1. TEST CLAIM TITLE

Joint Test Claims of Los Angeles County and Los Angeles County Flood Control District

2. CLAIMANT INFORMATION

Los Angeles County Flood Control District
Name of Local Agency or School District

Mark Pestrella
Claimant Contact

Chief Engineer
Title

900 South Fremont Avenue
Street Address

Alhambra, CA 91803
City, State, Zip

(626) 458-4001
Telephone Number

(626) 457-8897
Fax Number

mpestrella@dpw.lacounty.gov
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

Howard Gest
Claimant Representative Name

Title

Burhenn & Gest LLP
Organization

624 South Grand Avenue, Suite 2200
Street Address

Los Angeles, CA 90402
City, State, Zip

(213) 629-8787
Telephone Number

(213) 624-1376
Fax Number

hgest@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

Test Claim #:

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

Los Angeles RWQCB Order No. R4-2012-0175 (NPDES No. CAS 004001)

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages _____ to _____.
6. Declarations: pages _____ to _____.
7. Documentation: pages _____ to _____.

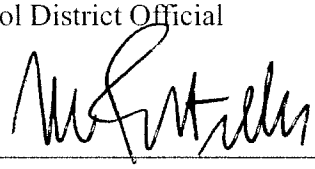
8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

Mark Pestrella
Print or Type Name of Authorized Local Agency or School District Official

Chief Engineer
Print or Type Title


Signature of Authorized Local Agency or School District Official

9/5/17
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

LOS ANGELES COUNTY

FLOOD CONTROL ACT EXCERPT

Chief Engineer as the Authorized Official for the
Los Angeles County Flood Control District

Test Claim No. 13-TC-02

West's Ann.Cal.Water Code App. § 28-2b

§ 28-2b. Chief engineer

Currentness

Sec. 2b. The board shall appoint a chief engineer for said district who shall be the principal officer thereof and who shall be charged with the duty of managing and administering the affairs of said district, in accordance with the provisions of this act, subject to the direction and control of said board. The chief engineer shall appoint all assistants, engineers, deputies, clerks, attaches and other persons employed by said district as the number thereof is fixed and from time to time changed by the board.

Credits

(Added by Stats.1939, c. 608, p. 2025, § 3.)

West's Ann. Cal. Water Code App. § 28-2b, CA WATER App. § 28-2b
Current with urgency legislation through Ch. 179 of 2017 Reg.Sess

End of Document

SECTION FIVE

NARRATIVE STATEMENT

In Support of Joint Test Claim of Los Angeles County and the Los Angeles County Flood Control District Concerning Los Angeles RWQCB Order No. R4-2012-0175 (NPDES No. CAS 004001), Test Claim No. 13-TC-02

NARRATIVE STATEMENT IN SUPPORT OF JOINT TEST CLAIM OF THE COUNTY OF LOS ANGELES AND THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

I. INTRODUCTION

The County of Los Angeles ("County") and the Los Angeles County Flood Control District ("District") (collectively, the "Claimants") bring this Joint Test Claim with respect to various requirements in a stormwater permit issued by the California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB"). Such requirements are unfunded state mandates for which a subvention of funds is required.

A. Adoption of Executive Order

On November 8, 2012, the LARWQCB adopted a new storm water permit, Order No. R4-2012-0175 (NPDES No. CAS 004001) ("Permit"), regulating discharges from the municipal separate storm sewer systems ("MS4s") operated by a number of municipal entities in portions of Los Angeles County.[1]

The County and the District are dedicated to fully implementing the Permit requirements. The full implementation of the Permit, however, will be quite costly. Therefore, as contemplated by article XIII B, section 6, of the California Constitution, Claimants here request reimbursement for the numerous new provisions of the Permit that exceed the requirements of federal law, which either were not included in the previous MS4 permit issued by the LARWQCB on December 13, 2001, Order No. 01-182 ("2001 Permit") or which already have been considered to be state mandates by the Commission on State Mandates ("Commission").[2]

This Section 5 of the Test Claim, which is filed on behalf of the County and the District only, identifies the activities that are unfunded mandates and sets forth the basis for reimbursement for such activities. The County and the District seek a subvention of funds for the following mandates:

1. Requirements to comply with Total Maximum Daily Load ("TMDL") programs set forth in Permit Part VI.E and Attachments L through Q and in the Permit's Monitoring and Reporting Program;

2. Requirements involving the prohibition of non-stormwater discharges into and through the permittees' MS4s, contained in Permit Part III;

[1] A copy of the Permit and all attachments are included as Exhibit A in Section 7, filed herewith. The permittees regulated under the Permit are the District, the County and 84 cities in the County. A full list of the permittees can be found on pages 1-8 of Exhibit A.

[2] A copy of the 2001 Permit is included as Exhibit B in Section 7.

3. Requirements relating to public agencies in Permit Part VI.D.4 (relating to the District) and Part VI.D.9 (relating to the County); and

4. Requirements relating to public information on illicit discharges and the preparation of spill response plans, set forth in Permit Part VI.D.4.d (relating to the District) and Part VI.D.10 (relating to the County).

On its own behalf, the County seeks a subvention of funds for the following mandates:

1. Requirements relating to public information programs in Permit Part VI.D.5;

2. Requirements to inventory and inspect commercial and industrial facilities in Permit Part VI.D.6;

3. Requirements for a planning and development program in Permit Part VI.D.7, and

4. Requirements in Permit Parts VI.D.8 relating to construction site activities.

Claimants are committed to achieving clean water and working together with the LARWQCB and other stakeholders to achieve the goals set forth in the Permit. Claimants submit this Test Claim solely for the purpose of obtaining the funds necessary to reach those goals.

B. Statement of Interest of Claimants

Claimants file this test claim jointly and, pursuant to 2 Cal. Code Reg. § 1183.1(g), attest to the following:

1. The County and District allege state-mandated costs resulting from the same Executive Order, *i.e.*, the Permit;

2. The County and District agree on all issues of the Joint Test Claim; and

3. The County and District have designated one contact person to act as a resource for information regarding the test claim in Section 3 of their Test Claim forms.[3]

C. Statement of Actual and/or Estimated Costs Exceeding $1,000

The County and District further state that, as set forth below and in the attached Section 6 Declarations in support, the actual and/or estimated costs from the state mandates set forth in this Joint Test Claim exceed $1,000 for each of them. This Narrative Statement sets forth specific and estimated amounts expended by the County and District as determined from the review of pertinent records and as disclosed in the Section 6 Declarations filed herewith. Such amounts reflect, in many cases, costs associated with the development of programs and not their later implementation by the County and District. Claimants respectfully reserve the right to modify such amounts when

[3] *See* Section 6 Declarations of Claimants, filed herewith.

or if additional information is received and to adduce additional evidence of costs if required in the course of the Joint Test Claim.

