is the "resolution marked Exhibit 'A' " in the following excerpt from the indemnity agreement that Monterey executed: "each County assumes to itself the sole obligation and responsibility occasioned by the adoption of the resolution marked Exhibit 'A,' for that portion of the project which is to be constructed within it's [*sic*] boundaries and being bound to each other County to hold them and each of them harmless and free from any liability or obligation arising by reason of the adoption of the resolution marked Exhibit 'A' as to that portion of said project within it's [*sic*] own boundaries; *meaning that each County will take care of the assurances given and obligations incurred* ***[***81]*** *by reason of the resolution marked Exhibit 'A' insofar as they relate to that part of the project being constructed within it's* [*sic*] *boundaries*." [11] (Italics added.) The plain language of this agreement supports the conclusion that Monterey assumed responsibility for the Project's operation and maintenance.

In practice, Monterey did exercise control over the Project by virtue of its financial control over MCWRA. Monterey and MCWRA and its predecessor district have always shared a common board of supervisors and common boundaries. [12] **HN28**[↑] County **[***82]** employees are considered ex officio employees of MCWRA and are required to perform the same duties for MCWRA that they perform for Monterey. (Stats. 1990, ch. 1159, § 16, p. 4841, West's Ann. Wat.--Appen., *supra*, § 52-16; Stats. 1947, ch. 699, §§ 2, 7, 8, pp. 1739, 1744 [repealed], West's Ann. Wat.--Appen., former §§ 52-2, 52-7, 52-8. **[**71]** Although Monterey and MCWRA are **[*764]** separate entities, the fact that they had governing boards, employees, and boundaries in common is relevant to the analysis. **HN29**[↑] "[C]ommon governing boards do not invariably indicate county control, but certainly that fact is relevant to the inquiry." (*Rider v. County of San Diego* (1991) 1 Cal. 4th 1, 12, [2 Cal. Rptr. 2d 490, 820 P.2d 1000] (*Rider I*).) Here, we find it significant because of the financial connection between the two entities.

Monterey financial statements reported MCWRA financial activity as if MCWRA was a part **[***83]** of the county. The statements expressly state that they do not report the financial activity of those agencies over which Monterey cannot impose its will or with which Monterey does not share a financial benefit, burden relationship. By implication, the inclusion of MCWRA on Monterey's financial statements means that Monterey itself considers that it is able to impose its will on MCWRA, and that there does exist a financial benefit, burden relationship between Monterey and MCWRA.

Further evidence of Monterey's control is the fact that MCWRA never had a revenue source, independent of the county's financial resources, that was sufficient to fulfill its promise to operate and maintain the Project. At least since 1974 MCWRA had entirely neglected the Project channel in favor of maintaining the levees because there was not enough money to do both. The main reason funding was so limited was that MCWRA's funding for the Project came from "Zone 1," the geographical area directly served by the Project. Zone 1 consists largely of agricultural land and the little town of Pajaro. Since the geographical area is relatively small and the town of Pajaro is economically

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[11] Monterey argues in its opening brief that its execution of the indemnity agreement was probably a mistake, and that the water district should have executed it instead. Although Monterey insisted throughout the proceedings below that it was an improper defendant, it never argued that it might have executed the agreement by mistake. There is no direct evidence in the record to support this argument, and we decline to consider it for the first time on appeal.

[12] Although MCWRA is also governed by an appointed board of directors, that board did not come into being until the 1990 Water Resources Act. (Stats. 1991, ch. 1130, §§ 5, 10, pp. 5440, 5442, West's Ann. Wat.--Appen. (1999 ed.) §§ 52-48, 52-53.)

disadvantaged, the revenue **[***84]** -generating potential of Zone 1 is and always has been very limited. Therefore, the only way MCWRA could have afforded to undertake the needed maintenance of the Project was to depend upon assistance from the county.

There is no dispute that Monterey's board of supervisors was aware of the maintenance needs of the Project, and the risk of flooding that it posed. From time to time, the board allocated money from its general fund for other programs and projects undertaken by MCWRA. Although Supervisor Del Piero, who represented the district that included Zone 1, attempted several times during the 1970's and 1980's to have Monterey's board make allocations to augment MCWRA's Zone 1 funding, he was, for the most part, unsuccessful.

Monterey cites *Galli v. State of California* (1979) 98 Cal. App. 3d 662, [159 Cal. Rptr. 721] (*Galli*) in support of its contention that an entity cannot substantially participate if it has done nothing. In *Galli*, the local levee maintenance district was liable in tort and inverse condemnation for flood **[*765]** damage resulting from the failure of a levee. The plaintiffs argued that State should also be liable because it had substantially participated **[***85]** in the levee maintenance. The plaintiffs based their argument primarily upon the assertion that the levee was part of a comprehensive water resource development system under the general control of State and State knew that the levee had maintenance problems. (*Id.* at p. 688.) The appellate court rejected the plaintiffs' argument on the ground, among others, that the levee in question was a nonproject levee. A nonproject levee was not required to be maintained to State or federal standards and was not inspected by State, and, consequently, was not under the general control of State as far as its maintenance was concerned. For that **[**72]** reason, State's knowledge of the maintenance problems was not enough to establish substantial participation. (*Id.* at pp. 681, 688.) *Galli* is distinguishable because, as we have explained, Monterey's actual knowledge of the maintenance problems was coupled with its actual ability to control Project maintenance. [13]

[*86]** Monterey argues that it never had any obligation to maintain the Project or any obligation to fund MCWRA to do so. The Supreme Court rejected a similar argument long ago in *Shea v. City of San Bernardino* (1936) 7 Cal. 2d 688, [62 P.2d 365]. In that case the city argued that it was powerless to fix a dangerous condition that existed in a railroad crossing because the Railroad Commission had exclusive jurisdiction over its right of way. The Supreme Court held "the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. The governing board and officers of the municipality in dealing with such an affair may not complacently declare that they were powerless over a long period of years to take any steps to remedy a defective and dangerous condition that existed in one of the principal streets of the city." (*Id.* at p. 693.) The court's rationale in that individual personal injury matter applies with even greater force where the risk threatens an injury such as that which occurred here.

The constitutional basis for all takings jurisprudence supports a finding of liability in these circumstances. That is, **[***87]** **HN30[↑]** the owner of private property ought not to contribute more than his or her proper share to the public undertaking. The purpose of article I, section 19 is to distribute throughout the community the loss that would otherwise fall upon the individual. (*Holtz, supra*, 3 Cal. 3d at p. 303.) If Monterey had chosen to fund maintenance efforts to the degree that Mr. Madruga and Supervisor Del Piero determined was necessary, the **[*766]** flood would not have occurred. In failing to expend funds on the Project, Monterey benefited the ultimate recipients of those

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[13] Monterey also cites *Rider I, supra*, 1 Cal. 4th 1, *Vanoni v. County of Sonoma* (1974) 40 Cal. App. 3d 743, [115 Cal. Rptr. 485], and *Rider v. County of San Diego* (1992) 11 Cal. App. 4th 1410, [14 Cal. Rptr. 2d 885]. These cases involved certain constitutional taxing and debt limitation requirements and were decided on facts vastly different than those before us. We find them inapposite.

funds and took the risk that plaintiffs would be harmed as a result. Therefore, it is proper now to require the county to bear its share of the loss these plaintiffs incurred.

D. DISPOSITION

The judgment is affirmed.

Elia, J., and Wunderlich, J., concurred.

A petition for a rehearing was denied July 23, 2002, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied September 18, 2002. George, C. J., and Baxter, J., did not participate therein.

End of Document

Howard Jarvis Taxpayers Ass'n v. City of Salinas

Court of Appeal of California, Sixth Appellate District

June 3, 2002, Decided

No. H022665.

Reporter

98 Cal. App. 4th 1351 *; 121 Cal. Rptr. 2d 228 **; 2002 Cal. App. LEXIS 4198 ***; 2002 Cal. Daily Op. Service 4853; 2002 Daily Journal DAR 6161

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.

Subsequent History: [*1]** Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: 2002 Cal. LEXIS 5938.

Prior History: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

Disposition: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Core Terms

storm drain, sewer, storm water, property-related, facilities, parcel, surface, runoff, sanitary, storm, property owner, services, voter, industrial waste, surface water, water service, sewer system, Taxpayers, drainage, storm drainage system, drainage system, sewer service, city council, proportional, impervious, pollutants, ordinance, carries, defines

Case Summary

Procedural Posture

Plaintiff taxpayers filed a complaint under Cal. Code Civ. Proc. § 863 to determine the validity of a storm drainage fee imposed by defendant city. The Monterey County Superior Court (California) ruled that the fee did not violate Cal. Const. art. XIIID, § 6. The taxpayers appealed.

Overview

The city adopted ordinances and a resolution imposing a storm water management utility fee that was imposed on the owners of every developed parcel of land within the city. The storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it was discharged into natural bodies of water. The appellate court found that: (1) Cal. Const. art. XIIID, § 6, required the city to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area because the fee was not exempt as a water service; and (2) the trial court therefore erred in ruling that Salinas, Cal., Ordinance 2350, 2351, and Salinas, Cal., Resolution 17019 were valid exercises of authority by the city council.

Outcome

The judgment of the superior court was reversed.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Elections

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN1[↓] State & Territorial Governments, Elections

The Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. Cal. Const. art. XIIID, § 6 (a)(2).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN2[↓] State & Local Taxes, Real Property Taxes

See Cal. Const. XIIID, § 6(c).

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN3[↓] Overview & Legal Concepts, Ownership

Cal. Const. art. XIIID, § 2(e), defines a "fee" under the article as a levy imposed upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN4[↓] Overview & Legal Concepts, Ownership

A "property-related service" is a public service having a direct relationship to property ownership. Cal. Const. art. XIIID, § 2(h).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN5[↓] State & Local Taxes, Real Property Taxes

Salinas, Cal., Resolution 17019 plainly establishes a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the city. The resolution expressly states that each owner and occupier of a developed lot or parcel of real property within the city, is served by the city's storm drainage facilities and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property should therefore pay for the improvement, operation and maintenance of such facilities. Accordingly, the resolution makes the fee applicable to each and every developed parcel of land within the city.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN6[↓] State & Local Taxes, Real Property Taxes

Cal. Proposition 218, § 5, specifically states that the provisions of the Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Legislation > Interpretation

HN7[↓] Legislation, Interpretation

The appellate court is obligated to construe constitutional amendments in accordance with the

natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Tax Law > ... > Personal Property Taxes > Exemptions > General Overview

HN8[↓] Personal Property Taxes, Exemptions

The exception in Cal. Const. art. XIIID, § 6(c), applies to fees for sewer, water, and refuse collection services.

Governments > Legislation > Interpretation

HN9[↓] Legislation, Interpretation

The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN10[↓] Legislation, Interpretation

Exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.

Governments > Legislation > Interpretation

HN11[↓] Legislation, Interpretation

Cal. Gov't Code § 53750 is enacted to explain some of the terms used in Cal. Const. art. XIIIC, XIIID, and defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a)[] (1a) CA(1b)[] (1b)

Drains and Sewers § 3—Fees and Assessments—Storm Drain Fee—Application of Voter Approval Requirement for Property-related Fees: Property Taxes § 7.8—Special Taxes.

--A storm water management fee resolution established a property-related fee for a property-related service, the management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C.]

CA(2)[] (2)

Constitutional Law § 12—Construction—Ordinary Language—Amendments.

--Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Counsel: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

Judges: Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

Opinion by: Elia

Opinion

[*1352] [229] ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee **[*1353]** and (2) it met the exemption **[***2]** for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a

resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each **[***3]** and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" [1] on that parcel.

[*4]** **[**230]** Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee. [2] Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

[*5]** *DISCUSSION*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D [3] **HN1**[↑] requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), **HN2**[↑] which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

HN3[↑] Section 2 **[***6]** defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) **HN4**[↑] A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) **CA(1a)**[↑] **(1a)** The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid

[1] "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[2] Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[3] All further unspecified section references are to article XIII D of the California Constitution.

simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 **HN5**[↑] plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the **[*1355]** City. The resolution **[**231]** expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the **[***7]** system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to "*each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905] [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. [4] A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee **[***8]** nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged $ 18.66 based on that assumption.

Proposition 218 **HN6**[↑] specifically stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local **[***9]** government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) **CA(2)**[↑] **(2)** **HN7**[↑] We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 863 [167 **[*1356]** Cal. Rptr. 820, 616 P.2d 802].) **CA(1b)**[↑] **(1b)** To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners*," and is therefore subject **[***10]** to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles,*

[4] According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

supra, 24 Cal. 4th at p. 842.)

[232]** *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." **HN8[**] The exception in section 6(c) applies to fees "for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. [5] **[***11]** The City also points to Public Utilities Code section 230.5 and the Salinas City Code, which describe storm drains as a type of sewer. [6]

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the **[*1357]** Attorney General, who observed that several California **[***12]** statutes differentiate between management of storm drainage and sewerage systems. [7] (81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D.* (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically **[**233]** for "*sewers*, water, flood control, [and] *drainage systems*" (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

[*13]** The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (

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[5] Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[6] Public Utilities Code section 230.5 defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

[7] For example, Government Code section 63010 specifies "storm sewers" in delimiting the scope of " '[d]rainage,' " while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.' " (Gov. Code, § 63010, subd. (q)(3), (10).) Government Code section 53750, part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." Health and Safety Code section 5471 sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. **HN9**[↑] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' **[***14]** intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted **[*1358]** by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that **HN10**[↑] exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. [8] (Cf. *Estate of Banerjee* (1978) 21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658].)

The City itself treats storm drainage differently **[***15]** from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water. [9] **[***16]** The Salinas City Code contains requirements **[**234]** addressed specifically to the management of storm water runoff. [10] (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, **HN11**[↑] enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of **[*1359]** the affected area. The trial court therefore **[***17]** erred in ruling that ordinance

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[8] Sanitary sewerage carries "putrescible waste" from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

[9] Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining "storm drainage system"].)

[10] Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

End of Document

Waste Resource Technologies v. Department of Public Health

Court of Appeal of California, First Appellate District, Division Four

March 16, 1994, Decided

No. A060784.

Reporter
23 Cal. App. 4th 299 *; 28 Cal. Rptr. 2d 422 **; 1994 Cal. App. LEXIS 233 ***; 94 Cal. Daily Op. Service 1900; 94 Daily Journal DAR 3463

WASTE RESOURCE TECHNOLOGIES et al., Plaintiffs, Cross-defendants and Appellants, v. DEPARTMENT OF PUBLIC HEALTH OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents; GOLDEN GATE DISPOSAL COMPANY et al., Interveners, Cross-complainants and Respondents.

Prior History: [***1] Superior Court of the City and County of San Francisco, No. 946390, Stuart R. Pollak, Judge.

Disposition: The judgment is affirmed.

Core Terms

waste management, Ordinance, collection, City's, disposal, solid waste, handling, local government, preemption, regulation, plaintiffs', materials, municipal, local regulation, police power, preempted, recycling, transportation, commercial value, city and county, local authority, Integrated, provisions, discarded, franchise, landfills, services

Case Summary

Procedural Posture

Plaintiffs, waste collection and recycling businesses, appealed an order of the Superior Court of the City and County of San Francisco (California), which granted injunctive relief against them in connection with their claims that a city ordinance allowing exclusive arrangements with certain waste collection companies was preempted by the California Integrated Waste Management Act of 1989, Cal. Pub. Res. Code § 40000.

Overview

Plaintiffs, waste collection and recycling businesses, filed suit against defendant city department of public health, claiming that a city ordinance that provided for exclusive arrangements with certain waste disposal companies was preempted by the California Integrated Waste Management Act of 1989 (Waste Management Act), Cal. Pub. Res. Code § 40000. Intervenors, waste disposal companies who held the exclusive franchises, cross-claimed against plaintiffs and were granted injunctive relief. On appeal, the court affirmed and held that § 40000 did not preempt the local ordinance, that the Waste Management Act looked to a partnership between state and local governments, with local governments retaining a substantial measure of regulatory independence and authority. The legislature recognized that not every aspect of the solid waste problem could be handled in the Waste Management Act, that the details should be left to local authorities with knowledge of local conditions, including the decision of whether local circumstances would be best served by an exclusive waste disposal service. The court ruled that defendant city's ordinance was validly enforced within its police powers.

Outcome

The court affirmed the order granting injunctive against plaintiffs, waste collection and recycling businesses, on the grounds that California's Integrated Waste Management Act of 1989 did not preempt a city ordinance granting exclusive

franchises to intervenor waste disposal companies, and that the ordinance was validly enforced as an exercise of the city's police power.

LexisNexis® Headnotes

Governments > Local Governments > Licenses

Governments > Local Governments > Ordinances & Regulations

Governments > Local Governments > Police Power

HN1[⬇] Local Governments, Licenses

A city has constitutional authorization to make and enforce within its limits all local, police, sanitary, or other ordinances and regulations not in conflict with general laws. Cal. Const. art. XI, § 7.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Hazardous Materials

Environmental Law > Hazardous Wastes & Toxic Substances > Transportation

Governments > Legislation > Types of Statutes

Banking Law > Regulators > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN2[⬇] Common Carrier Duties & Liabilities, Hazardous Materials

Preemption can be either express or implied. Preemption by implication exists when the scope or the goal of state legislation necessitates the abrogation of local regulation. In determining whether the legislature has preempted by implication to the exclusion of local regulation, a court must look to the whole purpose and scope of the legislative scheme. There are three tests: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN3[⬇] Legislation, Effect & Operation

Preemption by implication of legislative intent may not be found when the legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.

Governments > Public Improvements > General Overview

HN4[⬇] Governments, Public Improvements

See Cal. Pub. Res. Code § 40059.

Governments > Local Governments > Police Power

HN5[↓] Local Governments, Police Power

Long-established authority holds that intrusions upon property incidental to the exercise of police powers are accepted as damnum absque injuria. The very essence of the police power is that the deprivation of individual rights and property cannot prevent its operation.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Two corporations sought an injunction allowing them to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise that had been granted in accordance with a city ordinance requiring a permit to collect and dispose of refuse. The trial court denied injunctive relief to plaintiffs but granted it to the holders of the exclusive franchise, thereby permanently restraining plaintiffs from soliciting, contracting, collecting, or transporting refuse (as defined in the ordinance) for a fee. (Superior Court of the City and County of San Francisco, No. 946390, Stuart R. Pollak, Judge.)