D. The Joint Test Claim is Timely Filed

A test claim must be filed with the Commission "not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. For purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[4]

The Permit became effective on December 28, 2012. Claimants first incurred costs to implement the Permit during fiscal year ("FY") 2012-2013, which ended on June 30, 2013.[5] This Test Claim was filed on June 30, 2014, i.e., by June 30 of the fiscal year following the fiscal year in which the increased costs were first incurred. It is thus timely.[6]

II. THE STATUTORY AND REGULATORY FRAMEWORK

The Permit was issued as both a "waste discharge requirement" under the Porter-Cologne Water Quality Control Act, Water Code § 13000 *et seq.,* and as a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Clean Water Act ("CWA"), 42 U.S.C. § 1342. *See* Permit Part II.H. In 1969, three years before Congress enacted the CWA, the California Legislature enacted the Porter-Cologne Act, which established the State Board and nine regional control boards as the agencies responsible for the coordination and control of water quality in California. Water Code § 13001.[7] Under Porter-Cologne, any person who discharges or proposes to discharge "waste" that could affect the quality of the "waters of the state" is required to obtain a waste discharge requirement permit. Water Code §§ 13260 and 13263.

In 1972 Congress adopted what later became known as the CWA. In so doing, Congress expressly preserved the right of any state to adopt or enforce standards or limitations respecting discharges of pollutants or the control or abatement of pollutants, so long as such provisions were not "less stringent" than federal law. 33 U.S.C. § 1370. *See also* 40 C.F.R. § 123.1(i) ("Nothing in this part precludes a State from: (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part; (2) Operating a program with a greater scope of coverage than that required under this part.").

Under the CWA, the discharge of a pollutant to a navigable water of the United States is prohibited unless the discharge is in accordance with one of the statutory provisions of the Act. 33 U.S.C. § 1311(a).[8] One of those provisions is the NPDES permit program. 33 U.S.C. § 1342. The CWA provides that states may administer their own NPDES permit programs in lieu of the

[4] 2 Cal. Code Regs. § 1183.1(c).
[5] County Section 6 Declaration, ¶¶ 8-15; District Section 6 Declaration, ¶¶ 8-11.
[6] 2 Cal. Code Regs. § 1183.1(c).
[7] Copies of relevant California statutes are contained in Section 7, Exhibit C.
[8] Copies of federal statutes and regulations are contained in Section 7, Exhibit D.

federal program. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22. A state's decision to do so is entirely voluntary, and if the state chooses not to administer this program, NPDES permits for that state are issued by USEPA. *See* 33 U.S.C. § 1342(a).

To effectuate California's issuance of NPDES permits, the Legislature in 1972 added Chapter 5.5 to the Porter-Cologne Act, Water Code §§ 13370-13389. *Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 875.[9] In so doing, the Legislature ensured that California law would mirror the CWA's savings clause by authorizing the State Board and regional boards to not only issue permits that complied with the CWA's requirements, but also to include in them "any more stringent effluent standards or limitations necessary to implement water quality control plans, or the protection of beneficial uses, or to prevent nuisance." Water Code § 13377.

In California, NPDES permits are issued by the State Board and the nine regional boards. Water Code § 13377. Such permits can include both federal requirements and any other state provisions that are more stringent than the federal requirements. *Id.* As the California Supreme Court held in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 627-28, the latter requirements are state-imposed and subject to the requirements of state law.

The CWA was amended in 1987 to regulate discharges of stormwater from both industrial and municipal sources. 33 U.S.C. § 1342(p). Permits for discharges from municipal separate storm sewer systems:

(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 U.S.C. § 1342(p)(3)(B).

The CWA requirements imposed on municipal stormwater dischargers are less stringent than those imposed on industrial dischargers. Industrial dischargers, including industrial stormwater dischargers, must assure that their discharges meet "water quality standards." 33 U.S.C. §§ 1342(a), 1311(b)(1)(C) and 1342(p)(3)(A). The CWA does not impose this requirement on municipal stormwater dischargers. 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164-65. In *Defenders*, the Ninth Circuit specifically held that MS4 permits were not required to include requirements to meet water quality standards. The

[9] Copies of cited federal and state cases are contained in Section 7, Exhibit E.

court found that EPA or a state may have the *discretion* to include such requirements in a MS4 permit, but such inclusion was solely discretionary. It is not required by the CWA. *Id.* at 1166.

Under the CWA, a state administers "*its own permit program* for discharges into navigable waters," which program is established and administered "*under State law*." 33 U.S.C. § 1342(b) (emphasis added.) *See also* 40 C.F.R. §123.22 ("Any State that seeks to administer a program . . . shall submit a description of the program it proposes to administer in lieu of the Federal program *under State law*. . . .") (emphasis added).

When administering an NPDES program, the state is not acting as an arm of the United States Environmental Protection Agency ("EPA"), but is acting *in lieu* of the federal program. 40 C.F.R. § 123.22; *State of California v. United States Department of the Navy* (9th Cir. 1988) 845 F.2d 222, 225 (CWA legislative history "clearly states that the state permit programs are 'not a delegation of Federal Authority' but instead are state programs which 'function . . . in lieu of the Federal program.'"); *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 522 ("It is true, as these parties observe, that the Clean Water Act does not directly delegate a state agency the authority to administer the federal clean water program; instead, it 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.").

The Permit is a "Phase I" permit issued to MS4s serving large urban populations. In 1990, EPA issued regulations to implement Phase I of the MS4 permit program. 55 Fed. Reg. 47990 (November 16, 1990). The requirements of those regulations, as they apply to the provisions of the Permit relevant to this Test Claim, are discussed in further depth below.

This Commission previously has found, in a test claim brought regarding the 2001 Los Angeles MS4 permit ("2001 Permit") and in a test claim brought regarding a 2007 San Diego MS4 permit, that those permits contained requirements that exceeded federal law and constituted unfunded state mandates. *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 ("Los Angeles County Test Claim"); *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Case No. 07-TC-09 ("San Diego County Test Claim"). The Supreme Court affirmed the Commission's findings in the Los Angeles County Test Claim in *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal. 5th 749 ("*Dept. of Finance"*), a case which is discussed in detail in Section III.B below. Review of the Commission's decision in the San Diego County Test Claim is pending in the California Court of Appeal.

The State Board has issued two state-wide general NPDES stormwater permits covering construction sites (SWRCB Order 2009-0009 DWQ, as amended by Order 2010-0014 DWQ) ("GCASP") and certain industrial facilities (SWRCB Order 97-03 DWQ, superseded by Order No. 2014-0057-DWQ (effective July 1, 2015)) ("GIASP"). The responsibility to enforce these permits has been delegated by the State Board to the regional boards. *See* Order 2009-0009 DWQ, paragraph 8; Order 97-03 DWQ, paragraph 13; Order 2014-0057, paragraphs I.A.7, I.Q, and

XIX.B.[10] In addition, permittees covered by the GCASP and GIASP are required to pay fees to the State Board, fees which are authorized under Water Code § 13260(d)(2)(B)(i)-(iii).

As will be discussed below, however, notwithstanding these State Board Orders the Permit requires the permittees to inspect industrial and construction sites and to conduct enforcement activities with respect to these general permits, which represents a transfer of these state obligations to local agencies. The Commission itself has already found, in the Los Angeles County Test Claim, that similar obligations under the 2001 Permit represented state mandates. Los Angeles County Test Claim, Statement of Decision at 40-48.

III. STATE MANDATE LAW

A. Introduction

Article XIII B, section 6, of the California Constitution requires that the Legislature provide a subvention of funds to reimburse local agencies any time that the Legislature or a state agency "mandates a new program or higher level of service on any local government." The purpose of 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." *County of San Diego v. State of California* (1991) 15 Cal.4th 68, 81. The Legislature implemented section 6 by enacting a comprehensive administrative scheme to establish and pay mandate claims. Govt. Code § 17500 *et seq.*; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 333 (statute establishes "procedure by which to implement and enforce section 6").

"Costs mandated by the state" include "any increased costs which a local agency … 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." Govt. Code § 17514.

Govt. Code § 17516 defines "executive order" to mean "any order, plan, requirement, rule or regulation issued by the Governor, any officer or official serving at the pleasure of the Governor, or any agency, department, board, or commission of state government."

Govt. Code § 17556 identifies seven exceptions to the reimbursement requirement for state mandated costs. The exceptions are as follows:

> (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. . . .

[10] See Section 7, Exhibit F and Supplemental Authorities filed herewith.

> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The 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. . . .
>
> (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.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies or . . . includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election. . . .
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Of these exceptions, only (c) and (d) are relevant to the determination of this Test Claim.

B. The Supreme Court's Holdings in *Dept. of Finance* Control this Case

In *Dept. of Finance*, the Supreme Court addressed a challenge to the Commission's finding that the inspection and trash receptacle provisions of the 2001 Permit constituted state, as opposed to federal, mandates. Three holdings from that case are pertinent here:

1. The first is the holding that sets forth the test to determine if a mandate is federal versus state: "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.

2. The second is the holding that addresses the lack of deference to Regional Board findings: In determining whether a mandate is state or federal, the Commission does not defer to the Regional Board. Instead, the Commission makes its own, independent finding. *Id.* at 768-769.

3. The third holding addresses the burden of proof: The State has the burden of proving that one of Government Code section 17756 exceptions applies, including that a mandate is federal as opposed state. *Id.* at 769.

The manner in which the Supreme Court reached its conclusion that the inspection and trash receptacle requirements were state mandates is also pertinent here. The Supreme Court's analysis included (a) examination of federal and state statutory and regulatory authority, (b) evidence from the permit development process, and (c) evidence of other permits issued by the federal and state governments. In affirming the Commission's decision, the Court explicitly rejected the State's argument that the inspection and trash requirements were implementation of the maximum extent practicable ("MEP") standard required of stormwater permittees by 33 U.S.C. § 1342(p)(3)(B)(iii), and that the existence of this MEP provision alone was sufficient to establish that federal law compelled these requirements. 1 Cal. 5th at 759-760, 767-768. Instead the Court undertook an analysis of whether federal law specifically compelled the inspection and trash receptacle requirements at issue. 1 Cal. 5th at 770-772. The Court also rejected the State's argument that the Commission should defer to Regional Board findings that the permit requirements were federal versus state. 1 Cal. 5th at 768-769.

The Supreme Court's holdings were based on the public policies underlying article XIII B, section 6, and the reasoning in four principal cases, *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805, *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, and *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal.App.3d 794. *See Dept. of Finance,* 1 Cal. 5th at 762-769.

These public policies, the holdings in *Dept. of Finance,* and the holdings in the four cases the Supreme Court relied on, all apply here. As set forth below, the mandates at issue in this Test Claim carry out the governmental function of providing services to the public and impose unique requirements on Claimants. The mandates are new or impose a higher level of service. Each requirement is the result of a "true choice" by the Regional Board to impose the conditions at issue or to specify the means of compliance. Nowhere in the Permit is there any case-specific Regional Board finding that the requirements at issue are the *only* way in which the MEP standard could be achieved. Finally, Claimants do not have the authority to levy service charges, fees or assessments sufficient to pay for these mandates.

IV. THE MANDATES IN THIS TEST CLAIM ARE STATE MANDATES FOR WHICH CLAIMANTS ARE ENTITLED TO A SUBVENTION OF FUNDS

As noted, Calif. Const. article XIII B, section 6, requires a subvention of funds whenever the Legislature or any state agency imposes a new program or higher level of service on any local government. A "program" within the meaning of article XIII B, section 6, is a program that carries out a governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments. *County of Los Angeles v. State of California* (1987) 43 Cal.3d, 46, 56.

The Permit requirements at issue here are "programs" within the meaning of article XIII B, section 6, in that they require the County and District to provide certain services to the public. The Permit requirements here are unique because they arise from the operation of an MS4 NPDES permit, which is issued only to municipalities and which requires activities that are not required of private, non-governmental dischargers. These requirements include the adoption of ordinances, the development and amendment of government planning documents and electronic databases, the inspection of facilities, the enforcement of statutes and ordinances and other governmental functions.

Under the Permit, the County and District can comply directly with its specific provisions or comply through a Watershed Management Program ("WMP") or Enhanced Watershed Management Program ("EWMP"), as set forth in Part VI.C of the Permit. The WMP and EWMP are intended to allow permittees, individually or collectively, to develop a coordinated plan to implement the requirements of the Permit. Permit Part VI.C.1.a. For example, permittees that prepare a WMP or EWMP can prepare a customized program to comply with the "Storm Water Management Program Minimum Control Measures" ("MCM") set forth in Permit Part VI.D. Part VI.C.5.b(iv). However, the control measures set forth in the WMP or EWMP must be consistent with those MCM control measures set forth in Permit Part VI.D, which are "incorporated" as part of the WMP or EWMP pursuant to Part VI.C.5.b.(iv).