The Court of Appeal affirmed. The court held that the Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq.) did not preempt the city's authority under the ordinance to grant exclusive refuse collection permits. The act does not include the plain language needed for express preemption and, since the act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority, preemption by implication of legislative intent may not be found. Furthermore, the court held that the city's determination that the materials plaintiffs wished to collect posed a threat to public health or safety so as to be within the reach of municipal police power had to be upheld on appeal. Plaintiffs failed to establish that the city's police powers were not exercised in good faith and in a constitutional manner. Moreover, although the ordinance required no permit for collection and disposal of refuse having a commercial value, the city's interpretation of "commercial value" as being from the standpoint of the producer of the refuse, rather than the collector of the refuse, was not unreasonable, arbitrary, or capricious. Also, the city had shown that the economic advantages accruing from exclusivity resulted in lower charges and increased efficiency in a number of programs that benefited refuse producers. Lastly, the court held that the ordinance did not violate a constitutional property right to work and earn a living from any legitimate business pursuit. (Opinion by Poche, J., with Anderson, P. J., and Reardon, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a)[↓] (1a) CA(1b)[↓] (1b)

Pollution and Conservation Laws § 3.2—Pollution—Solid Waste—Integrated Waste Management Act—As Preempting Local Regulation of Refuse Collection and Disposal—Authority of City to Grant Exclusive Franchise to Collect Refuse.

--In an action to allow plaintiffs to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise, the trial court properly ruled that the Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq.) did not preempt the city's authority under a city ordinance to grant exclusive refuse collection permits. The act does not include the plain language needed for express preemption and, since the act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority, preemption by implication of legislative intent may not be found.

Much in the act indicates that the Legislature did not intend a wholesale preclusion of political subdivisions' regulatory power, and Gov. Code, § 40059 (issues for local determination), indicates that the Legislature believed there was no need for statewide uniformity that outweighed the advantages of local governments retaining the power to handle problems peculiar to their communities.

CA(2)[⬇] (2)

Municipalities § 56—Ordinances, Bylaws, and Resolutions—Validity—Conflict With Statutes or Charter—Test for Preemption.

--In determining whether the Legislature has preempted by implication to the exclusion of local regulation, a reviewing court must look to the whole purpose and scope of the legislative scheme. There are three tests: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

[See 8 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 794 et seq.]

CA(3)[⬇] (3)

Municipalities § 27—Police Power—Standard of Review—Authority of City to Grant Exclusive Franchise to Collect Refuse.

--In an action to allow plaintiffs to collect and recycle refuse within a city for a fee, despite the existence of an exclusive franchise that had been granted in accordance with a city ordinance requiring a permit to collect and dispose of refuse, the city's determination that the materials plaintiffs wished to collect posed a threat to public health or safety so as to be within the reach of municipal police power had to be upheld on appeal. Plaintiffs failed to establish that the city's police powers were not exercised in good faith and in a constitutional manner. Moreover, although the ordinance required no permit for collection and disposal of refuse having a commercial value, the city's interpretation of "commercial value" as being from the standpoint of the producer of the refuse, rather than the collector of the refuse, was not unreasonable, arbitrary, or capricious. Also, the city had shown that the economic advantages accruing from exclusivity resulted in lower charges and increased efficiency in a number of programs that benefited refuse producers.

CA(4)[⬇] (4)

Municipalities § 54—Ordinances, Bylaws, and Resolutions—Validity—Ordinance Requiring Permit to Collect and Dispose of Refuse—As Violating Constitutional Property Rights.

--A city ordinance requiring a permit to collect and dispose of refuse did not violate a constitutional property right to work and earn a living from any legitimate business pursuit. The ordinance could be validly enforced as within the city's police powers, and intrusions upon property incidental to the exercise of those powers are accepted as *damnum absque injuria*. The very essence of the police power is that the deprivation of individual rights and property cannot prevent its operation.

Counsel: Reuben & Cera, James A. Reuben, Joeal Yodowitz and Andrew J. Junius for Plaintiffs, Cross-defendants and Appellants.

Louise H. Renne, City Attorney, and John D. Cooper, Deputy City Attorney, for Defendants and Respondents.

Howard, Rice, Nemerovski, Canady, Robertson & Falsk, Peter J. Busch and Todd E. Thompson for Interveners, Cross-complainants and Respondents.

Burke, Williams & Sorensen, Rufus C. Young, Jr., and Virginia R. Pesola as Amici Curiae.

Judges: Opinion by Poch, J., with Anderson, P. J., and Reardon, J., concurring.

Opinion by: POCHE, J.

Opinion

[*302] [423]** The City and County of San Francisco (City) has a long-standing practice of granting to private entities what amounts to an exclusive franchise to collect refuse. The issue presented is whether the City's authority to enter into this type of arrangement survived passage of the California Integrated Waste Management Act of 1989. [1] We conclude that the City still has the power to grant an exclusive refuse **[***2]** collection permit.

BACKGROUND

In November of 1932 the voters of San Francisco adopted an initiative measure entitled the Refuse Collection and Disposal Ordinance (Ordinance). [2] It divides the City into 97 "routes for the collection of refuse." Permits to collect or dispose of refuse from each of these routes are issued by the City's director of public health. Since the 1930's the only permit recipients have been Golden Gate Disposal Company and Sunset Scavenger Company (or their predecessors in interest), which are subsidiaries of Norcal Solid Waste Systems, Inc. As a general proposition, they alone are authorized to collect, transport, or dispose of "refuse," which the Ordinance comprehensively defines as "all waste and discarded materials from **[***3]** dwelling places, households, apartment houses, stores, office buildings, restaurants, hotels, institutions and all commercial establishments, including waste or discarded food, animal and vegetable matter from all kitchens thereof, waste paper, cans, glass, ashes, and boxes **[**424]** and cuttings from trees, lawns and **[*303]** gardens." [3] A permit is not, however, required for the collection, transportation, or disposal of "waste paper or other refuse having a commercial value."

The Ordinance--most recently amended in 1960--makes no mention of recycling which generated this litigation. Initially and primarily concerned with the collection **[***4]** of construction debris excluded from the Ordinance's definition of refuse (see fn. 3, *ante*), and having been blocked in their efforts to enter the recycling field, plaintiffs Waste Resource Technologies and L & K Debris Box Service, Inc., sought an injunction allowing "the collection and recycling, for a fee, of commercially valuable 'dry waste', consisting of cardboard, newspaper and other paper products, plastic bottles, sheet plastic, metal products, Styrofoam packing waste, discarded wood, and other similar commercially valuable materials."

Extensive proceedings before the trial court culminated with entry of a final judgment denying injunctive relief to plaintiffs but granting it to Norcal's subsidiaries; [4] plaintiffs were permanently restrained from soliciting, contracting, collecting, or transporting "refuse, as defined in . . . the . . .

[1] This enactment (which shall be cited hereinafter as the Waste Management Act or the Act) comprises Division 30 ("Waste Management") commencing with section 40000 of the Public Resources Code. Subsequent statutory references are to this code unless otherwise indicated.

[2] The Ordinance, which was subsequently amended in 1946, 1954, and 1960, appears as appendix A to the City's charter.

[3] Excluded from the definition of refuse are "debris and waste construction materials, including wood, brick, plaster, glass, cement, wire, and other ferrous materials, derived from the construction of or the partial or total demolition of buildings or other structures."

[4] A third Norcal subsidiary, Sanitary Fill Company, became a party during the course of proceedings in the trial court. It describes itself as owner and operator of "a transfer station . . . where in excess of 600,000 tons of refuse" collected annually by Golden Gate and Sunset Scavenger are processed and transported to the City's landfill site.

Ordinance," for a fee. Plaintiffs thereafter perfected this timely appeal.

[***5] REVIEW

Plaintiffs attack the judgment with an array of challenges to the City's power under the Ordinance to grant and enforce an exclusive permit system which prevents plaintiffs from continuing their collection and recycling operations. Mustering a number of arguments derived from provisions of the Waste Management Act, which they claim gives them a right to collect and recycle discarded materials not within its definition of solid waste, plaintiffs contend that the City's exclusivity arrangements are now prohibited by state law. The premise for these arguments is that the Ordinance is preempted by the Act. Turning to the permit exemption the Ordinance gives to "waste paper or other refuse having commercial value," plaintiffs claim that the City's interpretation of this language has been unreasonable and arbitrary. Lastly, plaintiffs submit that if the City's course of action does not run afoul of the Waste Management Act, it nevertheless exceeds the City's police powers and thus infringes constitutional rights belonging to plaintiffs and [*304] those who contract for plaintiffs' services. Plaintiffs also contend that, as to them, the City should be deemed estopped from its [***6] enforcement of the Ordinance.

Because it proves largely dispositive of these arguments, the preemption issue will be addressed first.

I

HN1[↑] The City has constitutional authorization to "make and enforce within its limits all local, police, sanitary, or other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) Prior to passage of the Waste Management Act, a substantial body of law upheld the police power of a municipality or unit of local government to legislate on the issue of refuse. [5] Equally well established was the concomitant right to grant an exclusive franchise or permit for refuse collection. (E.g., *Reduction Company* v. *Sanitary Works* (1905) 199 U.S. 306, 316-317 [50 L.Ed. 204, 208-209, 26 S.Ct. 100]; *In re Zhizhuzza* (1905) 147 Cal. 328, 335 [81 P. 955]; *Matula* v. *Superior Court* (1956) 146 Cal.App.2d 93, 98-99 [303 P.2d 871]; *Ponti* v. *Burastero* (1952) 112 Cal.App.2d 846, 851-853 [247 P.2d 597]; *Davis* v. *City of Santa Ana* (1952) 108 Cal.App.2d 669, 676-677 [239 [**425] P.2d 656]; [***7] *In re Sozzi* (1942) 54 Cal.App.2d 304, 306 [129 P.2d 40]; 7 McQuillin, Law of Municipal Corporations (3d ed. 1989) § 24.242, 24.245, 24.249-24.251.)

CA(1a)[↑] (1a) HN2[↑] Preemption can be either express or implied. The Waste Management Act does not include anything like the plain language needed for express preemption. [6] Preemption by implication exists when the scope or the goal of state legislation necessitates the abrogation of local regulation. This is what plaintiffs obliquely contend has been done to the Ordinance by the Act. The governing principles are familiar and fixed:

[***8] [*305] CA(2)[↑] (2) "In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the

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[5] For the moment, we use "refuse" as an inclusive generic having no different meaning from other, equally familiar terms (e.g., trash, garbage, rubbish, etc.).

[6] Such as "The Legislature . . . finds that divergent and competing local tax measures imposed on financial corporations impair the uniform statewide regulation of banks and financial corporations. For this reason . . . the Legislature declares that the state, by this amendment, has preempted such local taxation" (Stats. 1979, ch. 1150, § 20, p. 4220) and "It is the intent of the Legislature that this article preempt all local regulations . . . concerning the transportation of hazardous waste . . .. No state agency, city, city and county, county, or other political subdivision of this state, including, but not limited to, a chartered city, city and county, or county, shall adopt or enforce any ordinance or regulation which is inconsistent with the rules and regulations adopted . . . pursuant to this article." (Health & Saf. Code, § 25167.3.)

For additional examples of state legislation held to oust local efforts, see *In re Murphy* (1923) 190 Cal. 286, 288 [212 P. 30]; *Ex parte Daniels* (1920) 183 Cal. 636, 641 [192 P. 442, 21 A.L.R. 1172].

legislative scheme. There are three tests: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.' . . . [P] CA(1b)[↑] (1b) HN3[↑] Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." (*People* ex rel. *Deukmejian* v. *County of Mendocino* (1984) 36 Cal.3d 476, 485 [204 Cal.Rptr. 897, 683 P.2d 1150] **[***9]** [citations omitted]; accord, *IT Corp.* v. *Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 90-91, 94 [2 Cal.Rptr.2d 513, 820 P.2d 1023] [text & fn. 10].)

The purposes of the Waste Management Act are "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs" (§ 40052). Diminishing landfill space was a particular concern. (See §§ 40000, 41780, 42861, 42870-42871, 46001.)

The Legislature intended to establish a "comprehensive program for solid waste management" (§ 40002) and the purview of the Waste Management Act is indeed broad, extending to what is done with "metallic discards" (§§ 42160-42165), a variety of paper products (§ 42200-42222, 42550-42563, **[***10]** 42750-42791), composted materials (§ 42230-42247), plastics (§§ 42300-42380), retreaded tires (§ 42400-42416), lead-acid and household batteries (§§ 42440-42450), household hazardous waste (§§ 47000-47550), and oil (§§ 48600-48691).

The Act reconstituted a state Integrated Waste Management Board (§§ 40400-40510) with the power to adopt "minimum standards" for solid waste handling and disposal (§ 43020; see § 40502). This board has many **[*306]** responsibilities, among which are approving the integrated waste management plans that all cities and counties must prepare (§§ 41750, 41800), regulating closed and **[**426]** active landfills (§§ 43500-43606, 46000-46507), and administering a fund taking in $20 million annually (§ 47900-48008; see § 46801). The board is also vested with the power to enforce the Act using a number of corrective actions (e.g., cease-and-desist orders, cleanup orders, civil penalties) (§§ 43300, 45000-45201).

But if the scope of the Waste Management Act is broad, it was not achieved by elbowing local government off the stage. Quite the contrary, the Legislature expressly declared that ". . . the responsibility for solid waste management is a shared responsibility between the **[***11]** state and local governments" (§ 40001, subd. (a)), and that local governmental responsibilities "are integral to the successful implementation" of the Act (§ 40703, subd. (a)). There are numerous provisions directing the state board to consult and coordinate with local governmental agencies (§§ 40703, 40914, 43301, 43307) and provide them with myriad types of assistance and information (§§ 40001, subd. (b), 40910, 41791.2, 42500, 42501, 42511, 42540, 42600, subds. (e)-(f), 42650, 43217, 47003, 47103). It is the cities and counties, each of which must designate a "local enforcement agency," that have the primary responsibility for policing the Act, with the state board providing oversight (§§ 43200-43309, 44001-44018, 44100-

44106, 44300-44817, 45000-45407).

In order to sustain plaintiffs' preemption claim, we would have to conclude that with passage of the Waste Management Act the state's entry into the field of refuse collection and disposal is so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy. The difficulties to such a conclusion are simply too great.

It should be apparent from **[***12]** the preceding statutory survey that the Waste Management Act looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority. When the Legislature wanted to forbid local initiatives, it knew and used language appropriate to that goal in the Act. [7] The very narrow express quashing of local power in the Act undermines plaintiffs' claim of implied preemption. (See *IT Corp.* v. *Solano County Bd. of Supervisors, supra,* 1 Cal.4th 81 at pp. 94-95.)

[*307] In addition, much in the Waste Management Act indicates that **[***13]** the Legislature did not intend a wholesale preclusion of political subdivisions' regulatory power. There are many provisions attesting to the Legislature's desire to have state and local authorities work together in a cooperative effort. The Act leaves unimpaired local authority to "impose and enforce reasonable land use conditions or restrictions on solid waste management facilities" (§ 40053; see § 41851, 42023, 43208). It also includes an express grant of authority for local government to legislate increased penalties for unauthorized removal of specified materials (§ 41954). Moreover, the provision directing the state board to promulgate "minimum standards for solid waste handling . . . and disposal" (§ 43020) clearly suggests the possibility of local governments adopting additional standards. This also weighs against implied preemption. (See *Candid Enterprises, Inc.* v. *Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 886-888 [218 Cal.Rptr. 303, 705 P.2d 876].)

Courts "will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest **[***14]** to be served that may differ from one locality to another." (*Fisher* v. *City of Berkeley* (1984) 37 Cal.3d 644, 707 [209 Cal.Rptr. 682, 693 P.2d 261].) The Waste Management Act was in large measure a consolidation and recodification of existing law. (See Stats. 1989, ch. 1095, § 32, pp. 3899-3900; Legis. Counsel's Dig., Assem. Bill No. 939, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 409.) Prior to its passage courts accepted that, state legislation notwithstanding, **[**427]** the dominant role in refuse handling belonged to localities. (E.g., *City of Fresno* v. *Pinedale County Water Dist.* (1986) 184 Cal.App.3d 840, 847 [229 Cal.Rptr. 275]; *Matula* v. *Superior Court, supra,* 146 Cal.App.2d at pp. 99-101.) The antecedent statutes were viewed as acknowledging that allowance had to be made for "the unique circumstances of individual communities" and that the Legislature had therefore "empowered local governments to adopt refuse regulations which would best serve the local public interest." (*City of Camarillo* v. *Spadys Disposal Service* (1983) 144 Cal.App.3d 1027, 1031 [193 Cal.Rptr. 22].) **[***15]**

It is self-evident that the way in which Los Angeles deals with refuse may be entirely different from the approach of a small rural town. Provisions of the Waste Management Act demonstrate that the Legislature took account of this reality. It knew that factors such as geography and population density might require a different approach (see §§ 40973, 41782, 42500, 46203). Local conditions transcending city or county boundaries might

[7] The conspicuously unique flat taboo in the Waste Management Act is section 43208, which provides that ". . . no local governing body may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit . . . so as to prohibit or unreasonably regulate the operation of, or the disposal, treatment, or recovery of resources from solid wastes" by a specified type of facility.

require collection and disposal to be handled on a regional basis, and the Legislature encouraged such efforts (see §§ 40001, subd. (b), 40002, 41791.2). It therefore made provision in the Act for the creation and operation of regional **[*308]** agencies (§§ 40970-40975), garbage disposal districts (§§ 49000-49050), and garbage and refuse disposal districts (§ 49100-49195).

Touching all of these points, and close to being dispositive by itself, is HN4[↑] section 40059 (Government Code former section 66757). Given its importance, it deserves quotation in full:

"(a) Notwithstanding any other provision of law, each county, city, [8] district or other local governmental agency may determine all of the following:

[*16]** "(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.

"(2) Whether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.

"(b) Nothing in this division modifies or abrogates in any manner either of the following:

"(1) Any franchise previously granted or extended by any county or other local governmental agency.

"(2) Any contract, license, or any permit to collect solid waste previously granted or extended by a city, county, or a city and county."

[*17]** A number of conclusions--all of which are adverse to plaintiffs--can be extracted from this statute. First, the Legislature recognized that not every aspect of the solid waste problem could be handled in the Waste Management Act; the infinite details of actual day-to-day operations could not be resolved in Sacramento. Second, the Legislature further recognized that those details should more appropriately be specified by local authorities with **[*309]** greater knowledge of local conditions. Third, the Legislature made express provision for this element of local regulation. Fourth, the Legislature left local authorities the option of deciding that local circumstances attending solid waste handling would be best served by an exclusive service. [9] The gist of these conclusions is the **[**428]** Legislature's considered opinion that there was no need for statewide uniformity which outweighed the advantages of local governments retaining the power to handle problems peculiar to their communities.