Permittees that participate in a WMP or EWMP must assess the MCMs for the Development Construction Program (Part VI.D.8), the Industrial/Commercial Facilities Program (Part VI.D.6), the Illicit Connection and Illicit Discharges Detection and Elimination Program (Part VI.D.10), the Public Agency Activities Program (Part VI.D.9) and the Public Information and Participation Program (Part VI.D.5) and identify "potential modifications that will address watershed priorities." Part VI.C.5.b(iv)(1)(a). The discretion of permittees participating in a WMP or EWMP is thus constrained by the requirements of the MCMs. Permit Part VI.C.5.b.(iv)(1)(c) further requires that if a permittee (including both the District and the County) "elects to eliminate a control measure identified in Parts VI.D.4 [relating to the District], VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 because that specific control measure is not applicable to the Permittee(s), the Permittee(s) shall provide a justification for its elimination." Control measures set forth in the Permit's Planning and Land Development Program (Permit Part VI.D.7) are "not eligible for elimination." *Id.*

Permittees participate in a WMP or EWMP also must, with regard to non-stormwater discharge measures, include "strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A [which addresses non-stormwater discharges] and VI.D.10 [the MCM concerning illicit connection and illicit discharges detection and elimination]." Permit Part VI.C.5.b(iv)(2). Additionally, as discussed in Section IV.A below, permittees can also comply with Total Maximum Daily Load ("TMDL") programs through participation in a WMP or EWMP.

Thus, the specific requirements of the Permit as to MCMs, non-stormwater discharges, and TMDL and RWL compliance drive the scope and ultimate expense of the development and implementation of the WMP or EWMP. The WMP or EWMP is one means of complying with

the mandates imposed by the Permit. Permittees participate in a WMP/EWMP (which must be generally consistent with the Permit's requirements) or otherwise comply directly with the Permit's requirements. Permit Part VI.C.4.e. If a permittee does not have an approved WMP or EWMP within the time deadlines set forth in the Permit, it "shall be subject to the baseline requirements in Part VI.D [the MCM] and shall demonstrate compliance with receiving water limitations pursuant to Part V.A and with applicable interim water quality-based effluent limitations in Part VI.E . . . ." *Id.*

Requirements Applicable to Both the County and District

A. TMDL Requirements

The Permit requires the County and District to comply with TMDLs in various watersheds, either directly, or through the preparation of a WMP or EWMP. The requirements of the Permit with respect to TMDLs are set forth below.

1. Mandate Requirements in the Permit

The Permit requires the County and District to comply with applicable water quality-based effluent limitations and receiving water limitations contained in the Total Maximum Daily Loads ("TMDLs") set forth in the Permit's attachments L through R. The County and District must comply with the implementation plans and schedules in state adopted TMDLs, and can comply with interim limits and EPA-adopted TMDLs through a WMP or EWMP, as discussed above. Permit Parts VI.E.1.c, VI.E.2.d, and VI.E.3.

As part of this compliance, permittees, such as the County and District, must sample and analyze water samples at TMDL "receiving water compliance points" and at storm water and non stormwater outfalls as designated in TMDL Monitoring Plans. Permit Part VI.B and Attachment E, Parts II.E.1-3, and Part V. This monitoring can be part of an Integrated or Coordinated Integrated Monitoring Program. The monitoring programs can be developed in conjunction with any watershed management program or enhanced watershed management program for a particular water body. Permit Part VI.C.7.

The County is required to comply with all of the TMDLs identified in the Permit with the exception of the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL, the Colorado Lagoon Pesticides, PCBs, Toxics and Metals TMDL, and the Middle Santa Ana River Bacteria TMDL. Permit Attachment K.

The District must comply with all TMDLs except the Lakes Elizabeth, Munz and Hughes Trash TMDL, the Los Angeles Harbor Bacteria TMDL, and the Middle Santa Ana River Bacteria TMDL. Permit Attachment K.

The Permit's specific mandates are as follows:

a. Part VI.E.1.c requires the County and District to "comply with the 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 WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR 122.44(d)(1)(vii)(B); Cal. Wat. Code § 13263(a))."

b. Permit Attachment K sets forth the TMDLs with which the County and District must comply.

c. Permit Attachments L through Q set forth the requirements of each TMDL and its "waste load allocations ("WLAs")" with which the County and District must comply.

d. Permit Part VI.B requires the County and District "to comply with the [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A of Attachment E and includes the elements set forth in Part II.E of Attachment E."

e. Permit Attachment E requires that in the performance of the monitoring program, the County and District must include monitoring at "TMDL receiving water compliance points" and other "TMDL monitoring requirements specified in approved TMDL Monitoring Plans." Permit Attachment E, Parts II.E.1-3 and Part V; *see also* Permit Attachment E, Parts VI.A.1.b(iii-iv), VI.B.2, VI.C.1.a, VI.D.1.a, VIII.B.1.b(ii), IX.A.5, IX.C.1.a, IX.E.1.a-b, IX.G.1.b, and IX.G.2.

The County and District can meet their TMDL compliance requirements through participation in a WMP or EWMP that addresses the TMDL. Permit Part VI.E.2.a.

2. These Permit Requirements are New Programs or Higher Levels of Service

As adopted, the 2001 Permit included no TMDL provisions or associated required monitoring. On August 9, 2007, the Regional Board amended the 2001 Permit to include provisions relating to the Marina del Rey Bacteria TMDL. 2001 Permit, Part 2.6. On December 10, 2009, the permit was amended to incorporate provisions of the Los Angeles River Watershed Trash TMDL.[11] 2001 Permit, Appendix 7.

With respect to the Marina del Rey Bacteria TMDL, under the 2001 Permit, permittees were required to be in compliance with only the summer dry weather provisions. 2001 Permit, Part 2.6. The 2012 Permit has different, additional requirements. Under the Permit, the County and District are now required to comply with the Marina del Rey Bacteria wet weather TMDL requirements in addition to dry weather. Permit Attachment M, Part F.1. These new requirements are new programs or higher levels of service.

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

[11] The 2001 Permit was also amended to add a TMDL covering Santa Monica Bay Beaches Bacteria, but those requirements were removed by order of the Los Angeles County Superior Court.

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.[12] The 2012 Permit has different requirements; permittees must now reduce trash to zero percent of the baseline allocation. Permit Attachment O, Part A.3.