[*18]** We do not believe that the Waste Management Act represents a fundamental change in the Legislature's traditional outlook towards the subject of waste handling. Section 40059--as well as the entire scope of the Act--establishes the Legislature's awareness that " 'substantial[] geographic, economic, ecological or other distinctions are persuasive of the need for local control' " and thus precludes the subject from being " 'comprehensively dealt with at the state level.' " (*Galvan* v. *Superior Court* (1969) 70 Cal.2d 851, 863-864 [76 Cal.Rptr. 642, 452 P.2d 930].) Beyond question, the Act not only anticipates and tolerates,

[8] As the state's sole city and county, San Francisco qualifies as both a city and a county for purposes of the Waste Management Act (§ 40115).

[9] The trial court had before it evidence that most local governments in California have opted for exclusive garbage collection arrangements. The fact that 78 municipalities appear as amici in support of the City tends to show that the practice is indeed widespread.

but as a practical matter demands, supplementary local regulation to spell out the details of solid waste collection and disposal. This is "convincing evidence that the state legislative scheme was not intended to occupy the field." (*IT Corp.* v. *Solano County Bd. of Supervisors, supra,* 1 Cal.4th at p. 94, fn. 10.) These factors demonstrate that there is no exclusive or even paramount state concern which requires disabling traditional local power in this area. There being no argument made concerning **[***19]** the impact upon transient citizens, not one of the three tests for implied preemption is satisfied. We find no legislative intent to displace deeply entrenched local authority. (See *City of Dublin* v. *County of Alameda* (1993) 14 Cal.App.4th 264, 275-279 [17 Cal.Rptr.2d 845].) Moreover, we conclude that the City's Ordinance harmonizes with the Waste Management Act and furthers its purpose.

II

With the preemption issue decided, plaintiffs' remaining contentions are very easily resolved.

Plaintiffs' arguments construing various provisions of the Waste Management Act look to finding statutory authorization for their conduct. The jumping-off point for all of these creative arguments is the premise that the **[*310]** Ordinance, having been preempted, is no longer a factor. But because the Ordinance is not preempted, it is the governing authority; it is the Act which has become irrelevant.

CA(3)[↑] **(3)** As for plaintiffs' claim that the materials they wish to collect do not pose a genuine threat to public health or safety and thus are beyond the reach of municipal police power, the City's contrary determination is to be taken as "well-nigh conclusive." **[***20]** (*Berman* v. *Parker* (1954) 348 U.S. 26, 32 [99 L.Ed. 27, 37, 75 S.Ct. 98].) The factors explored in the following paragraphs support the plausibility of that determination, which must therefore be upheld. (E.g., *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479]; *Ex parte Lacey* (1895) 108 Cal. 326, 328-329 [41 P. 411].) Once that is done, the subject matter nestles comfortably within the City's valid police powers. (E.g., *City of Fresno* v. *Pinedale County Water Dist., supra,* 184 Cal.App.3d at p. 847.) Those powers, which have been described as "whatever will promote the peace, comfort, convenience, and prosperity" of the City's citizens (*Escanaba Co.* v. *Chicago* (1882) 107 U.S. 678, 683 [27 L.Ed. 442, 445, 2 S.Ct. 185]) should "not be lightly limited." (*Miller* v. *Board of Public Works, supra,* at pp. 484-485.) **[***21]** They are presumed exercised in good faith and a constitutional manner. (E.g., *Ex parte Hadacheck* (1913) 165 Cal. 416, 421-422 [132 P. 584]; *Barenfeld* v. *City of Los Angeles* (1984) 162 Cal.App.3d 1035, 1040 [209 Cal.Rptr. 8].) Plaintiffs have not established otherwise.

An ordinance enacted pursuant to a municipality's police powers may be nullified if palpably unreasonable, arbitrary, or capricious. (E.g., *Barenfeld* v. *City of Los Angeles, supra,* 162 Cal.App.3d at p. 1040; *Brix* v. *City of San Rafael* (1979) 92 Cal.App.3d 47, 50-51 [154 Cal.Rptr. 647].) As previously mentioned, the Ordinance requires no permit for collection and disposal of "waste paper or other refuse having a commercial value." The city attorney initially interpreted "commercial value" from the standpoint of the collector of the refuse, **[**429]** but since 1964 has advised that "commercial value" should be viewed from the vantage point of the producer of the refuse. The City demonstrated that the different perspectives are intrinsically linked **[***22]** and are in fact somewhat circular. In brief, it has shown that the economic advantages accruing from exclusivity result in lower charges (for residential as opposed to commercial users) and increased efficiency in a number of programs (e.g., a curbside recycling program) that benefit refuse producers. [10]

[10] It would not be improper for the City to think that new entrants into the waste field would be inimical to the public good by hindering efficient and effective enforcement of the Ordinance. (See *City of Fresno* v. *Pinedale County Water Dist., supra,* 184 Cal.App.3d 840, 847; *Sievert* v. *City of National City* (1976) 60

Although reasonable minds could differ as to the wisdom of the policy behind it, the City's revised interpretation is now of long duration and must **[*311]** be respected as not unreasonable, arbitrary, or capricious. (E.g., *Miller* v. *Board of Public Works, supra*, 195 Cal. 477 at p. 490; *DeYoung* v. *City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].)

[*23]** CA(4)[↑] **(4)** Plaintiffs submit that the ordinance violates their "explicit constitutional property rights . . . to work and earn a living from any legitimate business pursuit." Although plaintiffs are probably not entitled to argue that the manner in which the City enforces the Ordinance infringes upon the rights of plaintiffs' once and future customers to acquire, possess, protect, and dispose of property (see *In re Cregler* (1961) 56 Cal.2d 308, 313 [14 Cal.Rptr. 289, 363 P.2d 305]), we will reach the merits because they are so clear-cut. It having already been shown that the Ordinance may be validly enforced as within the City's police powers, HN5[↑] long-established authority holds that intrusions upon property incidental to the exercise of those powers, are accepted as *damnum absque injuria*. (E.g., *Reduction Company* v. *Sanitary Works*, *supra*, 199 U.S. 306, 324-325 [50 L.Ed.2d 204, 212-213]; *In re Zhizhuzza, supra*, 147 Cal. at p. 335; *In re Pedrosian* (1932) 124 Cal.App. 692, 700-701 [13 P.2d 389].) As **[***24]** stated by our Supreme Court, ". . . the very essence of the police power . . . is that the deprivation of individual rights and property cannot prevent its operation" (*Beverly Oil Co.* v. *City of Los Angeles* (1953) 40 Cal.2d 552, 557 [254 P.2d 865]).

As for plaintiffs' estoppel argument, we will not address the merits of this factual issue which is unveiled here for the first time. (See *California Teachers' Assn.* v. *Governing Board* (1983) 145 Cal.App.3d 735, 746 [193 Cal.Rptr. 650]; *Coast Electric Co.* v. *Industrial Indemnity Co.* (1983) 144 Cal.App.3d 879, 886, fn. 3 [193 Cal.Rptr. 74].)

The judgment is affirmed.

Anderson, P. J., and Reardon, J., concurred.

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Cal.App.3d 234, 237 [131 Cal.Rptr. 358].)

TAB 2

40 CFR 122.30

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.30 What are the objectives of the storm water regulations for small MS4s?

(a) Sections 122.30 through 122.37 are written in a "readable regulation" format that includes both rule requirements and EPA guidance that is not legally binding. EPA has clearly distinguished its recommended guidance from the rule requirements by putting the guidance in a separate paragraph headed by the word "guidance".

(b) Under the statutory mandate in section 402(p)(6) of the Clean Water Act, the purpose of this portion of the storm water program is to designate additional sources that need to be regulated to protect water quality and to establish a comprehensive storm water program to regulate these sources. (Because the storm water program is part of the National Pollutant Discharge Elimination System (NPDES) Program, you should also refer to § 122.1 which addresses the broader purpose of the NPDES program.)

(c) Storm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in several ways including by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables.

(d)EPA strongly encourages partnerships and the watershed approach as the management framework for efficiently, effectively, and consistently protecting and restoring aquatic ecosystems and protecting public health.

History

[64 FR 68722, 68842, Dec. 8, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68842, Dec. 8, 1999, added this section, effective Feb. 7, 2000.]

RESEARCH GUIDE Applicable to entire Part:Hierarchy Notes:Part Note

Case Notes

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Part Note

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010; 77 FR 42181, July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: 81 FR 43492, July 5, 2016.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final report, see: 82 FR 51160, Nov. 1, 2017.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 122 policy statements, see: 61 FR 41698, Aug. 9, 1998.]

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40 CFR 122.31

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.31 As a Tribe, what is my role under the NPDES storm water program?

As a Tribe you may:

(a) Be authorized to operate the NPDES program including the storm water program, after EPA determines that you are eligible for treatment in the same manner as a State under §§ 123.31 through 123.34 of this chapter. (If you do not have an authorized NPDES program, EPA implements the program for discharges on your reservation as well as other Indian country, generally.);

(b) Be classified as an owner of a regulated small MS4, as defined in § 122.32. (Designation of your Tribe as an owner of a small MS4 for purposes of this part is an approach that is consistent with EPA's 1984 Indian Policy of operating on a government-to-government basis with EPA looking to Tribes as the lead governmental authorities to address environmental issues on their reservations as appropriate. If you operate a separate storm sewer system that meets the definition of a regulated small MS4, you are subject to the requirements under §§ 122.33 through 122.35. If you are not designated as a regulated small MS4, you may ask EPA to designate you as such for the purposes of this part.); or

(c) Be a discharger of storm water associated with industrial activity or small construction activity under §§ 122.26(b)(14) or (b)(15), in which case you must meet the applicable requirements. Within Indian country, the NPDES permitting authority is generally EPA, unless you are authorized to administer the NPDES program.

History

[64 FR 68722, 68842, Dec. 8, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68842, Dec. 8, 1999, added this section, effective Feb. 7, 2000.]

RESEARCH GUIDE Applicable to entire Part:Hierarchy Notes:Part Note

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

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40 CFR 122.32

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.32 As an operator of a small MS4, am I regulated under the NPDES storm water program?

(a) Unless you qualify for a waiver under paragraph (c) of this section, you are regulated if you operate a small MS4, including but not limited to systems operated by federal, State, Tribal, and local governments, including State departments of transportation; and:

(1) Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. (If your small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated); or

(2) You are designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4) of this chapter, or is based upon a petition under § 122.26(f).

(b) You may be the subject of a petition to the NPDES permitting authority to require an NPDES permit for your discharge of storm water. If the NPDES permitting authority determines that you need a permit, you are required to comply with §§ 122.33 through 122.35.

(c) The NPDES permitting authority may waive the requirements otherwise applicable to you if you meet the criteria of paragraph (d) or (e) of this section. If you receive a waiver under this section, you may subsequently be required to seek coverage under an NPDES permit in accordance with § 122.33(a) if circumstances change. (See also § 123.35(b) of this chapter.)

(d) The NPDES permitting authority may waive permit coverage if your MS4 serves a population of less than 1,000 within the urbanized area and you meet the following criteria:

(1) Your system is not contributing substantially to the pollutant loadings of a physically interconnected MS4 that is regulated by the NPDES storm water program (see § 123.35(b)(4) of this chapter); and

(2) If you discharge any pollutant(s) that have been identified as a cause of impairment of any water body to which you discharge, storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established "total maximum daily load" (TMDL) that addresses the pollutant(s) of concern.

(e) The NPDES permitting authority may waive permit coverage if your MS4 serves a population under 10,000 and you meet the following criteria:

(1) The permitting authority has evaluated all waters of the U.S., including small streams, tributaries, lakes, and ponds, that receive a discharge from your MS4;

(2) For all such waters, the permitting authority has determined that storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL that addresses the pollutant(s) of concern or, if a TMDL has not been developed or approved, an equivalent analysis that determines sources and allocations for the pollutant(s) of concern;

(3) For the purpose of this paragraph (e), the pollutant(s) of concern include biochemical oxygen demand (BOD), sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation), pathogens, oil and grease, and any pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from your MS4; and

(4) The permitting authority has determined that future discharges from your MS4 do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

History

64 FR 68722, 68842, Dec. 8, 1999

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68842, Dec. 8, 1999, added this section, effective Feb. 7, 2000.]

Case Notes

LexisNexis® Notes

Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir Jan. 14, 2003).

Overview: *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

40 CFR 122.33

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.33 Requirements for obtaining permit coverage for regulated small MS4s.

(a) The operator of any regulated small MS4 under § 122.32 must seek coverage under an NPDES permit issued by the applicable NPDES permitting authority. If the small MS4 is located in an NPDES authorized State, Tribe, or Territory, then that State, Tribe, or Territory is the NPDES permitting authority. Otherwise, the NPDES permitting authority is the EPA Regional Office for the Region where the small MS4 is located.

(b) The operator of any regulated small MS4 must seek authorization to discharge under a general or individual NPDES permit, as follows:

(1) General permit.

(i) If seeking coverage under a general permit issued by the NPDES permitting authority in accordance with § 122.28(d)(1), the small MS4 operator must submit a Notice of Intent (NOI) to the NPDES permitting authority consistent with § 122.28(b)(2). The small MS4 operator may file its own NOI, or the small MS4 operator and other municipalities or governmental entities may jointly submit an NOI. If the small MS4 operator wants to share responsibilities for meeting the minimum measures with other municipalities or governmental entities, the small MS4 operator must submit an NOI that describes which minimum measures it will implement and identify the entities that will implement the other minimum measures within the area served by the MS4. The general permit will explain any other steps necessary to obtain permit authorization.

(ii) If seeking coverage under a general permit issued by the NPDES permitting authority in accordance with § 122.28(d)(2), the small MS4 operator must submit an NOI to the Director consisting of the minimum required information in § 122.28(b)(2)(ii), and any other information the Director identifies as necessary to establish additional terms and conditions that satisfy the permit requirements of § 122.34, such as the information required under § 122.33(b)(2)(i). The general permit will explain any other steps necessary to obtain permit authorization.

(2) Individual permit. (i) If seeking authorization to discharge under an individual permit to implement a program under § 122.34, the small MS4 operator must submit an application to the appropriate NPDES permitting authority that includes the information required under § 122.21(f) and the following:

(A) The best management practices (BMPs) that the small MS4 operator or another entity proposes to implement for each of the storm water minimum control measures described in § 122.34(b)(1) through (6);

(B) The proposed measurable goals for each of the BMPs including, as appropriate, the months and years in which the small MS4 operator proposes to undertake required actions, including interim milestones and the frequency of the action;

(C) The person or persons responsible for implementing or coordinating the storm water management program;

(D) An estimate of square mileage served by the small MS4;

(E) Any additional information that the NPDES permitting authority requests; and

(F)A storm sewer map that satisfies the requirement of § 122.34(b)(3)(i) satisfies the map requirement in § 122.21(f)(7).

(ii) If seeking authorization to discharge under an individual permit to implement a program that is different from the program under § 122.34, the small MS4 operator must comply with the permit application requirements in § 122.26(d). The small MS4 operator must submit both parts of the application requirements in § 122.26(d)(1) and (2). The small MS4 operator must submit the application at least 180 days before the expiration of the small MS4 operator's existing permit. Information required by § 122.26(d)(1)(ii) and (d)(2) regarding its legal authority is not required, unless the small MS4 operator intends for the permit writer to take such information into account when developing other permit conditions.

(iii) If allowed by your NPDES permitting authority, the small MS4 operator and another regulated entity may jointly apply under either paragraph (b)(2)(i) or (ii) of this section to be co-permittees under an individual permit.

(3) Co-permittee alternative. If the regulated small MS4 is in the same urbanized area as a medium or large MS4 with an NPDES storm water permit and that other MS4 is willing to have the small MS4 operator participate in its storm water program, the parties may jointly seek a modification of the other MS4 permit to include the small MS4 operator as a limited co-permittee. As a limited co-permittee, the small MS4 operator will be responsible for compliance with the permit's conditions applicable to its jurisdiction. If the small MS4 operator chooses this option it must comply with the permit application requirements of § 122.26, rather than the requirements of § 122.33(b)(2)(i). The small MS4 operator does not need to comply with the specific application requirements of § 122.26(d)(1)(iii) and (iv) and (d)(2)(iii) (discharge characterization). The small MS4 operator may satisfy the requirements in § 122.26 (d)(1)(v) and (d)(2)(iv) (identification of a management program) by referring to the other MS4's storm water management program.

(4) Guidance for paragraph (b)(3) of this section. In referencing the other MS4 operator's storm water management program, the small MS4 operator should briefly describe how the existing program will address discharges from the small MS4 or would need to be supplemented in order to adequately address the discharges. The small MS4 operator should also explain its role in coordinating storm water pollutant control activities in the MS4, and detail the resources available to the small MS4 operator to accomplish the program.

(c) If the regulated small MS4 is designated under § 122.32(a)(2), the small MS4 operator must apply for coverage under an NPDES permit, or apply for a modification of an existing NPDES permit under paragraph (b)(3) of this section, within 180 days of notice of such designation, unless the NPDES permitting authority grants a later date.

History

[64 FR 68722, 68843, Dec. 8, 1999; 81 FR 89320, 89348, Dec. 9, 2016]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68843, Dec. 8, 1999, added this section, effective Feb. 7, 2000; 81 FR 89320, 89348, Dec. 9, 2016, revised this section, effective Jan. 9, 2017.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges
Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview
Governments : Local Governments : Licenses
Governments : Public Improvements : Sanitation & Water

Case Notes Applicable to Entire Part

Part Note

Environmental Law : Water Quality : General Overview

Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir Jan. 14, 2003).

40 CFR 122.34

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.34 Permit requirements for regulated small MS4 permits.

(a) General requirements. For any permit issued to a regulated small MS4, the NPDES permitting authority must include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. Terms and conditions that satisfy the requirements of this section must be expressed in clear, specific, and measurable terms. Such terms and conditions may include narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions).

(1) For permits providing coverage to any small MS4s for the first time, the NPDES permitting authority may specify a time period of up to 5 years from the date of permit issuance for the permittee to fully comply with the conditions of the permit and to implement necessary BMPs.

(2) For each successive permit, the NPDES permitting authority must include terms and conditions that meet the requirements of this section based on its evaluation of the current permit requirements, record of permittee compliance and program implementation progress, current water quality conditions, and other relevant information.

(b) Minimum control measures. The permit must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures in paragraphs (b)(1) through (6) of this section during the permit term. The permit must also require a written storm water management program document or documents that, at a minimum, describes in detail how the permittee intends to comply with the permit's requirements for each minimum control measure.

(1) Public education and outreach on storm water impacts.

(i) The permit must identify the minimum elements and require implementation of a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: The permittee may use storm water educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The public education program should inform individuals and households about the steps they can take to reduce

storm water pollution, such as ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes. EPA recommends that the program inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups. EPA recommends that the permit require the permittee to tailor the public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups. In addition, EPA recommends that the permit require that some of the materials or outreach programs be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permit should encourage the permittee to tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children.

(2) Public involvement/participation.

(i) The permit must identify the minimum elements and require implementation of a public involvement/participation program that complies with State, Tribal, and local public notice requirements.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit include provisions addressing the need for the public to be included in developing, implementing, and reviewing the storm water management program and that the public participation process should make efforts to reach out and engage all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts. (Citizens should obtain approval where necessary for lawful access to monitoring sites.)

(3) Illicit discharge detection and elimination. (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to detect and eliminate illicit discharges (as defined at § 122.26(b)(2)) into the small MS4. At a minimum, the permit must require the permittee to:

(A) Develop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls;

(B) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions;

(C) Develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system; and

(D) Inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.

(ii) The permit must also require the permittee to address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if the permittee identifies them as a significant contributor of pollutants to the small MS4: Water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(b)(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from firefighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to waters of the United States).

(iii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit require the plan to detect and address illicit discharges include the following four components: Procedures for locating priority areas likely to have illicit discharges; procedures for tracing the source of an illicit discharge; procedures for removing the source of the discharge; and procedures for program evaluation and assessment. EPA recommends that the permit require the permittee to visually screen outfalls during dry weather and conduct field tests of selected pollutants as part of the procedures for locating priority areas. Illicit discharge education actions may include storm drain stenciling, a program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials.

(4) Construction site storm water runoff control. (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to reduce pollutants in any storm water runoff to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the Director waives requirements for storm water discharges associated with small construction activity in accordance with § 122.26(b)(15)(i), the permittee is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites. At a minimum, the permit must require the permittee to develop and implement:

(A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;

(B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(D) Procedures for site plan review which incorporate consideration of potential water quality impacts;

(E) Procedures for receipt and consideration of information submitted by the public, and

(F) Procedures for site inspection and enforcement of control measures.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: Examples of sanctions to ensure compliance include non-monetary penalties, fines, bonding requirements and/or permit denials for non-compliance. EPA recommends that the procedures for site plan review include the review of individual pre-construction site plans to ensure consistency with local sediment and erosion control requirements. Procedures for site inspections and enforcement of control measures could include steps to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and receiving water quality. EPA also recommends that the permit require the permittee to provide appropriate educational and training measures for construction site operators, and require storm water pollution prevention plans for construction sites within the MS4's jurisdiction that discharge into the system. See § 122.44(s) (NPDES permitting authorities' option to incorporate qualifying State, Tribal and local erosion and sediment control programs into NPDES permits for storm water discharges from construction sites). Also see § 122.35(b) (The NPDES permitting authority may recognize that another government entity, including the NPDES permitting authority, may be responsible for implementing one or more of the minimum measures on the permittee's behalf).

(5) Post-construction storm water management in new development and redevelopment. (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the small MS4. The permit must ensure that controls are in place that would prevent or minimize water quality impacts. At a minimum, the permit must require the permittee to:

(A) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community;

(B) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; and

(C) Ensure adequate long-term operation and maintenance of BMPs.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: If water quality impacts are considered from the beginning stages of a project, new development and potentially redevelopment provide more opportunities for water quality protection. EPA recommends that the permit ensure that BMPs included in the program: Be appropriate for the local community; minimize water quality impacts; and attempt to maintain pre-development runoff conditions. EPA encourages the permittee to participate in locally-based watershed planning efforts which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, EPA recommends that the permit require the permittee to adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures. In developing the program, the permit should also require the permittee to assess existing ordinances, policies, programs and studies that address storm water runoff quality. In addition to assessing these existing documents and programs, the permit should require the permittee to provide opportunities to the public to participate in the development of the program. Non-structural BMPs are preventative actions that involve management and source controls such as: Policies and ordinances that provide requirements and standards to direct growth to identified areas, protect sensitive areas such as wetlands and riparian areas, maintain and/or increase open space (including a dedicated funding source for open space acquisition), provide buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; policies or ordinances that encourage infill development in higher density urban areas, and areas with existing infrastructure; education programs for developers and the public about project designs that minimize water quality impacts; and measures such as minimization of percent impervious area after development and minimization of directly connected impervious areas. Structural BMPs include: Storage practices such as wet ponds and extended-detention outlet structures; filtration practices such as grassed swales, sand filters and filter strips; and infiltration practices such as infiltration basins and infiltration trenches. EPA recommends that the permit ensure the appropriate implementation of the structural BMPs by considering some or all of the following: Pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with design, construction or operation and maintenance. Storm water technologies are constantly being improved, and EPA recommends that the permit requirements be responsive to these changes, developments or improvements in control technologies.

(6) Pollution prevention/good housekeeping for municipal operations.

(i) The permit must identify the minimum elements and require the development and implementation of an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from

municipal operations. Using training materials that are available from EPA, the State, Tribe, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit address the following: Maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas operated by the permittee, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices. Operation and maintenance should be an integral component of all storm water management programs. This measure is intended to improve the efficiency of these programs and require new programs where necessary. Properly developed and implemented operation and maintenance programs reduce the risk of water quality problems.

(c) Other applicable requirements. As appropriate, the permit will include:

(1) More stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the Director determines such terms and conditions are needed to protect water quality.

(2) Other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the provisions of §§ 122.41 through 122.49.

(d) Evaluation and assessment requirements --(1) Evaluation. The permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program, and the status of achieving the measurable requirements in the permit.

Note to paragraph (d)(1): The NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed. Participation in a group monitoring program is encouraged.

(2) Recordkeeping. The permit must require that the permittee keep records required by the NPDES permit for at least 3 years and submit such records to the NPDES permitting authority when specifically asked to do so. The permit must require the permittee to make records, including a written description of the storm water management program, available to the public at reasonable times during regular business hours (see § 122.7 for confidentiality provision).

(The permittee may assess a reasonable charge for copying. The permit may allow the permittee to require a member of the public to provide advance notice.)

(3) Reporting. Unless the permittee is relying on another entity to satisfy its NPDES permit obligations under § 122.35(a), the permittee must submit annual reports to the NPDES permitting authority for its first permit term. For subsequent permit terms, the permittee must submit reports in year two and four unless the NPDES permitting authority requires more frequent reports. As of December 21, 2020 all reports submitted in compliance with this section must be submitted electronically by the owner, operator, or the duly authorized representative of the small MS4 to the NPDES permitting authority or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the owner, operator, or the duly authorized representative of the small MS4 may be required to report electronically if specified by a particular permit or if required to do so by state law. The report must include:

(i) The status of compliance with permit terms and conditions;

(ii) Results of information collected and analyzed, including monitoring data, if any, during the reporting period;

(iii)A summary of the storm water activities the permittee proposes to undertake to comply with the permit during the next reporting cycle;

(iv) Any changes made during the reporting period to the permittee's storm water management program; and

(v) Notice that the permittee is relying on another governmental entity to satisfy some of the permit obligations (if applicable), consistent with § 122.35(a).

(e) Qualifying local program. If an existing qualifying local program requires the permittee to implement one or more of the minimum control measures of paragraph (b) of this section, the NPDES permitting authority may include conditions in the NPDES permit that direct the permittee to follow that qualifying program's requirements rather than the requirements of paragraph (b). A qualifying local program is a local, State or Tribal municipal storm water management program that imposes, at a minimum, the relevant requirements of paragraph (b).

History

[64 FR 68722, 68843, Dec. 8, 1999; 80 FR 64064, 64097, Oct. 22, 2015; 81 FR 89320, 89349, Dec. 9, 2016]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68843, Dec. 8, 1999, added this section, effective Feb. 7, 2000; 80 FR 64064, 64097, Oct. 22, 2015, revised paragraph (g)(3) introductory text, effective Dec. 21, 2015; 81 FR 89320, 89349, Dec. 9, 2016, revised this section, effective Jan. 9, 2017.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Speech : Political Speech
Environmental Law : Natural Resources & Public Lands : Wetlands Management
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Dredged or Fill Material : Alternatives Analysis
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges
Governments : Legislation : Interpretation
Governments : Local Governments : Licenses
Governments : Local Governments : Police Power
Governments : Public Improvements : General Overview
Governments : Public Improvements : Sanitation & Water
Real Property Law : Torts : General Overview
Real Property Law : Water Rights : Riparian Rights

Case Notes Applicable to Entire Part

Part Note

Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Speech : Political Speech

Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir Jan. 14, 2003).

Overview: *To comply with the CWA, aspects of the issuance of notices of intent in an EPA final administrative rule mandating that discharges from certain storm sewer systems and construction sites be subject to certain permitting requirements were remanded.*

40 CFR 122.35

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.35 May the operator of a regulated small MS4 share the responsibility to implement the minimum control measures with other entities?

(a) The permittee may rely on another entity to satisfy its NPDES permit obligations to implement a minimum control measure if:

(1) The other entity, in fact, implements the control measure;

(2) The particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and

(3) The other entity agrees to implement the control measure on the permittee's behalf. In the reports, the permittee must submit under § 122.34(d)(3), the permittee must also specify that it is relying on another entity to satisfy some of the permit obligations. If the permittee is relying on another governmental entity regulated under section 122 to satisfy all of the permit obligations, including the obligation to file periodic reports required by § 122.34(d)(3), the permittee must note that fact in its NOI, but the permittee is not required to file the periodic reports. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure (or component thereof). Therefore, EPA encourages the permittee to enter into a legally binding agreement with that entity if the permittee wants to minimize any uncertainty about compliance with the permit.

(b) In some cases, the NPDES permitting authority may recognize, either in your individual NPDES permit or in an NPDES general permit, that another governmental entity is responsible under an NPDES permit for implementing one or more of the minimum control measures for your small MS4 or that the permitting authority itself is responsible. Where the permitting authority does so, you are not required to include such minimum control measure(s) in your storm water management program. (For example, if a State or Tribe is subject to an NPDES permit that requires it to administer a program to control construction site runoff at the State or Tribal level and that program satisfies all of the requirements of § 122.34(b)(4), you could avoid responsibility for the construction measure, but would be responsible for the remaining minimum control measures.) Your permit may be reopened and modified to include the requirement to implement a minimum control measure if the entity fails to implement it.

History

[64 FR 68722, 68846, Dec. 8, 1999; 81 FR 89320, 89352, Dec. 9, 2016]

Annotations

Notes

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64 FR 68722, 68846, Dec. 8, 1999, added this section, effective Feb. 7, 2000; 81 FR 89320, 89352, Dec. 9, 2016, amended this section, effective Jan. 9, 2017.]

RESEARCH GUIDE Applicable to entire Part:Hierarchy Notes:Part Note

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part

Part Note

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010; 77 FR 42181, July 18, 2012.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Decision, see: 81 FR 43492, July 5, 2016.]

40 CFR 122.36

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.36 As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?

NPDES permits are federally enforceable. Violators may be subject to the enforcement actions and penalties described in Clean Water Act sections 309 (b), (c), and (g) and 505, or under applicable State, Tribal, or local law. Compliance with a permit issued pursuant to section 402 of the Clean Water Act is deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for toxic pollutants injurious to human health. If you are covered as a co-permittee under an individual permit or under a general permit by means of a joint Notice of Intent you remain subject to the enforcement actions and penalties for the failure to comply with the terms of the permit in your jurisdiction except as set forth in § 122.35(b).

History

[64 FR 68722, 68847, Dec. 8, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68847, Dec. 8, 1999, added this section, effective Feb. 7, 2000.]

RESEARCH GUIDE Applicable to entire Part:Hierarchy Notes:Part Note

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

40 CFR 122.37

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART B -- PERMIT APPLICATION AND SPECIAL NPDES PROGRAM REQUIREMENTS

§ 122.37 Will the small MS4 storm water program regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter change in the future?

EPA will evaluate the small MS4 regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter after December 10, 2012 and make any necessary revisions. (EPA intends to conduct an enhanced research effort and compile a comprehensive evaluation of the NPDES MS4 storm water program. EPA will re-evaluate the regulations based on data from the NPDES MS4 storm water program, from research on receiving water impacts from storm water, and the effectiveness of best management practices (BMPs), as well as other relevant information sources.)

History

[64 FR 68722, 68847, Dec. 8, 1999]

Annotations

Notes

[EFFECTIVE DATE NOTE:

64 FR 68722, 68847, Dec. 8, 1999, added this section, effective Feb. 7, 2000.]

RESEARCH GUIDE Applicable to entire Part:Hierarchy Notes:Part Note

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

40 CFR 124.12

This document is current through the January 22, 2019 issue of the Federal Register. with the exception of the amendment appearing at 84 FR 138, January 18, 2019. Title 3 is current through January 11, 2019.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 124 -- PROCEDURES FOR DECISIONMAKING > SUBPART A -- GENERAL PROGRAM REQUIREMENTS

§ 124.12 Public hearings.

(a)(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).) (1) The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s);

(2) The Director may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision;

(3) For RCRA permits only, (i) the Director shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice under § 124.10(b)(1); (ii) whenever possible the Director shall schedule a hearing under this section at a location convenient to the nearest population center to the proposed facility;

(4) Public notice of the hearing shall be given as specified in § 124.10.

(b) Whenever a public hearing will be held and EPA is the permitting authority, the Regional Administrator shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

(c) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under § 124.10 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d)A tape recording or written transcript of the hearing shall be made available to the public.

(2) For initial RCRA permits for existing HWM facilities, the Regional Administrator shall have the discretion to provide a hearing under the procedures in subpart F. The permit applicant may request such a hearing pursuant to § 124.114 no one or more issues, if the applicant explains in his request why he or she believes those issues:

(i) Are genuine issues to material fact; and (ii) determine the outcome of one or more contested permit conditions identified as such in the applicant's request, that would require extensive changes to the facility ("contested major permit conditions"). If the Regional Administrator decides to deny the request, he or she shall send to the applicant a brief

written statement of his or her reasons for concluding that no such determinative issues have been presented for resolution in such a hearing.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251 et seq.; Clean Air Act, 42 U.S.C. 7401 et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 17718, Apr. 24, 1984; 50 FR 6941, Feb. 19, 1985; 54 FR 258, Jan. 4, 1989; 65 FR 30886, 30911, May 15, 2000]

Annotations

Notes

[EFFECTIVE DATE NOTE:

65 FR 30886, 30911, May 15, 2000, removed paragraph (e), effective June 14, 2000.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Contracts Law : Negotiable Instruments : Negotiation : Indorsement : Qualified Indorsements
Environmental Law : Environmental Justice
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Case Notes Applicable to Entire Part

Part Note

Contracts Law : Negotiable Instruments : Negotiation : Indorsement : Qualified Indorsements

Rhode Island v. United States EPA, 378 F.3d 19, 2004 U.S. App. LEXIS 15929 (1st Cir Aug. 3, 2004).

TAB 3

Cal Evid Code § 452

Deering's California Codes are current through all 1016 chapters of the 2018 Regular Session and the November 6, 2018 Ballot Measures.

Deering's California Codes Annotated > EVIDENCE CODE > Division 4 Judicial Notice

§ 452. Matters which may be judicially noticed

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

Deering's California Codes Annotated
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End of Document

Cal Gov Code § 11515

Deering's California Codes are current through all 1016 chapters of the 2018 Regular Session and the November 6, 2018 Ballot Measures.

Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 3 Executive Department > Part 1 State Departments and Agencies > Chapter 5 Administrative Adjudication: Formal Hearing

§ 11515. Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

History

Added Stats 1945 ch 867 § 1.

Deering's California Codes Annotated
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End of Document

AB-1180 Los Angeles County Flood Control District: taxes, fees, and charges. (2017-2018)

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Date Published: 10/09/2017 09:00 PM

Assembly Bill No. 1180

CHAPTER 617

An act to amend Section 2 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District.

[Approved by Governor October 09, 2017. Filed with Secretary of State October 09, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1180, Holden. Los Angeles County Flood Control District: taxes, fees, and charges.

Existing law, the Los Angeles County Flood Control Act, establishes the Los Angeles County Flood Control District and authorizes the district to control and conserve the flood, storm, and other wastewater of the district. Existing law authorizes the district to impose a fee or charge, in compliance with Article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and providing services to improve water quality and reduce stormwater and urban runoff pollution in the district in accordance with specified criteria. The act requires that any fees imposed be levied and collected together with taxes for county purposes, and the revenues paid into the county treasury to the credit of the district, and requires the county board of supervisors to expend the funds to pay for those costs and expenses, to be allocated as prescribed.

This bill would authorize the district to levy a tax, in compliance with the applicable provisions of Article XIII C of the California Constitution, or impose a fee or charge, in compliance with the applicable provisions of Article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and programs to increase stormwater capture and reduce stormwater and urban runoff pollution in the district, and would specify that projects funded by the revenues from the tax, fee, or charge may include projects providing multiple benefits that increase water supply, improve water quality, and, where appropriate, provide community enhancements, as prescribed. The bill would revise certain provisions prescribing the allocation of those revenues derived from any tax, fee, or charge imposed pursuant to the above-described provisions for those water projects and programs.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), as amended by Section 2 of Chapter 212 of the Statutes of 2012, is amended to read:

Sec. 2. The objects and purposes of this act are to provide for the control and conservation of the flood, storm and other waste waters of said district, and to conserve these waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within the district, or to save or conserve in any manner, all or any of these waters, and to protect from damage from flood or storm waters, the harbors,

waterways, public highways and property in the district, and to provide for public use of navigable waterways under the district's control that are suitable for recreational and educational purposes, when these purposes are not inconsistent with the use thereof by the district for flood control and water conservation.

The Los Angeles County Flood Control District is hereby declared to be a body corporate and politic, and has all the following powers:

1. To have perpetual succession.

2. To sue and be sued in the name of the district in all actions and proceedings in all courts and tribunals of competent jurisdiction.