Accordingly, with the exception of the dry weather requirements of the Marina del Rey Bacteria TMDL, all TMDL requirements in the Permit, including monitoring requirements with respect thereto, are new programs or higher levels of service. These TMDL and monitoring requirements were not imposed on Claimants until the Permit was adopted.

3. These Permit Requirements are State Mandates

The Permit's TMDL requirements, including monitoring, are state mandates. The LARWQCB was not compelled to include these provisions in the Permit, but instead included them as a matter of discretion.

TMDLs are adapted pursuant to the CWA. 33 U.S.C. § 1313(d) provides that states must identify those waters for which effluent limitations required by 33 U.S.C. §§ 1311(d)(1)(A) and (B) are not stringent enough to implement any "water quality standard" applicable to such waters. 33 U.S.C. § 1313(d)(1)(A).

"Water quality standards" are adopted by the state. These standards consist of the designated uses of a navigable water and the water quality criteria required to support such uses. 33 U.S.C. § 1313(c)(2)(A).

A state must establish a TMDL for those waters where the effluent limitations are not stringent enough to implement any water quality standard. 33 U.S.C. § 1313(d)(1)(A). The TMDL must be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety and 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).

Under the federal CWA regulations, a TMDL is composed of both "Wasteload Allocations" ("WLAs") and Load Allocations ("LAs"). 40 C.F.R. § 130.2(g)-(h). The TMDL is the sum of the individual WLAs for point sources and LAs for non-point sources and natural background. 40 C.F.R. § 130.2(i).

The Permit requires the permittees to comply with the TMDLs referenced in the Permit and their associated WLAs. These WLAs are numeric limitations on the permittees' discharges; the permittees must develop programs to limit the pollutants in their discharges to these WLAs. Permit Part VI.E.1.c; Permit Attachments L through R.

[12] See Section 7, Exhibit F.

The LARWQCB was not required to include TMDL provisions in the Permit. As set forth above, TMDL provisions are solely for the purpose of meeting water quality standards. Federal law, however, 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). 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.) Because requiring compliance is discretionary, it is not a federal mandate. *Defenders of Wildlife,* 191 F.3d at 1166-67; *Dept. of Finance,* 1 Cal. 5th at 765 (where "the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated").

Similarly, the federal stormwater regulations do not require municipal stormwater permits to contain TMDL provisions. 40 C.F.R. § 122.44(d)(1)(vii)(B) addresses the interrelationship between TMDLs and NPDES permits. This regulation provides that NPDES permits are to include conditions consistent with the assumptions and requirements of TMDL waste load allocations "when applicable." 40 C.F.R § 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 Permit recognized that the LARWQCB'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 §§ 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 state agency decision, and thus a state, not a federal, mandate. A subvention of funds is appropriate not only for the cost of the structural controls and non-structural programs to achieve the WLAs but also the monitoring required by the TMDL implementation plans.

The CWA also does not compel the inclusion of numeric effluent limitations. As set forth above, 42 U.S.C. § 1342(p)(3)(B)(iii) provides that MS4 permits "shall require controls to reduce the pollutants to the maximum extent practicable . . . and such other provisions as the Administrator or the state determines appropriate for the control of such pollutants." *Defenders* held that this provision did not require the inclusion of numeric effluent limits to meet water quality standards in MS4 permits, but that EPA or a state had the discretion to include them. 191 F.3d at 1165-66. *See also Building Industry Ass'n, supra,* 124 Cal.App.4th at 874 ("With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce a discharge of pollutants to the maximum extent practicable'").

On November 22, 2002, EPA issued a guidance memorandum on "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and

NPDES Permit Requirements based on Those WLAs." In this memorandum,[13] EPA noted that because stormwater discharges are due to storm events, which are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal stormwater discharges. *Id.* p. 4. EPA concluded that, in light of 33 U.S.C. § 1342(p)(3)(B)(iii), "for NPDES-regulated municipal and small construction discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits." *Id.*

The LARWQCB was therefore not compelled by the CWA or its implementing regulations to incorporate TMDLs and their WLAs into the Permit. Even if it was so required, it was not required to reflect TMDL requirements as numeric effluent limits. Because federal law did not compel the LARWQCB to include the TMDLs, the monitoring program to implement those TMDLs was also not required. These requirements are state mandated requirements imposed by the LARWQCB itself.

4. Increased Costs of Mandate

As set forth in the Declarations in Section 6, the County incurred $1,653,000 in FY 2012-2013 and $6,937,000 in FY 2013-2014 in increased costs with respect to the above requirements. The District incurred $361,000 in FY 2012-2013 and $1,173,000 in FY 2013-14 in increased costs. *See* County Declaration, ¶ 8(f); District Declaration ¶ 8(f).

B. Requirements Related to Discharge Prohibitions For Non-Stormwater

Part III.A.1 of the Permit requires the County and District 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.

As noted above, Claimants can prepare a WMP or EWMP that would incorporate provisions regarding non-stormwater discharges. However, the Permit requires that any such WMP or EWMP provisions must include "strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A . . . . " Part VI.C.5.b(iv)(2). Thus, the provisions of Part III.A discussed below represent state-mandated requirements for new programs or higher levels of service that will, in whole or in part, be part of a WMP or EWMP.

[13] See Section 7, Exhibit F.

1. Mandate Requirements in the Permit

Permit Part III.A.1 of the Permit requires the County and District to prohibit certain non-stormwater discharges "through the MS4 to receiving waters."

Parts III.A.2 and VI.D.9.f, relating to conditional exemptions from the non-stormwater discharge prohibition, require the County (but not the District) to assure that appropriate BMPs are employed for discharges from essential non-emergency firefighting activities. With regard to unpermitted discharges by drinking water suppliers, both the County and the District are required to work with those suppliers on the conditions of their discharges.

Part III.A.4.a requires both the County and District to "develop and implement procedures" to require non-stormwater dischargers to fulfill requirements set forth in Part III.A.4.a(i-vi).

Part III.A.4.b requires the County (but not the District) to "develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs." The County is 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 County is 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.

Part III.A.4.c requires both the County and District to evaluate monitoring data collected pursuant to the 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, the County and District 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.

2. The Permit Requirements are New Programs or Higher Levels of Service

The Permit requirements set forth above are new programs or higher levels of service that have not been imposed on Claimants before. This can be seen by a comparison of these activities to the 2001 Permit.