3. To adopt a seal and alter it at pleasure.

4. To take by grant, purchase, gift, devise or lease, hold, use, enjoy, and to lease or dispose of real or personal property of every kind within or without the district necessary to the full exercise of its power.

5. To acquire or contract to acquire lands, rights-of-way, easements, privileges and property of every kind, and construct, maintain and operate any and all works or improvements within or without the district necessary or proper to carry out any of the objects or purposes of this act, and to complete, extend, add to, repair or otherwise improve any works or improvements acquired by it as herein authorized. Construction or improvement of existing facilities may involve landscaping and other aesthetic treatment in order that the facility will be compatible with existing or planned development in the area of improvement.

6. To exercise the right of eminent domain, either within or without the district, to take any property necessary to carry out any of the objects or purposes of this act.

7. To incur indebtedness, and to issue bonds in the manner herein provided.

7a. To borrow money from the United States of America, any agency or department thereof, or from any nonprofit corporation, organized under the laws of this state, to which the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of an act of Congress, entitled "Reconstruction Finance Corporation Act," or other agency, or department, of the United States government, has authorized, or shall hereafter authorize, a loan to enable nonprofit corporation to lend money to the Los Angeles County Flood Control District, for any flood control work authorized under this act, and to repay the same, in annual installments, over a period of not to exceed twenty (20) years, with interest at a rate of not to exceed four and one-fourth per centum (41/4%) per annum, payable semiannually, and, without the necessity of an election when authorized by resolution of the board of supervisors, as evidences of that indebtedness, the district is hereby authorized to execute and deliver a note, or a series of notes, or bonds, or other evidences of indebtedness, signed by the chairperson of the board of supervisors of the district, which notes, bonds, or other evidences of indebtedness, shall be negotiable instruments if so declared in the resolution of the board of supervisors providing for their issuance, and notes, bonds, or other evidences of indebtedness, may have interest coupons attached to evidence interest payments, signed by the facsimile signature of the chairperson of the board. All applications for these loans shall specify the particular flood control work or projects for which the funds will be expended, and when received, the money shall be deposited in a special fund, and shall be expended for those purposes only which are described and referred to in the applications. If a surplus remains after the completion of the work, the surplus shall be applied to the payment of the note, notes, bonds, or other evidences of indebtedness, executed as aforesaid, for the loan including interest coupons. The board of supervisors shall annually levy a tax upon the taxable real property of the district, clearly sufficient to pay the interest and installments of principal, as the same shall become due and payable, under any loan made pursuant to the authority of this section, and to create and maintain a reserve fund to assure the prompt payment thereof, as may be provided by resolution of the board of supervisors. However, the amount of taxes levied in any year, pursuant to this subsection, shall, pro tanto, reduce the authority of the board of supervisors, during any year, to levy taxes under Section 14 of this act, but this proviso shall not be a limitation upon the power and duty to levy and collect taxes under this subsection. Notwithstanding any other provisions of law, interest earned on funds representing the proceeds of bonds of the district shall be deposited and retained in the reserve fund of the district to meet the principal and interest falling due on these bonds.

Notwithstanding anything in this subsection to the contrary, the total amount the district may borrow under the authority of any or all of the provisions of this subsection is limited to and shall not exceed in the aggregate the sum of four million five hundred thousand dollars ($4,500,000).

7b. The power granted in the next preceding subsection is hereby extended to authorize the issuance and sale of bonds or other evidences of indebtedness of the district to the County of Los Angeles and the purchase thereof by the county in accordance with "An act authorizing the investment and reinvestment and disposition of any surplus moneys in the treasury of any county, city and county, incorporated city or town or municipal utility district or flood control district," approved April 23, 1913, as amended; all subject to the provisions and limitations of the next preceding subsection relative to the disposition and use of funds, interest rate, period of repayment, tax rate and mode of issuance. The total amount of bonds or other evidence of indebtedness, in the aggregate, which the district may issue and sell under the authority of subsection 7a and of this subsection is limited to and shall not exceed four million five hundred thousand dollars ($4,500,000).

8. To cause taxes to be levied and collected for the purpose of paying any obligation of the district in the manner provided in this section.

8a. To levy a tax, in compliance with the applicable provisions of Article XIII C of the California Constitution, or impose a fee or charge, in compliance with the applicable provisions of Article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and programs to increase stormwater capture and reduce stormwater and urban runoff pollution in the district in accordance with criteria established by the ordinance adopted pursuant to subsection 8c. Projects and programs funded by the revenues from the tax, fee, or charge may include projects providing multiple benefits that increase water supply, improve water quality, and, where appropriate, provide community enhancements such as the greening of schools, parks, and wetlands, and increased public access to rivers, lakes, and streams. Any tax, fee, or charge that is levied or imposed pursuant to this subsection shall be levied and collected together with, and not separately from, taxes for county purposes, and the revenues derived from the tax, fee, or charge shall be paid into the county treasury to the credit of the district, and the board of supervisors shall expend these funds to pay for costs and expenses in accordance with this subsection.

8b. The district shall allocate the revenues derived from any tax, fee, or charge imposed pursuant to subsection 8a as follows:

(A) Ten percent shall be allocated to the district for implementation and administration of projects and programs described in subsection 8a, and for payment of the costs incurred in connection with the levy and collection of the tax, fee, or charge and the distribution of the funds generated by imposition of the tax, fee, or charge, in accordance with the procedures established by the ordinance adopted pursuant to subsection 8c.

(B) Forty percent shall be allocated to cities within the boundaries of the district and to the County of Los Angeles, in the same proportion as the amount of revenues collected within each jurisdiction and within the unincorporated territories, to be expended by those cities within the cities' respective jurisdictions and by the County of Los Angeles within the unincorporated territories that are within the boundaries of the district, for the implementation, operation and maintenance, and administration of projects and programs described in subsection 8a, in accordance with the procedures established by the ordinance adopted pursuant to subsection 8c.

(C) Fifty percent shall be allocated to pay for the implementation, operation and maintenance, and administration of watershed-based projects and programs described in subsection 8a, including projects and programs identified in regional plans such as stormwater resource plans developed in accordance with Part 2.3 (commencing with Section 10560) of Division 6 of the Water Code, watershed management programs developed pursuant to waste discharge requirements for municipal separate storm sewer system (MS4) discharges within the coastal watersheds of the County of Los Angeles, issued by the Los Angeles Regional Water Quality Control Board, and other regional water management plans, as appropriate, in accordance with the procedures established by the ordinance adopted pursuant to subsection 8c.

8c. The governing board of the district shall adopt an ordinance to establish criteria and procedures to implement the authority granted pursuant to subsections 8a and 8b.

9. To make contracts, and to employ for temporary services only, expert appraisers, consultants and technical advisers, and to do all acts necessary for the full exercise of all powers vested in the district, or any of the officers thereof, by this act.

10. To grant or otherwise convey to counties, cities and counties, cities or towns easements for street and highway purposes, over, along, upon, in, through, across or under any real property owned by the Los Angeles County Flood Control District.

11. To remove, carry away and dispose of any rubbish, trash, debris or other inconvenient matter that may be dislodged, transported, conveyed or carried by means of, through, in, or along the works and structures operated or maintained hereunder and deposited upon the property of the district or elsewhere.

12. To pay premiums on bonds of contractors required under any contract if the amount payable to the contractor exceeds five million dollars ($5,000,000); provided, that the specifications in these cases shall specifically so provide and state that the bidder shall not include in his or her bids the cost of furnishing the required bonds.

13. To lease, sell or dispose of any property (or any interest therein) whenever in the judgment of the board of supervisors of the property, or any interest therein or part thereof, is no longer required for the purposes of the district, or may be leased for any purpose without interfering with the use of the same for the purposes of the district, and to pay any compensation received therefor into the general fund of the district and use the same for the purposes of this act. However, nothing herein shall authorize the board of supervisors or other governing body of the district or any officer thereof to sell, lease or otherwise dispose of any water, water right, reservoir space or storage capacity or any interest or space therein except to public agencies for recreational purposes when the use is not inconsistent with the use thereof by the district for flood control and water conservation purposes; or except as provided by Section 17 of this act. However, the district may grant and convey to the United States of America, or to any federal agency authorized to accept and pay for the land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam or reservoir site, improved or constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed and deemed reasonable by the Secretary of War and the Chief of Engineers.

14. To provide, by agreement with other public agencies or private persons or entities or otherwise, for the recreational use of the lands, facilities, and works of the district which shall not interfere, or be inconsistent, with the primary use and purpose of the lands, facilities, and works by the district.

15. In addition to its other powers, the district shall have the power to preserve, enhance, and add recreational features to its properties and upon a finding by the board of supervisors that the acquisition is necessary for those purposes, to acquire, preserve, enhance, and add recreational features to lands or interests in lands contiguous to its properties, for the protection, preservation, and use of the scenic beauty and natural environment for the properties or the lands and to collect admission or use fees for the recreational features where deemed appropriate.

The district by or through its board of supervisors, or other board or officers at any time succeeding to the duties or functions of its board of supervisors, is hereby authorized and empowered to warrant and defend the title to all land and interests therein so conveyed to the United States of America or to any agency and its respective assigns; to covenant and agree to indemnify and keep indemnified and to hold and save harmless and exonerated the United States of America or any agency, to which lands or any interest therein are so conveyed by the district, from and against all demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any defect or defects whatsoever in the title to any land or interest in land so conveyed by the district; to reimburse and save harmless and exonerated the United States of America or any agency for any and all amounts, paid, and expenses incurred, in the compromise or settlement of any demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any claim to or defect or defects whatsoever in the title to any land or interests in land so conveyed by the district; to pay all just compensation, costs and expenses, which may be incurred in any condemnation proceeding deemed necessary by the United States of America or that agency, in order to perfect title to any land or interests in land, including without limitation all attorneys' fees, court costs and fees, costs of abstracts and other evidences of title, and all other costs, expenses or damages incurred or suffered by the United States of America or that agency; and consent is hereby given to the bringing of suit or other legal proceedings against the district by the United States of America or that agency, as the case may be, in the proper district court of the United States, upon any cause of action arising out of any conveyance, contract or covenant made or entered into by the district pursuant to the authority granted in this act, or to enforce any claims, damages, loss or expenses arising out of or resulting from any defect whatsoever in the title to the land or any interest therein or any claims of others in or to the land or interest therein.

AB-2554 Los Angeles County Flood Control District: fees and charges. (2009-2010)

SHARE THIS:

Assembly Bill No. 2554

CHAPTER 602

An act to amend Sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District.

[Approved by Governor September 30, 2010. Filed with Secretary of State September 30, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2554, Brownley. Los Angeles County Flood Control District: fees and charges.

Existing law, the Los Angeles County Flood Control Act, establishes the Los Angeles County Flood Control District and authorizes the district to control and conserve the flood, storm, and other wastewater of the district. The act declares the district to be a body corporate and politic, and to have various powers, including the power to cause taxes to be levied and collected for the purpose of paying any obligation of the district.

This bill would authorize the district to impose a fee or charge, in compliance with Article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and providing services to improve water quality and reduce stormwater and urban runoff pollution in the district in accordance with specified criteria. The bill would require that any fees imposed be levied and collected together with taxes for county purposes, and the revenues paid into the county treasury to the credit of the district. The bill would require the county board of supervisors to expend the funds to pay for those costs and expenses, to be allocated as prescribed.

The act authorizes the board of the district, subject to certain limitations, to do all acts or things necessary or useful for the promotion of the work or the control of the floodwater and stormwater of the district, to conserve those waters for beneficial and useful purposes, and to protect from damage from floodwater and stormwater, the harbors, waterways, public highways, and property of the district. One limitation upon the authority of the board of the district is that it is not authorized to raise money for the district by any method or system other than by issuing bonds, or the levying of a tax upon the assessed value of all the real property of the district, except from the sale and lease of its property.

This bill would instead provide that the board of the district is not authorized to raise money for the district by any method or system other than by issuing bonds, the levying of a tax, or the imposition of a fee or charge in compliance with Article XIII D of the California Constitution.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), as amended by Section 33 of Chapter 1276 of the Statutes of 1975, is amended to read:

Sec. 2. The objects and purposes of this act are to provide for the control and conservation of the flood, storm and other waste waters of said district, and to conserve these waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within the district, or to save or conserve in any manner, all or any of these waters, and to protect from damage from flood or storm waters, the harbors, waterways, public highways and property in the district.

The Los Angeles County Flood Control District is hereby declared to be a body corporate and politic, and has all the following powers:

1. To have perpetual succession.

2. To sue and be sued in the name of the district in all actions and proceedings in all courts and tribunals of competent jurisdiction.

3. To adopt a seal and alter it at pleasure.

4. To take by grant, purchase, gift, devise or lease, hold, use, enjoy, and to lease or dispose of real or personal property of every kind within or without the district necessary to the full exercise of its power.

5. To acquire or contract to acquire lands, rights-of-way, easements, privileges and property of every kind, and construct, maintain and operate any and all works or improvements within or without the district necessary or proper to carry out any of the objects or purposes of this act, and to complete, extend, add to, repair or otherwise improve any works or improvements acquired by it as herein authorized. Construction or improvement of existing facilities may involve landscaping and other aesthetic treatment in order that the facility will be compatible with existing or planned development in the area of improvement.

6. To exercise the right of eminent domain, either within or without the district, to take any property necessary to carry out any of the objects or purposes of this act.

7. To incur indebtedness, and to issue bonds in the manner herein provided.

7a. To borrow money from the United States of America, any agency or department thereof, or from any nonprofit corporation, organized under the laws of this state, to which the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of an act of Congress, entitled "Reconstruction Finance Corporation Act," or other agency, or department, of the United States government, has authorized, or shall hereafter authorize, a loan to enable nonprofit corporation to lend money to the Los Angeles County Flood Control District, for any flood control work authorized under this act, and to repay the same, in annual installments, over a period of not to exceed twenty (20) years, with interest at a rate of not to exceed four and one-fourth per centum (41/4%) per annum, payable semiannually, and, without the necessity of an election when authorized by resolution of the board of supervisors, as evidences of that indebtedness, the district is hereby authorized to execute and deliver a note, or a series of notes, or bonds, or other evidences of indebtedness, signed by the chairperson of the board of supervisors of the district, which notes, bonds, or other evidences of indebtedness, shall be negotiable instruments if so declared in the resolution of the board of supervisors providing for their issuance, and notes, bonds, or other evidences of indebtedness, may have interest coupons attached to evidence interest payments, signed by the facsimile signature of the chairperson of the board. All applications for these loans shall specify the particular flood control work or projects for which the funds will be expended, and when received, the money shall be deposited in a special fund, and shall be expended for those purposes only which are described and referred to in the applications. If a surplus remains after the completion of the work, the surplus shall be applied to the payment of the note, notes, bonds, or other evidences of indebtedness, executed as aforesaid, for the loan including interest coupons. The board of supervisors shall annually levy a tax upon the taxable real property of the district, clearly sufficient to pay the interest and installments of principal, as the same shall become due and payable, under any loan made pursuant to the authority of this section, and to create and maintain a reserve fund to assure the prompt payment thereof, as may be provided by resolution of the board of supervisors. However, the amount of taxes levied in any year, pursuant to this subsection, shall, pro tanto, reduce the authority of the board of supervisors, during any year, to levy taxes under Section 14 of this act, but this proviso shall not be a limitation upon the power and duty to levy and collect taxes under this subsection. Notwithstanding any other provisions of law, interest earned on funds representing the proceeds of bonds of the district shall be deposited and retained in the reserve fund of the district to meet the principal and interest falling due on these bonds.

Notwithstanding anything in this subsection to the contrary, the total amount the district may borrow under the authority of any or all of the provisions of this subsection is limited to and shall not exceed in the aggregate the sum of four million five hundred thousand dollars ($4,500,000).

7b. The power granted in the next preceding subsection is hereby extended to authorize the issuance and sale of bonds or other evidences of indebtedness of the district to the County of Los Angeles and the purchase thereof by the county in accordance with "An act authorizing the investment and reinvestment and disposition of any surplus moneys in the treasury of any county, city and county, incorporated city or town or municipal utility district or flood control district," approved April 23, 1913, as amended; all subject to the provisions and limitations of the next preceding subsection relative to the disposition and use of funds, interest rate, period of repayment, tax rate and mode of issuance. The total amount of bonds or other evidence of indebtedness, in the aggregate, which the district may issue and sell under the authority of subsection 7a and of this subsection is limited to and shall not exceed four million five hundred thousand dollars ($4,500,000).

8. To cause taxes to be levied and collected for the purpose of paying any obligation of the district in the manner provided in this section.

8a. To impose a fee or charge, in compliance with the applicable provisions of Article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and providing services to improve water quality and reduce stormwater and urban runoff pollution in the district in accordance with criteria established by the ordinance adopted pursuant to subsection 8c. Any fee that is imposed pursuant to this subsection shall be levied and collected together with, and not separately from, taxes for county purposes, and the revenues derived from the fees shall be paid into the county treasury to the credit of the district, and the board of supervisors shall expend these funds to pay for costs and expenses in accordance with this subsection.

8b. The district shall allocate the revenues derived from any fee or charge imposed pursuant to subsection 8a as follows:

(A) Ten percent shall be allocated to the district for implementation and administration of water quality programs, as determined by the district, including activities such as planning, water quality monitoring, and any other related activities, and for payment of the costs incurred in connection with the levy and collection of the fee and the distribution of the funds generated by imposition of the fee, as established by the ordinance adopted pursuant to subsection 8c.

(B) Forty percent shall be allocated to cities within the boundaries of the district and to the County of Los Angeles, in the same proportion as the amount of fees collected within each jurisdiction and within the unincorporated territories, to be expended by those cities within the cities' respective jurisdictions and by the County of Los Angeles within the unincorporated territories that are within the boundaries of the district, for water quality improvement programs, as established by the ordinance adopted pursuant to subsection 8c.

(C) Fifty percent shall be allocated to nine watershed authority groups that shall be authorized by the ordinance adopted pursuant to subsection 8c, in the same proportion as the amount of fees collected within each watershed, to implement collaborative water quality improvement plans or programs in the watersheds as established by the ordinance adopted pursuant to subsection 8c. Those nine watershed authority groups shall be established for the Ballona Creek, Dominguez Channel, Upper Los Angeles River, Lower Los Angeles River, Rio Hondo, Upper San Gabriel River, Lower San Gabriel River, Santa Clara River, and Santa Monica Bay watersheds. The watershed authority groups shall be established pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1 of the Government Code. The implementation of a collaborative water quality improvement plan or program by a watershed authority group shall require the consent of any watershed authority group member whose jurisdiction comprises more than 40 percent of the total land area in a watershed.

8c. The governing board of the district shall adopt an ordinance to implement the authority granted pursuant to subsections 8a and 8b.

9. To make contracts, and to employ for temporary services only, expert appraisers, consultants and technical advisers, and to do all acts necessary for the full exercise of all powers vested in the district, or any of the officers thereof, by this act.

10. To grant or otherwise convey to counties, cities and counties, cities or towns easements for street and highway purposes, over, along, upon, in, through, across or under any real property owned by the Los Angeles County Flood Control District.

11. To remove, carry away and dispose of any rubbish, trash, debris or other inconvenient matter that may be dislodged, transported, conveyed or carried by means of, through, in, or along the works and structures operated or maintained hereunder and deposited upon the property of the district or elsewhere.

12. To pay premiums on bonds of contractors required under any contract if the amount payable to the contractor exceeds five million dollars ($5,000,000); provided, that the specifications in these cases shall specifically so provide and state that the bidder shall not include in his or her bids the cost of furnishing the required bonds.

13. To lease, sell or dispose of any property (or any interest therein) whenever in the judgment of the board of supervisorsof the property, or any interest therein or part thereof, is no longer required for the purposes of the district, or may be leased for any purpose without interfering with the use of the same for the purposes of the district, and to pay any compensation received therefor into the general fund of the district and use the same for the purposes of this act. However, nothing herein shall authorize the board of supervisors or other governing body of the district or any officer thereof to sell, lease or otherwise dispose of any water, water right, reservoir space or storage capacity or any interest or space therein except to public agencies for recreational purposes when the use is not inconsistent with the use thereof by the district for flood control and water conservation purposes; or except as provided by Section 17 of this act. However, the district may grant and convey to the United States of America, or to any federal agency authorized to accept and pay for the land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam or reservoir site, improved or constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed and deemed reasonable by the Secretary of War and the Chief of Engineers.

14. To provide, by agreement with other public agencies or private persons or entities or otherwise, for the recreational use of the lands, facilities, and works of the district which shall not interfere, or be inconsistent, with the primary use and purpose of the lands, facilities, and works by the district.

15. In addition to its other powers, the district shall have the power to preserve, enhance, and add recreational features to its properties and upon a finding by the board of supervisors that the acquisition is necessary for those purposes, to acquire, preserve, enhance, and add recreational features to lands or interests in lands contiguous to its properties, for the protection, preservation, and use of the scenic beauty and natural environment for the properties or the lands and to collect admission or use fees for the recreational features where deemed appropriate.

The district by or through its board of supervisors, or other board or officers at any time succeeding to the duties or functions of its board of supervisors, is hereby authorized and empowered to warrant and defend the title to all land and interests therein so conveyed to the United States of America or to any agency and its respective assigns; to covenant and agree to indemnify and keep indemnified and to hold and save harmless and exonerated the United States of America or any agency, to which lands or any interest therein are so conveyed by the district, from and against all demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any defect or defects whatsoever in the title to any land or interest in land so conveyed by the district; to reimburse and save harmless and exonerated the United States of America or any agency for any and all amounts, paid, and expenses incurred, in the compromise or settlement of any demands, claims, liabilities, liens, actions, suits, charges, costs, loss, damages, expenses and attorneys' fees of whatsoever kind or nature, resulting from, arising out of or occasioned by any claim to or defect or defects whatsoever in the title to any land or interests in land so conveyed by the district; to pay all just compensation, costs and expenses, which may be incurred in any condemnation proceeding deemed necessary by the United States of America or that agency, in order to perfect title to any land or interests in land, including without limitation all attorneys' fees, court costs and fees, costs of abstracts and other evidences of title, and all other costs, expenses or damages incurred or suffered by the United States of America or that agency; and consent is hereby given to the bringing of suit or other legal proceedings against the district by the United States of America or that agency, as the case may be, in the proper district court of the United States, upon any cause of action arising out of any conveyance, contract or covenant made or entered into by the district pursuant to the authority granted in this act, or to enforce any claims, damages, loss or expenses arising out of or resulting from any defect whatsoever in the title to the land or any interest therein or any claims of others in or to the land or interest therein.

SEC. 2. Section 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), as amended by Section 6 of Chapter 1276 of the Statutes of 1975, is amended to read:

Sec. 16. (a) The board of supervisors of the district shall have power to make and enforce all needful rules and regulations for the administration and government of the district, and to perform all other acts necessary or proper to accomplish the purposes of this act.

(b) The board of supervisors shall have power to do all work and to construct and acquire all improvements necessary or useful for carrying out any of the purposes of this act; and the board of supervisors shall have power to acquire either within or without the boundaries of the district, by purchase, donation or by other lawful means in the name of the district, from private persons, corporations, reclamation districts, swampland districts, levee districts, protection districts, drainage districts, irrigation districts, or other public corporations or agencies or districts, all lands, rights-of-way, easements, property or materials necessary or useful for carrying out any of the purposes of this act; to make contracts to indemnify or compensate any owner of land or other property for any injury or damage necessarily caused by the exercise of the powers conferred by this act, or arising out of the use, taking or damage of any property, rights-of-way or easements, for any of these purposes; to compensate any reclamation district, protection district, drainage district, irrigation district or other district, public corporation or agency or district, for any right-of-way, easement or property taken over or acquired by the Los Angeles County Flood Control District as a part of its work of flood control or conservation or protection provided for in this act, and any reclamation district, protection district, drainage district, irrigation district or other district or public corporation or agency is hereby given power and authority to distribute compensation in any manner that may be now or hereafter allowed by law; to maintain actions to restrain the doing of any act or thing that may be injurious to carrying out any of the purposes of this act by the district, or that may interfere with the successful execution of that work, or for damages for injury thereto; to do any and all things necessary or incident to the powers hereby granted, or to carry out any of the objects and purposes of this act; to require, by appropriate legal proceedings, the owner or owners of any bridge, trestle, wire line, viaduct, embankment or other structure which shall be intersected, traversed or crossed by any channel, ditch, bed of any stream, waterway, conduit or canal, so to construct or alter the same as to offer a minimum of obstruction to the free flow of water through or along any channel, ditch, bed of any stream, waterway, conduit or canal, and whenever necessary in the case of existing works or structures, to require the removal or alteration thereof for that purpose. However, nothing in this act contained shall be deemed to authorize the district in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, alteration or destruction of any bridge, railroad, wire line, pipeline, facility or other structure unless just compensation therefor be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California.

The board of supervisors of the district is hereby vested with full power to do all other acts or things necessary or useful for the promotion of the work of the control of the floodwater and stormwater of the district, and to conserve those waters for beneficial and useful purposes, and to protect from damage from floodwater and stormwater, the harbors, waterways, public highways, and property in the district. However, this act does not authorize the district, or any person or persons, to divert the waters of any river, creek, stream, irrigation system, canal or ditch, from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, irrigation system, canal or ditch, or the waters thereof or therein, unless previous compensation be first ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses. This act does not affect the plenary power of any incorporated city, city and county, or town, or municipal or county water district, to provide for a water supply of that public corporation, or as affecting the absolute control of any properties of that public corporations necessary for the water supply, and this act does not vest any power of control over the properties in the Los Angeles County Flood Control District, or in any officer thereof, or in any person referred to in this act. This act does not authorize the board of supervisors to raise money for the district by any method or system other than that by the issuing of bonds, the levying of a tax, or the imposition of a fee or charge in compliance with Article XIII D of the California Constitution, in the manner in this act provided, except from the sale and lease of its property as provided in this act.

ARTICLE 9

MISCELLANEOUS

HISTORY: Added Stats 2016 ch 391 § 1 (SB 37), effective January 1, 2017.

§ 901. Conflict with Sustainable Groundwater Management Act

In the event of any conflict between the Kings River East Groundwater Sustainability Agency Act and the provisions of the Sustainable Groundwater Management Act (Part 2.74 (commencing with Section 10720) of Division 6 of the Water Code), the provisions of the Sustainable Groundwater Management Act shall prevail.

HISTORY:
Added Stats 2016 ch 391 § 1 (SB 37), effective January 1, 2017.

ACT 420

LAKE COUNTY WATERSHED PROTECTION DISTRICT ACT (1951 CH 1544)

§ 13.2. Collection of benefit assessments

Notwithstanding any other provision of law, benefit assessments levied pursuant to Section 13.1 or any other provision of this act may be collected by the county tax collector by way of the tax bills of the county. Any assessments so collected shall appear as a separate item on the tax bill, shall be collected at the same time and in the same manner as county property taxes are collected, and shall be subject to the same penalties and the same procedure and sale in case of delinquency as provided for such taxes. The county may deduct from the revenue so collected for the district an appropriate amount for the billing and collection services rendered to the district.

HISTORY:
Added Stats 1981 ch 1123 § 1.

ACT 470

LOS ANGELES COUNTY FLOOD CONTROL ACT (1915 CH 755)

AN ACT to create a flood control district to be called "Los Angeles county flood control district"; to provide for the control and conservation of flood, storm and other waste waters, and for the protection of harbors, waterways, public highways and property in said district from damage from such waters, and for the construction of works and the acquisition of property therefor; to authorize the incurring of indebtedness, and the voting, issuing and selling of bonds, and the levying and collecting of taxes by said district; to provide for the govern-

provisions of this subsection is limited to and shall not exceed in 1 aggregate the sum of four million five hundred thousand doll ($4,500,000).

7b. The power granted in the next preceding subsection is hereby tended to authorize the issuance and sale of bonds or other evidences indebtedness of the district to the County of Los Angeles and the purch thereof by the county in accordance with "An act authorizing the investm and reinvestment and disposition of any surplus moneys in the treasury any county, city and county, incorporated city or town or municipal util district or flood control district," approved April 23, 1913, as amended; subject to the provisions and limitations of the next preceding subsect relative to the disposition and use of funds, interest rate, period of rep ment, tax rate and mode of issuance. The total amount of bonds or ot evidence of indebtedness, in the aggregate, which the district may issue a sell under the authority of subsection 7a and of this subsection is limited and shall not exceed four million five hundred thousand dollars ($4,500,00

8. To cause taxes to be levied and collected for the purpose of paying a obligation of the district in the manner provided in this section.

8a. To levy a tax, in compliance with the applicable provisions of Arti XIII C of the California Constitution, or impose a fee or charge, in com ance with the applicable provisions of Article XIII D of the Califor Constitution, to pay the costs and expenses of carrying out projects a programs to increase stormwater capture and reduce stormwater and urb runoff pollution in the district in accordance with criteria established by t ordinance adopted pursuant to subsection 8c. Projects and programs fund by the revenues from the tax, fee, or charge may include projects providi multiple benefits that increase water supply, improve water quality, a where appropriate, provide community enhancements such as the greeni of schools, parks, and wetlands, and increased public access to rivers, lak and streams. Any tax, fee, or charge that is levied or imposed pursuant this subsection shall be levied and collected together with, and not se rately from, taxes for county purposes, and the revenues derived from t tax, fee, or charge shall be paid into the county treasury to the credit of t district, and the board of supervisors shall expend these funds to pay costs and expenses in accordance with this subsection.

8b. The district shall allocate the revenues derived from any tax, fee, charge imposed pursuant to subsection 8a as follows:

(A) Ten percent shall be allocated to the district for implementation a administration of projects and programs, described in subsection 8a, a for payment of the costs incurred in connection with the levy and collecti of the tax, fee, or charge and the distribution of the funds generated imposition of the tax, fee, or charge, in accordance with the procedu established by the ordinance adopted pursuant to subsection 8c.

(B) Forty percent shall be allocated to cities within the boundaries the district and to the County of Los Angeles, in the same proportion as t amount of revenues collected within each jurisdiction and within t

TAB 4

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: 10-TC-12 Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4; Filed on June 30, 2011; By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants; *Consolidated with* 12-TC-01 Filed on February 28, 2013; California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28; By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.	Case Nos.: 10-TC-12 and 12-TC-01 *Water Conservation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2014*) (*Served December 12, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

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 sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.[1]

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/30/2011	Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.[2]
10/07/2011	Department of Finance (Finance) requested an extension of time to file comments, which was approved.

[1] See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

[2] Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011	Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.
02/01/2012	DWR requested an extension of time to file comments, which was approved.
03/30/2012	DWR requested an extension of time to file comments, which was approved.
05/30/2012	DWR requested an extension of time to file comments, which was approved.
08/02/2012	DWR requested an extension of time to file comments, which was approved.
10/02/2012	DWR requested an extension of time to file comments, which was approved.
12/03/2012	DWR requested an extension of time to file comments, which was approved.
12/07/2012	Finance requested an extension of time to file comments, which was approved.
02/04/2013	DWR requested an extension of time to file comments, which was approved.
02/06/2013	Finance requested an extension of time to file comments, which was approved.
02/28/2013	Richvale and Biggs filed test claim 12-TC-01 with the Commission.[3]
03/06/2013	The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation.*
03/29/2013	DWR requested an extension of time to file comments, which was approved.
06/07/2013	Finance submitted written comments on the consolidated test claims.[4]
06/07/2013	DWR submitted written comments on the consolidated test claims.[5]
07/09/2013	Claimants requested an extension of time to file rebuttal comments, which was approved.
08/07/2013	Claimants filed rebuttal comments.[6]
08/22/2013	Commission staff issued a request for additional information regarding the eligibility status of the claimants.[7]
09/19/2013	Finance submitted comments in response to staff's request.[8]
09/20/2013	The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.
09/23/2013	DWR submitted comments in response to staff's request.[9]

[3] Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

[4] Exhibit C, Finance Comments on Consolidated Test Claims.

[5] Exhibit D, DWR Comments on Consolidated Test Claims.

[6] Exhibit E, Claimant Rebuttal Comments.

[7] Exhibit F, Request for Additional Information.

[8] Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013	The claimants submitted comments in response to staff's request.[10]
10/07/2013	SCO submitted comments in response to staff's request.[11]
11/12/2013	Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.[12]
11/22/2013	Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.[13]
11/25/2013	The executive director issued notice that the appeal would be heard on March 28, 2014.[14]
01/13/2014	Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.[15]
01/13/2014	Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.[16]
01/15/2014	Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.[17]
07/31/2014	Commission staff issued a draft proposed statement of decision.[18]
08/13/2014	South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

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[9] Exhibit H, DWR Response to Commission Request for Comments.

[10] Exhibit I, Claimant Response to Commission Request for Comments.

[11] Exhibit J, SCO Response to Commission Request for Comments.

[12] Exhibit K, Notice of Pending Dismissal.

[13] Exhibit L, Appeal of Executive Director's Decision.

[14] Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

[15] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

[16] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[17] Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

[18] Exhibit Q, Draft Proposed Decision.

08/14/2014	Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
10/16/2014	Claimant filed comments on the draft proposed decision.[19]
10/17/2014	California Special Districts Association (CSDA) filed comments on the draft proposed decision.[20]
10/17/2014	Environmental Law Foundation (ELF)filed comments on the draft proposed decision.[21]
10/17/2014	DWR filed comments on the draft proposed decision.[22]
10/22/2014	Northern California Water Association (NCWA) filed late comments on the draft proposed decision.[23]
11/07/2014	Claimants filed late comments.[24]

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.[25] In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.[26] Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

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[19] Exhibit R, Claimant Comments on Draft Proposed Decision.

[20] Exhibit S, CSDA Comments on Draft Proposed Decision.

[21] Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

[22] Exhibit U, DWR Comments on Draft Proposed Decision.

[23] Exhibit V, NCWA Comments on Draft Proposed Decision.

[24] Exhibit W, Claimants Late Rebuttal Comments.

[25] Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[26] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.[27] This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).[28] An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;[29] and a report on the supplier's progress in meeting urban water use targets.[30]

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.[31] In addition, the Act requires agricultural water suppliers (with specified exceptions)[32] to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),[33] describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.[34]

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;[35] and to make the proposed plan available for

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[27] Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[28] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[29] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[30] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[31] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[32] See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

[33] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[34] Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[35] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.[36] An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP;[37] and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.[38]

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,[39] which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require "that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Moreover, article X, section 2 provides that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"[40] Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

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[36] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[37] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[38] Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[39] Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

[40] Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.[41]
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs. [42]
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.[43]
- Water Code section 375(b) provides that public water suppliers may encourage conservation through "rate structure design." The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state's water policy and that water conservation pricing is a best management practice.[44]
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier's general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.[45]
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.[46]

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

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[41] Statutes 1976, chapter 709, p. 1725, section 1.

[42] Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

[43] Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

[44] Statutes 1993, chapter 313, section 1.

[45] Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

[46] Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.[47] They have general authority to fix and collect charges for any service of the district.[48]
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.[49]
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.[50]

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.[51] This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.[52] The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level."[53] The Legislature declared as state policy that:

> (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
>
> (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

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[47] Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

[48] Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

[49] Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

[50] Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

[51] Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

[52] Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

[53] Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.[54]

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.[55]

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.[56] Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in California," may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.[57]

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a "catastrophic interruption of water supplies," such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.[58]

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

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[54] Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[55] Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

[56] Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

[57] Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

[58] Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.[59]

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.[60]

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.[61]

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan ... and any amendments or changes required as a result of that review shall be adopted pursuant to this article."[62] Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.[63]

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified..."[64]

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."[65] As amended by Statutes 2007, chapter 628, section 10644 requires an

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[59] Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

[60] Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

[61] Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

[62] Water Code section 10640 (Stats. 1983, ch. 1009).

[63] Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[64] Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

[65] Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.[66] And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.[67]

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP "by complying with all the provisions of the 'Memorandum of Understanding Regarding Urban Water Conservation in California'...and by submitting the annual reports required by Section 6.2 of that memorandum."[68] These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier's "demand management measures" that are currently or could be implemented.[69]
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.[70]
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

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[66] Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

[67] Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

[68] Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

[69] Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

[70] Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that "[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part."[71] The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier "may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan." Any best water management practice that is included in the plan that is identified in the "Memorandum of Understanding Regarding Urban Water Conservation in California" (discussed below) is deemed to be reasonable for the purposes of this section.[72] Therefore, suppliers are expressly authorized to recover the costs of implementing "reasonable water conservation measures" or any "best water management practice...identified in [the MOU for Urban Water Conservation]."

3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.[73] The 1986 Act stated in its legislative findings and declarations that "[t]he Constitution requires that water in the state be used in a reasonable and beneficial way..." and that "[t]he conservation of agricultural water supplies are of great concern." The findings and declarations further stated that "[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans," as are "[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board..." Therefore, the act stated that "it is the policy of the state as follows:"

(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.