The 2001 Permit required that permittees "effectively prohibit non-storm water discharges into the MS4 and watercourses" unless the non-stormwater discharge fell into one of several categories. 2001 Permit Part 1.A. The LARWQCB reserved to itself the obligation to add or remove categories of exempt non-stormwater discharges. *Id.*

The 2001 Permit did not require permittees to:

(a) police, through the establishment of procedures and standards, the categories of the "conditionally exempt" discharges to the MS4;

(b) assure that appropriate BMPs were employed for discharges from essential non-emergency firefighting activities or drinking water supply systems;

(c) implement procedures that minimized the discharge of landscape irrigation water into the MS4 or to coordinate with local water purveyors to promote landscape water use efficiency requirements;

(d) evaluate monitoring data to determine if any authorized or conditionally exempt non-stormwater discharges were a source of pollutants that may be causing or contributing to an exceedance of a receiving water limitation. (This previously was an obligation of the LARWQCB.); and

(e) "develop and implement procedures" to require non-stormwater dischargers to fulfill requirements set forth in Part III.A.4.a(i-vi).

The above-described requirements of the Permit are therefore new programs or higher levels of service.

3. The Permit Requirements are State Mandates

The CWA requires MS4 NPDES permits to "include a requirement to effectively prohibit non-stormwater discharges *into* the storm sewers." 33 U.S.C. § 1342(p)(3)(B)(ii) (emphasis added). The CWA does not, however, require regulation of non-stormwater discharges from storm sewers. The federal CWA regulations, in 40 C.F.R. § 122.26(d)(2)(iv)(B)(1):

(1) do not require a municipality to address certain specified categories of non-stormwater discharges into the MS4 unless the municipality determines that such discharges are sources of pollutants to "waters of the United States";

(2) do not require a municipality *to affirmatively evaluate* those discharges to determine if they are such a source of pollutants, as required by Section III.A of the Permit; and

(3) refer to the discharges as sources of pollutants to "waters of the United States," not to MS4 systems.

Here, the non-stormwater Permit requirements go beyond the requirements set forth in the federal CWA regulations, which do not mandate these particular implementing requirements. *Dept. of Finance,* 1 Cal. 5th at 765. Nor do the federal regulations require their scope and detail. *Id.* at 771. Additionally, by specifying the steps to be taken by the Claimants with regard to the evaluation of non-stormwater discharges, including the development and implementation of procedures, the evaluation of monitoring data, reporting to the LARWQCB, and coordination with local water purveyors and other requirements, the LARWQCB in the Permit has specified the

means of compliance with the non-stormwater discharge requirements. *Long Beach Unified School Dist. v State of California* (1990) 225 Cal.App.3d 155, 172-73. Thus, even if these requirements were federal in origin, the LARWQCB' specification of compliance, usurping the County and District's ability to design their own program, renders these Permit provisions state mandates. *Id.*; *Dept. of Finance,* 1 Cal. 5th at 771.

Finally, to the extent that these were previously performed by the LARWQCB, such as the responsibility to evaluate monitoring data to determine if authorized or conditionally exempt discharges were a source of pollutants, the LARWQCB in the Permit freely chose to impose these requirements on permittees rather than perform them itself. As such, a state mandate was imposed. *Id.*; *Hayes, supra,* 11 Cal.App.4th at 1593-94.

4. Increased Costs of Mandate

As set forth in the Declarations in Section 6, the County incurred $100,000 in FY 2012-2013 and $106,000 in FY 2013-2014 in increased costs with respect to the above requirements. The District incurred $24,000 in FY 2012-2013 and $5,000 in FY 2013-14 in increased costs. *See* County Declaration, ¶ 9(g); District Declaration ¶ 9(f).

C. Public Agency Requirements

Parts VI.D.4 and VI.D.9 of the Permit require Claimants to undertake numerous tasks with respect to their properties and operations.

As discussed above, the County or District can prepare a WMP or EWMP that would incorporate public agency program control measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.4 and Part VI.D.9 and incorporate or customize all public agency control measures set forth therein, unless their elimination is justified by the County or District as not applicable (Part VI.C.5.b(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

a. Applicable to the District

Permit Part VI.D.4.c(iii) requires the District to maintain an "updated inventory" of all District-owned or operated facilities that are potential sources of stormwater pollution, including 8 separate categories of 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.

Part VI.D.4.c(vi) requires the District 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, the District 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.

Part VI.D.4.c(x)(2) requires the District to train all employees and contractors "who use or have the potential to use pesticides or fertilizers" in 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.

b. Applicable to the County

Permit Part VI.D.9.c requires the County to maintain an "updated inventory" of all permittee-owned or operated facilities that are potential sources of stormwater pollution, including 24 separate categories of 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.

Part VI.D.9.d(i) requires the County to develop an inventory of "retrofitting opportunities" in existing development.

Part VI.D.9.d(ii) requires the County 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 the County 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.

Part VI.D.9.d(v) requires the County to cooperate with private landowners to "encourage site specific retrofitting projects." The County 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.

Part VI.D.9.g(ii) requires the County to implement an 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, in such policies, the County 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.

Part VI.D.9.h(vii) requires the County, 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, unless lack of maintenance causes the flooding. The County may also employ alternative or enhanced BMPs that "provide substantially equivalent removal of trash." If alternative means are employed, the County must demonstrate that such BMPs "provide equivalent trash removal performance as excluders."

Part VI.D.9.k(ii) requires the County to train all employees and contractors "who use or have the potential to use pesticides or fertilizers" that address the potential for pesticide-related surface water toxicity, in the proper use, handling, and disposal of pesticides, least toxic methods of pest prevention and control, including IPM and the reduction of pesticide use.

2. The Requirements are New Programs or Higher Levels of Service

The public agency requirements in the Permit represent a significantly enhanced set of requirements over those set forth in the 2001 Permit, and thus represent new programs or higher levels of service required of the County and District.

The 2001 Permit contained no requirements for permittees to inventory their public facilities or to inventory areas of existing development for retrofitting, to evaluate such areas or to encourage private landowners with respect to retrofitting. The 2001 Permit contained no requirements with respect to development and implementation of an IPM program or for the training of employees or contractors with respect to such a program.

The 2001 Permit contained a requirement that municipalities not covered by a Trash TMDL must place trash receptacles at transit stops. This requirement was determined to be a state mandate by the Commission in the Los Angeles County Test Claim, Statement of Decision at 1-2. The 2001 Permit did not contain a requirement for trash excluders or other equivalent BMPs.