(b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

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[71] Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

[72] Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

[73] Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

(c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.[74]

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers "shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices..." That report "shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management..." If a "significant opportunity exists" to conserve water or improve the quality of drainage water, the supplier "shall prepare and adopt an agricultural water management plan..." (AWMP).[75] The Act provided, however, that an agricultural water supplier "may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part." The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.[76] In addition, an AWMP "shall address all of the following:" quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.[77]

The Act further provided that an agricultural water supplier required to prepare an AWMP "may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques."[78] And, "[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon." This requirement

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[74] Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

[75] Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

[76] Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

[77] Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

[78] Former Water Code section 10841(as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.[79] In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and "shall file with [DWR] a copy of its plan no later than 30 days after adoption."[80] Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that "[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both."[81]

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,[82] and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.[83]

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:[84]

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.[85]
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

[79] Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

[80] Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

[81] Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

[82] Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

[83] See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[84] The Water Measurement Law was added by Statutes 1991, chapter 407.

[85] Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.[86]

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to "recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.[87]
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.[88]

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of "agricultural" and "urban retail" water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,[89] and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

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[86] Section 527 as amended by statutes 2005, chapter 22.

[87] Section 526 as amended by Statutes 2004, chapter 884.

[88] Section 531.10 as added by Statutes 2007, chapter 675.

[89] See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of "agricultural water supplier" and "urban retail water supplier."

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of $72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."[90] South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."[91] Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."[92]

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not 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 supporting data."[93] And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts…or to adopt a method for determining an urban water use target."[94]

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.[95] They further allege that they are required to adopt a pricing structure for water customers

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[90] Exhibit A, 10-TC-12, page 3.

[91] *Ibid.*

[92] Exhibit A, 10-TC-12, page 4.

[93] Exhibit A, 10-TC-12, pages 7-8.

[94] Exhibit A, 10-TC-12, page 8.

[95] Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that "[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process."[96]

In addition, Richvale and Biggs allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices," as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.[97] Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to "various entities" and posted on the internet for public review.[98]

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered." In addition, prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible." And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the "contents of the plans" are "more encompassing than plans required under the former law."[99] Richvale and Biggs allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation."[100]

As discussed below, in the early stages of Commission staff's review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend "proceeds of taxes," within the meaning of articles XIII A and XIII B.[101] After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission's executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.[102] Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

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[96] *Ibid.*

[97] Exhibit A, 10-TC-12, pages 4-6.

[98] Exhibit A, 10-TC-12, page 6.

[99] Exhibit A, 10-TC-12, page 8.

[100] Exhibit A, 10-TC-12, page 9.

[101] Exhibit F, Commission Request for Additional Information, page 1.

[102] Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.[103] This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.[104] Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least $1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.[105]

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that "[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process."[106] Therefore, claimants conclude that "[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218's majority protest procedure."[107]

In addition, claimants note the Commission's analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not "ignore a prior Commission decision that is directly on point..." The claimants assert that "as this Commission has already recognized..." Proposition 218 "created a legal barrier to establishing or increasing fees or charges..." and as a result claimants "can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject..." a fee increase.[108]

The claimants assert that the reasoning of the draft proposed decision "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..."[109] and "would create a class of local agencies that are per se ineligible for reimbursement under this test

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[103] Exhibit L, Appeal of Executive Director's Decision.

[104] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[105] *Ibid.*

[106] Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

[107] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[108] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[109] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[110] The claimant calls this a "sea change in Constitutional interpretation…"[111]

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."[112] The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."[113] The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources…'"[114]

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."[115] The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."[116]

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.[117]

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."[118] Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.[119] Finance further

[110] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[111] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[112] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[113] Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

[114] Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

[115] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[116] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

[117] Exhibit W, Claimant Late Comments, pages 1-4.

[118] Exhibit C, Finance Comments, page 1.

[119] Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that "each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales."[120] Moreover, Finance argues that "special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B...*and only when the mandated costs in question can be recovered solely from the proceeds of taxes.*"[121] Finance argues that the claimants "should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations."[122] Finance did not submit comments on the draft proposed decision.

State Controller's Office

In response to Commission staff's request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the "Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013," that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.[123] However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that "Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board," and that "Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO." However, the SCO noted that it "has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported." The SCO concluded, therefore, that "we are unable to determine which special district is subject to report an annual appropriations limit." The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a "program" within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a "new program," because it is "a refinement of urban and agricultural water conservation requirements that have been part of the law for years." DWR further asserts that even if the Act "were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs." And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because "they are free to choose alternative measurement methods." And finally, DWR argues that the Act does not impose any new programs or higher levels of service "because what is required is compliance with general and evolving water conservation standards based on

[120] Exhibit C, Finance Comments, page 2.

[121] Exhibit C, Finance Comments, page 2 [emphasis in original].

[122] Exhibit C, Finance Comments, page 2.

[123] Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California's Constitution revising water use standards."[124]

In comments on the draft proposed decision, DWR "concurs with and fully supports the ultimate conclusion reached...", but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.[125] DWR argues that "a law that governs private and public entities alike is not a 'program' for purposes of article XIII B..."[126] DWR continues:

> Claimants, in their Rebuttal Comments, ignore DWR's reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) "only 7.67%" of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable "programs" because those requirements "fall overwhelmingly on local governmental agencies."[127]

DWR maintains that "there are, in fact, 72 private wholesale and retail suppliers out of a total of 369...so the proportion of private water suppliers is actually 16.3 percent." And, "based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered."[128]

DWR acknowledges that there are more public than private water suppliers, but asserts that "[u]nder the Supreme Court's test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state."[129] DWR explains that "generally," in this context, is not synonymous with "commonly," and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, "generally" refers to

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[124] Exhibit D, DWR Comments, page 2.

[125] Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

[126] Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

[127] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant's Rebuttal Comments, pages 3-4].

[128] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[129] Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning "those that apply to all persons or entities of a particular class."[130] The Water Conservation Act, DWR maintains, "does just that."[131]

In addition, DWR disputes that the provision of water services is a "classic governmental function," as asserted by the claimants.[132] The California Supreme Court has held that reimbursement should be limited to new "programs" that carry out the governmental function of providing services to the public.[133] DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

> Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the "government as sovereign." At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.[134]

DWR argues that "California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions." DWR continues: "Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*." "On the other hand," DWR reasons, "there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery."[135]

DWR thus "urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

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[130] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391.

[131] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[132] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

[133] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

[134] Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[135] Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike." And, DWR reiterates: "contrary to Claimants' suggestion, water delivery, while clearly an important service, is not a classic "governmental function" in the constitutional sense."[136]

C. Interested Person Positions:[137]

California Special Districts Association

CSDA asserts that "the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6...as amended by Proposition 1A in 2004..."[138] CSDA argues that the draft proposed decision "rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6."[139]

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, "indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction."[140] CSDA further asserts that "[t]he plain language also mandates the state to appropriate the 'full payment amount' of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance."[141] CSDA reasons that "there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs." Therefore, absent "such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement...to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law."[142]

CSDA also argues that the voters' intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.[143] CSDA argues that "[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes..." In fact, CSDA argues, the LAO analysis indicates that Proposition 1A "expand(s) the circumstances under

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[136] Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

[137] "Interested person" is defined in the Commission's regulations to mean "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (Cal. Code Regs., tit. 2, § 1181.2(j).)

[138] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[139] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[140] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[141] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[142] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[143] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer."[144] CSDA maintains that "[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision."[145] CSDA relies on the language of the ballot pamphlet, which states: "if the state does not fund a mandate within any year, the state must eliminate local government's duty to implement it for that same time period."[146] CSDA concludes that "[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes."[147]

In addition, CSDA argues that the Commission's analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.[148] Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to "majority protest procedures" and "may not be expended for general governmental services…which are available to the public at large in substantially the same manner as they are to property owners..." [149] And, revenues from property-related fees "may not be used for any purpose other than that for which the fee was imposed;" and "may not exceed the costs required to provide the property related service."[150] In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.[151] CSDA also notes that "Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue."[152] CSDA argues that "[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs."[153] CSDA goes on to argue that "[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

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[144] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[145] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[146] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[147] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[148] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[149] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[150] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[151] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[152] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[153] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B."[154] CSDA concludes that "[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D."[155]

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, "[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim..."[156] ELF asserts that "the Commission should find that charges for irrigation water are not 'property-related fees' for the purposes of Article XIII D of the California Constitution."[157] Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);[158] however, ELF also argues that "charges for irrigation water are not 'property-related fees' at all." ELF reasons: "As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle."[159]

ELF continues: "Article XIII D, § 3 restricts local governments' ability to levy a new "assessment, fee, or charge" without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees)." However, ELF asserts that "Section 2 of Article XIII D makes Proposition 218's relatively limited reach abundantly clear."[160] ELF notes that section 2 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[161] ELF therefore reasons that "[f]ees that are not 'imposed upon a parcel' or that are not imposed upon a 'person as an incident of property ownership' or that are not a 'user fee or charge for a property related service' are not subject to Article XIII D."[162] ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*[163] the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.[164] The court, ELF

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[154] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[155] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[156] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[157] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[158] Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

[159] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[160] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[161] California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[162] Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

[163] (2001) 24 Cal.4th 830.

[164] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was "not 'property related' because it was dependent on the property's use – it was not imposed on the property simply as an incident of ownership."[165]

ELF goes on to note that "no case has squarely addressed the issue..." but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrheim*,[166] the court held that a groundwater augmentation charge was a property-related fee, but "it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators."[167] And, ELF notes, other cases have found that domestic water use is "necessary for 'normal ownership and use of property.'"[168] ELF concludes that these cases, and others, "present no obstacle to the conclusion that irrigation water is not a property-related service."[169] ELF concludes that fees for irrigation water are not "property-related" but a business-related fee, and that therefore the Commission should deny this test claim.[170]

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to "highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley."[171] NCWA argues that "[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies' landowners."[172] NCWA continues: "The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission."[173] NCWA denies that any "exemptions" apply to the test claim statutes, and "urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers."[174]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[165] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

[166] (2007) 150 Cal.App.4th 1364.

[167] Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

[168] Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

[169] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[170] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[171] Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

[172] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[173] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[174] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

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 such local government for the costs of such programs 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 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.

The purpose of article XIII B, section 6 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."[175] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] ..."[176]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[177]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[178]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[179]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

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

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

[177] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist.*) (2004) 33 Cal.4th 859, 874.

[178] *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56).

[179] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.[180]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[181] 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.[182] In making its 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."[183]

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not "property-related" fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

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[180] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[181] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[182] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

[183] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[184]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties..."[185] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[186]

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[187] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[188]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[189] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[190]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[191] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to

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[184] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

[185] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[186] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[187] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[188] *Ibid.*

[189] California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

[190] California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[191] California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[192] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds"; "investment (or authorizations to invest) funds...of an entity of local government in accounts at banks...or in liquid securities";[193] "[a]ppropriations for debt service"; "[a]ppropriations required to comply with mandates of the courts or the federal government"; and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[194]

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,[195] explained:

> 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 I, 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.) 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 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*.[196]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

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[192] California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[193] California Constitution, article XIII B, section 8.

[194] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[195] *County of Fresno, supra,* (1991) 53 Cal.3d 482.

[196] *Id*, at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness."[197] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[198]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[199] the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[200]

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[197] (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

[198] *Id*, at p. 31.

[199] (1997) 55 Cal.App.4th 976.

[200] *Redevelopment Agency of San Marcos, supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates,* affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[201]

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno, supra, Redevelopment Agency of San Marcos, supra,* and *City of El Monte, supra,* a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno, supra,* predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency, Redevelopment Agency of San Marcos,* and *City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.[202] In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..." and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[203] In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.[204] The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."[205]

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[201] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[202] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

[203] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

[204] See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions..." and "Articles XIII A, B, C, and D should be read together and harmonized..."].

[205] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno, supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.[206] Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.[207] If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.[208]

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.[209]

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,[210] can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.[211]

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A...severely restricted the *taxing* powers of local governments."[212] Article XIII B "was not intended to reach beyond taxation..." and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue..."[213] The issue, then, is

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[206] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno*, *supra*, 53 Cal.3d at p. 485.

[207] See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."

[208] See *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

[209] *City of El Monte*, *supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976].

[210] See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency*, *supra* (1985) 169 Cal.App.3d 24; *County of Fresno*, *supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976.

[211] California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

[212] See *County of Fresno*, *supra*, 53 Cal.3d at p. 487 [emphasis added].

[213] *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;[214] it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.[215] However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.[216] CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.[217] 12-TC-01 was filed by Richvale and Biggs only,[218] and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation*. Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.[219] However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.[220] The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

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[214] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

[215] See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

[216] See California Constitution, article XIII B, section 6 (b-c).

[217] Exhibit A, Test Claim 10-TC-12.

[218] Exhibit B, Test Claim 12-TC-01.

[219] See Exhibit K, Notice of Pending Dismissal.

[220] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that "Richvale and Biggs do not receive property tax revenue."[221] With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it "does not receive an annual share of property tax revenue."[222] However, Biggs had earlier stated in a declaration by Karen Peters, the District's Executive Administrator, that "Biggs receives an annual share of property tax revenue," and for "Fiscal Year 2011 the amount of property tax revenue is expected to be approximately $64,000."[223] Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District's General Manager, states that "[t]hat revenue estimate actually reflects Biggs' *assessment*, equating to $2 per acre within Biggs' boundaries." Mr. Massa goes on to state that "Biggs does not currently receive any share of ad valorem *property tax* revenue."[224,225]

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and "other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes."[226] The "historical quirk" to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

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[221] Exhibit I, Claimant Response to Request for Additional Information, page 1.

[222] Exhibit A, South Feather Water and Power Test Claim, page 22.

[223] Exhibit A, 10-TC-12, page 30.

[224] Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

[225] See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale's statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency's fee authority, and that the Districts are eligible for reimbursement "for the reasons already explained in the Districts' 'Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01.'" (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director's Decision)].

[226] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.[227] They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.[228] In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.[229]

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."[230] The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."[231] Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.[232] On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

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[227] Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[228] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[229] Exhibit I, Claimant Response to Request for Additional Information, page 3.

[230] Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

[231] Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

[232] Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

"divert[ing] existing revenues from their authorized purposes..."[233] Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants' assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes[234] and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that "South Feather and Paradise receive property tax revenue," and "are in the process of establishing their appropriations limits for their current fiscal years."[235]

Declarations attached to claimants' response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, "I have not calculated or otherwise established Paradise's appropriation limit as set forth in Proposition 4." Mr. Phillips further states that "[a]t the request of Paradise's legal counsel, I have begun working to establish Paradise's appropriation limit and intend...to ask Paradise's Board of Directors to adopt a resolution...for its current fiscal year."[236] Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not "calculated or otherwise established South Feather's appropriation limit" during his employment with South Feather. Mr. Wong further states that "[a]t the request of South Feather's legal counsel, I have begun working to establish South Feather's appropriation limit and intend, after the requisite public review period, to ask South Feather's Board of Directors to adopt a resolution establishing South Feather's appropriation limit for its current fiscal year."[237]

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[233] See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

[234] Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

[235] Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

[236] See Exhibit I, Claimant Response to Request for Additional Information, page 394.

[237] See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier "subject to the mandates imposed by the Agricultural Water Measurement Regulations...and the Water Conservation Act of 2009."[238] The declaration of Steve Knell, Oakdale's General Manager, attached to the Request for Substitution, states that Oakdale "receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties." The declaration further states that the District "received $5,701,730 in property taxes for 2011-2013 and expects to receive approximately $1.9 million in 2014."

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,[239] but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.[240]

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it "is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution," and is an agricultural water supplier, subject to "the mandates imposed by the Water Conservation Act of 2009...and the Agricultural Water Measurement Regulations."[241] In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District "received $520,420 in property taxes in 2013 and expects to receive $528,300 in 2014."[242]

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,[243] but Table 1 does not indicate an appropriations limit for the district.[244]

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[238] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

[239] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

[240] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

[241] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

[242] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

[243] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

[244] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,[245] states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."[246] The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,[247] to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

[245] Exhibit A, Test Claim 10-TC-12, page 3.

[246] Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[247] Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."[248] The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."[249] The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier " is defined as "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."[250] The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."[251] Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."[252] The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.[253] However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

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[248] Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[249] Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[250] Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[251] Exhibit A, 10-TC-12, page 2.

[252] Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[253] Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010...[254]

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010...the baseline daily per capita water use, urban water

[254] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data."[255]

And, section 10608.20(j) provides that an urban retail water supplier "shall be granted an extension to July 1, 2011..." to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 "that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part."[256]

Section 10608.40 provides that an urban retail water supplier shall also "report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631."[257]

Section 10608.24 provides that each urban retail water supplier "shall meet its interim urban water use target by December 31, 2015," and "shall meet its [final] urban water use target by December 31, 2020."[258]

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.[259] Pursuant to existing section 10621, that plan was required to be updated "once every five years...in years ending in five and zero."[260] And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

> (A) Single-family residential.
>
> (B) Multifamily.
>
> (C) Commercial.
>
> (D) Industrial.
>
> (E) Institutional and governmental.
>
> (F) Landscape.
>
> (G) Sales to other agencies.
>
> (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

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[255] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[256] Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[257] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[258] Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[259] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[260] Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.[261]

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.[262]
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.[263]
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.[264]
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.[265]
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.[266]
- Meet interim urban water use target by December 31, 2015.[267]
- Meet final urban water use target by December 31, 2020.[268]

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

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[261] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[262] Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[263] Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[264] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[265] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[266] Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[267] Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[268] Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that "[i]n complying with this part," an urban retail water supplier shall conduct at least one public hearing "to accomplish all of the following:" (1) allow community input regarding the urban retail water supplier's implementation plan; (2) consider the economic impacts of the urban retail water supplier's implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.[269]

The claimants assert that "prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target."[270]

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

> Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code...[271]

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier's water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.[272] As the implementing agency, DWRs interpretation of the Act is entitled to great weight.[273]

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

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[269] Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[270] Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

[271] Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

[272] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[273] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.[274]

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

> The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.[275]

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."[276] However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n 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."[277] The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."[278] The plain language of

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[274] Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[275] Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[276] Exhibit A, 10-TC-12, page 3.

[277] Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[278] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that "[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California." In addition, the claimants allege that "a failure to meet the 20% target shall be a violation of law on and after January 1, 2021," citing Water Code section 10608.8.[279] The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

> (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
>
> (b) 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).