3. These Permit Requirements are State Mandates

Nothing in the CWA or the stormwater regulations requires MS4 permittees to maintain an inventory of their public facilities. Similarly, nothing in the CWA or the regulations requires permittees to develop an inventory of existing development as candidates for retrofitting, or to evaluate and rank such candidates, or to include such projects as part of stormwater plans or off-

site mitigation projects or to cooperate with private landowners to encourage site specific retrofitting projects.

Similarly, nothing in the CWA or regulations requires the retrofitting of existing developed areas. The only retrofitting requirement in the CWA regulations is one which requires MS4 permits to include "[a] description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible." 40 CFR § 122.26(d)(2)(iv)(A)(4). This requirement however applies only to structural flood control devices and does not compel the type of comprehensive program required of the County in Part VI.D.9 of the Permit.

Nothing in the CWA or regulations requires the County or District to develop and implement an IPM program, or to train employees or contractors regarding such requirements.

Finally, nothing in the CWA or regulations requires the County to install trash excluders or other devices in areas where a Trash TMDL is not in effect. The California Supreme Court already has affirmed the Commission's determination in the Los Angeles County Test Claim that a requirement in the 2001 Permit for the placement of trash receptacles was a state mandate, not justified by any provision of the stormwater regulations. *Dept. of Finance*, 1 Cal. 5th at 771-72. That holding applies here.

The requirements of Permit Parts VI.D.4 and VI.D.9 outlined above exceed the requirements of the CWA and implementing federal regulations, and are thus state mandates. Since federal law (here the CWA) has given the LARWQCB discretion to impose these requirements, and the Board has exercised "its discretion to impose [the requirements] by virtue of a 'true choice,' the [requirements are] not federally mandated." *Dept. of Finance*, 1 Cal. 5th at 765.

4. Increased Costs of Mandate

As set forth in the Declarations in Section 6, the County incurred $35,000 in FY 2012-2013 and $82,000 in FY 2013-2014 in increased costs with respect to the above requirements. The District incurred $17,000 in FY 2012-2013 and $27,000 in FY 2013-14 in increased costs. *See* County Declaration, ¶ 14(i); District Declaration ¶ 10(d).

D. Illicit Connection and Discharge Program

Permit Parts VI.D.4 (for the District) and VI.D.10 (for the County) require the District and County to undertake requirements related to the investigation and reporting of illegal discharges ("ID") and spills, and mandates specific requirements for ID and spill response plans.

As discussed above, the County or District can prepare a WMP or EWMP that would incorporate illicit connection and discharge detection program control measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Parts VI.D.4 and VI.D.10 and incorporate all control measures set forth therein, unless their

elimination is justified by the County or District as not applicable (Part VI.C.5.b.(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

a. Applicable to the District

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.4.d(v)(3) 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.4.d(v)(4) 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.4.d(vi)(1) 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").

b. Applicable to the County

Permit Part VI.D.10.d(iv) requires the County 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."

Part VI.D.10.d(v) requires the County to maintain documentation of complaint calls and record the location of the reported spill or illicit discharge and the action undertaken in response.

Permit Part VI.D.10.e(i) requires, in pertinent part, that the County implement a "spill response plan" for all sewage and other spills that may discharge into its MS4.

Permit Part VI.D.10.e(i)(1) requires that 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)(3-4) requires the County 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 County to assemble and have available sufficient staff and equipment to meet these requirements.

2. The Requirements are New Programs or Higher Levels of Service

The 2001 Permit contained none of the above-cited requirements of Parts VI.D.4.d or VI.D.10(d)-(e). Part 4.B.1.a of the 2001 Permit required only that "signs with prohibitive language discouraging illegal dumping must be posted at designated public access points to creeks, other relevant water bodies, and channels . . . ." Thus, the above-cited requirements are new programs or required higher levels of service established by the LARWQCB in the Permit.

3. The Requirements are State Mandates

The Fact Sheet for the Permit (Appendix F) identifies only the general requirement in the CWA that MS4 permittees must "effectively prohibit non-stormwater discharges into the storm sewers." Fact Sheet at F-81 (citing 33 U.S.C. § 1342(p)(3)(B)(ii). The Fact Sheet also cites 40 C.F.R. § 122.26(d)(2)(iv)(B), which requires the permittees' management program to include "a program, including a schedule, to detect and remove (or require the discharger to the municipal storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. *Id.* at F-80. The Fact Sheet also cites 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), which requires the permittees' management program to include "[a] description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the [MS4] . . . ." *Id.* None of these statutory and regulatory provisions requires the actions set forth in Parts VI.D.4.d or VI.D.10.d or e.

The stormwater regulations also require that the management program include a "description of procedures to prevent, contain, and respond to spills that may discharge into the [MS4]" and 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 [MS4]." 40 C.F.R. §122.26(d)(iv)(B)(4-5).

These regulations do not require the specific actions set forth in Parts VI.D.4.d or VI.D.10.d and e. First, with respect to the public reporting provisions in Parts VI.D.4.d and VI.D.10.d, the Permit requires specific, detailed steps to be taken, including establishing a central contact point, revising signage adjacent to open channels and developing and maintaining written procedures regarding complaint calls. Because the regulations do not require the "scope and detail" that is mandated by these Permit's requirements, the requirements are not federal. *Dept. of Finance,* 1

Cal. 5th at 771. Even assuming that the stormwater regulations required a program to publicize public reporting, in the Permit the LARWQCB has gone farther and dictated the means of compliance with these regulatory requirements. For this reason also, these requirements constitute a state mandate. *Long Beach Unified School Dist. supra*, 225 Cal.App.3d at 172-73.

Similarly, the LARWQCB has dictated the means of compliance regarding spill responses, through requirements in Parts VI.D.4.d and Part VI.D.10.e regarding the manner of responding to a spill, including as to coordination, timing and reporting. As such, these requirements constitute a state mandate. *Long Beach Unified School Dist.,* 225 Cal.App.3d at 172-73.

4. Increased Costs of Mandate

As set forth in the Declarations in Section 6, the County incurred $49,000 in FY 2012-2013 and $45,000 in FY 2013-2014 in increased costs with respect to the above requirements. The District incurred $39,000 in FY 2012-2013 and $37,000 in FY 2013-14 in increased costs. *See* County Declaration, ¶ 15(f); District Declaration ¶ 11(e).

Requirements Applicable to the County

E. Public Information Program Requirements

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

As discussed above, the County can prepare a WMP or EWMP that would incorporate PIPP measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.5 and incorporate or customize all control measures set forth therein, unless their elimination is justified by the County as not applicable (Part VI.C.5.b.(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

Permit Part VI.D.5.a requires the County to "measurably increase" the knowledge of target audiences about the MS4, the 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 County to implement the PIPP activities by participating in a County-wide or Watershed Group-sponsored PIPP or individually.