[279] Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

(1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

(2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

(3) Facilitate the financing of capital improvements for on-farm irrigation systems.

(4) Implement an incentive pricing structure that promotes one or more of the following goals:

(A) More efficient water use at the farm level.

(B) Conjunctive use of groundwater.

(C) Appropriate increase of groundwater recharge.

(D) Reduction in problem drainage.

(E) Improved management of environmental resources.

(F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

(5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

(6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[280]

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate." In addition, they allege, agricultural water suppliers are required to "adopt a pricing structure for water customers based on the quantity of water delivered." The claimants further allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices" specified in section 10608.48(c).[281]

The claimants argue that prior to the test claim statute, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered," and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that "[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective." The claimants conclude that now "[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective."[282] In addition, the claimants assert that prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible."[283]

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

(a) 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.

(b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

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[280] Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

[281] Exhibit A, Test Claim 10-TC-12, page 4.

[282] Exhibit A, 10-TC-12, page 8.

[283] Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.[284] Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]" if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2)*," which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.[285] The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.[286] As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.[287]

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[284] Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

[285] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[286] Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

[287] Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.[288]

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.[289]
- *If the measures are locally cost effective and technically feasible,* implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:

  (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

  (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

  (3) Facilitate the financing of capital improvements for on-farm irrigation systems.

  (4) Implement an incentive pricing structure that promotes one or more of the following goals:

  (A) More efficient water use at the farm level.

  (B) Conjunctive use of groundwater.

  (C) Appropriate increase of groundwater recharge.

  (D) Reduction in problem drainage.

  (E) Improved management of environmental resources.

  (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

  (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

  (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

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[288] Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

[289] Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[290]

2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that "[t]his part shall

[290] Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993..." Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.[291]

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.[292]

Section 10826, as added, provides that the plan "shall do all of the following:"

> (a) Describe the agricultural water supplier and the service area, including all of the following:
>
> (1) Size of the service area.
>
> (2) Location of the service area and its water management facilities.
>
> (3) Terrain and soils.
>
> (4) Climate.
>
> (5) Operating rules and regulations.
>
> (6) Water delivery measurements or calculations.
>
> (7) Water rate schedules and billing.
>
> (8) Water shortage allocation policies.
>
> (b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:
>
> (1) Surface water supply.
>
> (2) Groundwater supply.
>
> (3) Other water supplies.
>
> (4) Source water quality monitoring practices.
>
> (5) Water uses within the agricultural water supplier's service area, including all of the following:
>
> (A) Agricultural.
>
> (B) Environmental.
>
> (C) Recreational.
>
> (D) Municipal and industrial.
>
> (E) Groundwater recharge.
>
> (F) Transfers and exchanges.

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[291] Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

[292] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(G) Other water uses.

(6) Drainage from the water supplier's service area.

(7) Water accounting, including all of the following:

(A) Quantifying the water supplier's water supplies.

(B) Tabulating water uses.

(C) Overall water budget.

(8) Water supply reliability.

(c) Include an analysis, based on available information, of the effect of climate change on future water supplies.

(d) Describe previous water management activities.

(e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.[293]

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."[294]

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."[295] And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."[296]

In addition, section 10828 provides that:

> (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply*:
>
> (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
>
> (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

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[293] Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[294] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[295] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[296] *Ibid.*

(b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.[297]

And, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[298]

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the "schedule" for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.[299]

As noted above, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.[300] Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828."[301] Therefore, the requirements to include in a supplier's AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

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[297] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[298] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[299] Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

[300] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[301] Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.[302] The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, "encourages" suppliers to file certain "documentation as an attachment with the USBR-accepted water management/conservation plan."[303] However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.[304]
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.[305]
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.[306]
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

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[302] Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[303] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, "The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. "DWR *encourages* CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook)." Emphasis added.

[304] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[305] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[306] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.[307]

In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[308]

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.[309]

  In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[310]

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.[311]

  An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[312]

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR "may update the efficient water management practices required pursuant to [section 10608.48(c)]," but only after conducting public hearings. Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement" of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

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[307] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[308] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[309] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[310] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[311] Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[312] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, "shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan."[313]

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

> Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...[314]

Section 10842 provides that an agricultural water supplier shall implement its AWMP "in accordance with the schedule set forth in its plan."[315]

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

> (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
>
> (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
>
> (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
>
> (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
>
> (6) The California State Library.
>
> (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[316]

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

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[313] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[314] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[315] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[316] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.

(b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.[317]

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.[318] Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.[319] This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

> All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review process.*[320]

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

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[317] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[318] See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

[319] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[320] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[321] That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.[322]
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.[323]
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.[324]
- Implement the AWMP in accordance with the schedule set forth in the AWMP.[325]
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
    - DWR.
    - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
    - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

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[321] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[322] Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[323] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[324] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[325] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[326]

- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.[327]

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR 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 of section 10609.48(b).[328] The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.[329] None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

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[326] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[327] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[328] Code of Regulations, title 23, section 597 (Register 2012, No. 28).

[329] Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of "accuracy," "agricultural water supplier," "approved by an engineer," "best professional practices," "customer," "delivery point," "existing measurement device," "farm-gate," "irrigated acres," "manufactured device," "measurement device," "new or replacement measurement device," "recycled water," and "type of device."[330] Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

> An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.
>
> **(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer**
>
> An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).
>
> (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
>
> and,
>
> (2) A new or replacement measurement device shall be certified to be accurate to within:
>
> (A) ±5% by volume in the laboratory if using a laboratory certification;
>
> (B) ±10% by volume in the field if using a non-laboratory certification.
>
> **(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:

[330] Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

(A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.

(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 measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.

(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:

(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 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 points.

(B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the 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.

(C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:

(i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;

(ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

(iii) That it was approved by the agricultural water supplier's governing board or body.[331]

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement "at the delivery point or farm-gate of a single customer" using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate "by either (1) using an existing measurement device, certified to be accurate within ±12% by volume or (2) a new or replacement measurement device, certified to be accurate within ±5% by volume in the laboratory if using a laboratory certification or ±10% by volume in the field if using a non-laboratory certification." In addition, the claimants allege that the regulations provide for "limited exceptions" if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.[332] The claimants assert that prior to these regulations, "there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception."[333]

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that "[n]o local government is required to comply with those regulations." DWR asserts that "the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements...described in the 2009 Water Law." DWR concludes that "[the regulations] are optional, and the suppliers are free to comply with the law in other ways."[334]

Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement" to comply with the measurement requirements of subdivision (b).[335] The phrase "may use or implement" suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states 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 [adopt a pricing structure based in part on quantity of water delivered]."[336] Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

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[331] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[332] Exhibit B, 12-TC-01, page 4.

[333] Exhibit B, 12-TC-01, page 6.

[334] Exhibit D, DWR Comments, page 11.

[335] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[336] *Ibid.*

supplier "shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section." The language states that the supplier "may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section."[337] There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it "shall" pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
  - An existing measurement device certified to be accurate to within ±12% by volume.
  - A new or replacement measurement device certified to be accurate to within:
    - ±5% by volume in the laboratory if using a laboratory certification;
    - ±10% by volume in the field if using a non-laboratory certification.

  If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.[338]
- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
  - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
  - 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, accuracy standards of measurement cannot be met by installing a measurement device or devices.[339]
- And, when a supplier chooses to measure water delivered at an upstream location:

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[337] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[338] Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

[339] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
  - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
  - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
  - That it was approved by the agricultural water supplier's governing board or body.[340]

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

(1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:

(A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

(B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.

(2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

[340] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

(A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

(B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:

(i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

(ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.

(2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.

(3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

(1) 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.

(2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

(1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).

(2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.

(3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:

(A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.

(B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

(C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).

(4) If an existing water measurement device is determined to be out of compliance with §597.3, 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.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of "existing, new or replacement measurement device[s]," as specified.[341] In addition, section 597.4 provides that field-testing "shall be performed" following "best professional practices," and either sampling "no less than 10% of existing devices," as recommended by the department, or developing a "sampling plan using an accepted statistical methodology." Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier "shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices..."[342] In addition, section 597.4 provides that records documenting compliance "shall be maintained...for ten years or two Agricultural Water Management Plan cycles."[343] Section 597.4 further provides that "all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored," and if a device no longer meets the accuracy requirements of section 597.3, the supplier "shall take appropriate corrective action," including repair or replacement, if necessary.[344] And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and "best professional practices" for water measurement in their agricultural water measurement plan.[345]

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.[346] To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.[347] In addition, for any agricultural water supplier that is also an urban water supplier,

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[341] Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

[342] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[343] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[344] Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

[345] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

[346] Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

[347] See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.[348] To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
    - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
    - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.[349]
- Certify the initial accuracy of new or replacement measurement devices by either:
    - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
    - Non-laboratory certification after installation of a measurement device in the field, documented by either:
        - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devises for each type of device installed at specified locations; or
        - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.[350]
- Ensure that field-testing is performed as follows:

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[348] Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

[349] Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

[350] Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.[351]

- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.[352]
- Ensure that all measurement devices are 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.[353]
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.[354]
- Report the information listed below in its Agricultural Water Management Plan(s). :
  - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

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[351] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[352] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[353] Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

[354] Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
    - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.
    - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.
    - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, 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.[355]

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

[355] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant "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.*[356] 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 I, 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 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.*[357]

Accordingly, in *Connell v. Superior Court of Sacramento County,*[358] the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: "rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[359] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[360] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees 'sufficient' to cover their costs,"

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[356] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

[357] *Id,* at p. 487 [emphasis added].

[358] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

[359] *Id,* at p. 399.

[360] *Ibid.*

and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[361]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[362] The court further noted that, "this basic principle flows from common sense as well." The court reasoned: "As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[363]

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are "statutorily authorized to charge a fee for the delivery of water," and thus "each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue."[364] DWR asserted that "Senate Bill 1017, which amended the [Urban Water Management Act] in 1994," provides authority for an urban water supplier "to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates."[365]

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that "[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor." Section 35470 further provides that "[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.*"[366] In addition, section 50911 provides that an irrigation district may "[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands."[367]

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[361] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

[362] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[363] *Ibid.*

[364] Exhibit C, Finance Comments on Test Claim, page 1.

[365] Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

[366] Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

[367] Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to "recover in its rates" for the costs incurred in preparing and implementing water conservation measures.[368] And, section 10608.48 expressly requires agricultural water suppliers to "[a]dopt a pricing structure for water customers based at least in part on quantity delivered."[369] This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.[370]

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants' statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and "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 claimants argue that "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."[371] In comments on the draft proposed decision, the claimants reiterate, more urgently:

> The Commission should not accept its staff's invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission' s credibility, eviscerate the Commission's Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.[372]

For the following reasons, the claimant's argument is unsound. In *Connell v. Superior Court, supra* the court held that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs," and that the economic viability of the necessary rate increases "was irrelevant and injected improper factual questions into the inquiry."[373] *Connell* did not address the possible impact of Proposition 218 on the districts' fee authority, because the districts did not "contend that the services at issue...are among the 'many services'

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[368] Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

[369] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[370] Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[371] Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[372] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[373] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218."[374] The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts' legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[375] article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

> Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
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> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> [¶...¶]
>
> (c) Voter Approval for New or Increased Fees and Charges. *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

[374] 59 Cal.App.4th at p. 403.

[375] Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.[376]

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: "Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies' discretion, to unilaterally establish or increase fees or charges for the provision of water services."[377] After Proposition 218, the claimants argue they are now "authorized to do no more than *propose* a fee increase that can be rejected" by majority protest.[378] Furthermore, the claimants maintain that the Commission's decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments' fee authority: "[f]inding *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.'"[379]

However, claimants' reliance on the Commission's prior action is misplaced, and claimants' assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants* and *the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.[380] The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,[381] "[w]ith 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."[382] The Commission reasoned that "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,"[383] and that "[a]bsent 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)."[384] Thus, the

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[376] California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

[377] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[378] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[379] Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[380] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

[381] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

[382] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

[383] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

[384] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that "[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[385]

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.[386] The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[387] Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe "water service." Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission's earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service "are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority."[388] Claimants therefore argue that they "find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers."[389]

However, the so-called "majority protest provision," which claimants allege constitutes a legal barrier to claimants' fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants' fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,[390] or provide evidence that a court determined that Proposition 218 represents a

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[385] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, at p. 401].

[386] See California Constitution, article XIII D, section 6(c).

[387] Government Code section 53750(m) (Stats. 2002, ch. 395).

[388] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[389] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[390] If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs "first incurred," within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels..."[391]

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

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section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

[391] See article XIII D, section 6(a)(2).

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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SACRAMENTO, CA 95814
PHONE: (916) 323-3562
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RE: **Decision**

Water Conservation, 10-TC-12 and 12-TC-01
Water Conservation Act of 2009 et al.
South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: December 12, 2014

Heather Halsey, Executive Director

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.

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[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:

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[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

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[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

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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]

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[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

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[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

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[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.

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[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.

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[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]

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[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

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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.

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[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

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[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.

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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.

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[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.

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[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

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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

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[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

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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,

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[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.

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[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."

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[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."

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[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

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[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

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[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:

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[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.

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[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:

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[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:

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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: [¶]...[¶]

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[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

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[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:

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[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]

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[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

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[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

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[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.

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[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.

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[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.
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> (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.

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[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*

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[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.

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[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:

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[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

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[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:

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[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;

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[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]

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[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

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[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.

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[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

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[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

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[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

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[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

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> 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.

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[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.

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[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.

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[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]

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[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

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[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:

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[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.

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[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]

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[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

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[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]

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[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

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[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

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[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

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[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

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[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).

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[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.

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[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

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[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

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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)).

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[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

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[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.

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[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

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[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).

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[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

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[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:

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[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.

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[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:

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[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.

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[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

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[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.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Quality Control Board Order No. 01-182 Permit CAS004001 Parts 4C2a., 4C2b, 4E & 4F5c3 Filed September 2, 2003, (03-TC-04) September 26, 2003 (03-TC-19) by the County of Los Angeles, Claimant Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants	Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 *Municipal Stormwater and Urban Runoff Discharges* 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 July 31, 2009)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

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 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

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

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> 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.[7]

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[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer 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).)

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

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

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

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

> 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.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> 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).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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

[9] 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 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.)

[10] 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).

discharges of pollutants are illegal except under a permit.[11] 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[12] 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.)[13]

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 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*

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[11] 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.

[12] *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.)

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

than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

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.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] 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.[18]

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.

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

[15] Best management practices, or BMPs, means "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.)

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

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

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.[19]

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,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. ... Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] 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.)

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

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,* 143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

regional board; "uncontaminated ground water infiltrations" ... and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]...[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: ...

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, 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 imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program ... [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed 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,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

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

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 submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its 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."[42] 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

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[40] 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 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.

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

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

task.[43] 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.[44]

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.[45] 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.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

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.[49] In making its 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."[50]

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

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

[44] *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*).

[45] *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.)

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

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

[48] *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.

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

[50] *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.

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) 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, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) 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 defines an "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."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both 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. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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[51] 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.

[52] Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

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.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants ... and who does not have an effective permit ... must submit a

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

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

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

complete application to the Director in accordance with this section and part 124 of this chapter.[56]

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 ..."[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge 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. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

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 were not the result of the claimants' discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 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.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

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."[62]

When analyzing federal law in the context of a test claim under article XII 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.[63] 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."[64]

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*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required 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.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

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

[63] *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).

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

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

[66] *Id.* at page 173.

Order and guidelines require specific actions ... [that were] required acts. These requirements constitute a higher level of service."[67]

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.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> 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).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This 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 convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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[67] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, 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, the section that describes the NPDES program (and which, in subdivision (p), 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 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 neither required to have an 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[77] 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

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] 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."

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 Water Code section 13370, 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[78] to effect the stormwater permit program.

Any 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.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he ... analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes*. ...The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) 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.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]...[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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

[79] State Board comments submitted June 2009, page 4.

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

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways ... [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law ... and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which 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[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] 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 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

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

[86] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

[87] "*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.)

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[88] 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: [¶]...[¶]

(3) A description of practices 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. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices 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"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

[91] Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California*,[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required 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.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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

[93] *Id.* at page 173.

[94] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that 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. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge 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. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same 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 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: [¶]...[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, <u>including inspections</u>, to implement and enforce an ordinance, orders or similar means <u>to prevent illicit discharges to the municipal separate storm sewer system</u>; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures <u>for inspections</u> and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above,[101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ..." Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

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

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

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

(c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
  - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
  - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
    - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
    - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
    - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

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[115] "(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

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 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: [¶]...[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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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).)

[116] "(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).)

[117] "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." (40 CFR § 122.2.)

> from construction sites to the municipal storm sewer system, which shall include: [¶]...[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and ... [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

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

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

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: ..."

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, 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.[123]

The State Water Board, in its April 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. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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[123] *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.)

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

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step 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.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, 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."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

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

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

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. 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.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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[127] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

These declarations illustrate that the costs associated 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. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

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. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

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 constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court 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

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[128] *County of Fresno v. State of California , supra,* 53 Cal.3d 482.

> 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 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.[129]

In *Connell v. Superior Court,*[130] 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

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[130] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

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.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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[131] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect 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."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] 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 the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, 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.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

[135] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization,* [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, 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.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "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."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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[136] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

[138] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[139] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[140] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[141] *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."

A regulatory fee is an imposition that funds a regulatory program[142] 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."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "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."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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[142] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[143] *Ibid.*

[144] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[145] City of Covina, Resolution No. 05-6455.

> [A]any entity[146] 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 ....

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (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.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] 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).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it ... holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

[149] *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra,* 79 Cal.App.4th, 935, 945.

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> ...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge 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. Among other things, 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 (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 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 impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service"[164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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[163] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 402.

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]

[¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution 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."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) 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.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "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.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

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.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

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[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 30, 2019, I served the:

- **Claimants' Rebuttal Comments filed January 29, 2019**

  California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, 13-TC-01 and 13-TC-02
  Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, County of Los Angeles, and Los Angeles County Flood Control District, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 30, 2019 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/9/19

Claim Number: 13-TC-01 and 13-TC-02

Matter: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175

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City of Beverly Hills
City of Carson
City of Cerritos
City of Commerce
City of Downey
City of Huntington Park
City of Lakewood
City of Manhattan Beach
City of Norwalk
City of Pico Rivera
City of Rancho Palos Verdes
City of Redondo Beach
City of San Marino
City of Santa Clarita
City of Santa Fe Springs
City of Signal Hill
City of South El Monte
City of Vernon
City of Westlake Village
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TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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