Part VI.D.5.c requires the County 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, in public information or government pages of the telephone book. Part VI.D.5.c also requires the County to identify staff or departments serving as contact persons and provide 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)."

Part VI.D.5.d requires the County 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 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 the County website, which must include educational material and opportunities for public participation in stormwater pollution and cleanup activities; and provide schools within each permittee's jurisdiction with materials to educate K-12 students on stormwater pollution.

In each of the VI.D.5.d requirements, the County is required to "use effective strategies to educate and involve ethnic communities in storm water pollution prevention through culturally effective methods." *Id.* This requires the permittees, including the County, to identify such ethnic communities as well as appropriate culturally effective methods.

2. The Permit Requirements are New Programs or Higher Levels of Service

The above-described requirements in the Permit are new programs or higher levels of service, as demonstrated by a comparison with the requirements of the 2001 Permit.

The 2001 Permit contained no requirements for permittees other than the District, the Principal Permittee under that permit, to undertake these PIPP obligations. Thus, the PIPP obligations in the Permit applicable to the County are new obligations.

3. The Permit Requirements are State Mandates

The federal stormwater regulations require that a permittee must 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 C.F.R. § 122.26(d)(2)(iv)(B)(5-6).

Additionally, 40 C.F.R. § 122.26(d)(2)(iv)(A)(6) requires that the management program include a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from MS4s 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." While this regulation was cited in the Permit Fact Sheet (F-56), the requirements in Part VI.D.5 apply to the general public, not solely to commercial applicators and distributors of pesticides, herbicides and fertilizer.

The requirements set forth in Part VI.D.5 of the Permit both go beyond the requirements of the federal regulations and specify methods of compliance, which lead to the conclusion that the requirements are a state, not federal, mandate. *Dept. of Finance,* 1 Cal. 5th at 765, 771; *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at 172-73. The Permit requirements exceed the federal requirements in several ways, including the requirements related to public information activities relating to materials other than used and oil and toxic materials, requirements to target educational and public information programs at ethnic communities and to organize events targeted to residents and population subgroups.

With regard to the specification of the means of compliance, a comparison of the detailed and mandatory requirements of Part VI.D.5 with the general and flexible requirements of the federal stormwater regulations demonstrates that the LARWQCB intended in the Permit to direct the specific compliance of the permittees, including the County, with regard to its PIPP efforts. These Permit requirements far exceed the "scope and detail" of the federal requirements and thus are state, not federal, mandates. *Dept. of Finance,* 1 Cal. 5th at 771.

4. Increased Costs of Mandate

As set forth in its Declaration in Section 6, the County incurred $100,000 in FY 2012-2013 and $193,000 in FY 2013-2014 in increased costs with respect to the above requirements. *See* County Declaration, ¶ 10(e).

F. Inventory and Inspections of Industrial/Commercial Sources

Part VI.D.6 of the Permit requires the permittees, including the County, to track various "critical" industrial and commercial sources, including the creation and updating of an electronic database containing information regarding such sources and to inspect such sources.

As discussed above, the County may elect to prepare a WMP or EWMP that would incorporate industrial/commercial source control measures in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.6 and incorporate or customize all control measures set forth therein, unless their elimination is justified by the County as not applicable (Permit Part VI.C.5.b.(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

Permit Part VI.D.6 requires that the County 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 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" with the State Board. This provision requires the County to conduct field work to identify facilities and to collect information sufficient to fill the tracking database. Additionally, the County 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.

Permit Part VI.D.6.d requires that commercial facilities (restaurants, automotive service facilities (including automotive dealerships), retail gasoline outlets and nurseries and nursery centers be inspected twice during the term of the Permit, with the first inspection to occur within 2 years after the effective date of the Permit. 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 the County to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

Permit Part VI.D.6.e requires the County to inspect industrial facilities, including the categories of facilities identified in 40 C.F.R. § 122.26(b)(14)(i-xi) (the "Phase I facilities"), and facilities specified in 40 C.F.R. § 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 No Exposure Certification, 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 that discharge to MS4s that discharge to a Significant Ecological Area ("SEA"), the permit requires that the County "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 the County to identify waterbodies into which the facilities discharge and to evaluate the effectiveness of BMPs at the facilities.

2. The Requirements are New Programs or Higher Levels of Service

The requirements described above are new requirements or represent a higher level of service. This is evident from a comparison with the requirements of the 2001 Permit. First, while some tracking and inspection requirements were carried over from the 2001 Permit, those requirements were determined by the Commission to represent a new program and/or higher level of service in the Los Angeles County Test Claim. Thus, such requirements in the Permit continue this new program and/or higher level of service.

Second, whereas the 2001 Permit required tracking of commercial facilities (but not nurseries and nursery centers), Phase I facilities and Specified Facilities (2001 Permit, Part 4.C.1(a)), the information required in such tracking was not as extensive as the Permit now requires. The 2001 Permit included only the facility name and address, the name of the owner/operator, whether it was covered under the GIASP or other individual or general NPDES permit and a narrative description "including SIC codes that best reflects the industrial activities at and principal products of each facility." 2001 Permit, Part 4.C.1(b). Also, the 2001 Permit did not require permittees to maintain the tracking in an electronic database.

Third, although the 2001 Permit Part 4.C.2 required inspections of the same types of facilities as in the Permit (inspections that the Commission determined were a state mandate), the 2001 Permit did not require the inspectors to evaluate the effectiveness of the BMPs at the facilities, a significant new requirement.

3. The Requirements are State Mandates

The federal stormwater regulations require that a permittee's management program include a "description of a program to monitor and control pollutants in storm water 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." 40 C.F.R. § 122.26(d)(2)(iv)(C). Included in this program must be an identification of "priorities and procedures for inspections . . . ." 40 C.F.R. § 122.26(d)(2)(iv)(C)(i). These regulations are cited in the Permit Fact Sheet as legal authority for the inspection requirements. Permit Attachment F, pp. F-58-59.

This regulation only requires inspections of 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." 40 C.F.R. § 122.26(d)(2)(iv)(C). The regulation does not require inspections of the commercial facilities or the Phase I facilities identified in Part VI.D.6 of the Permit. These inspections are therefore state, not federal mandates.

Indeed, as discussed in Section III.B, the Supreme Court affirmed the Commission's determination in the Los Angeles County Test Claim that similar inspection requirements constitute state mandates. *Dept. of Finance,* 1 Cal. 5th at 770. As set forth in *Dept. of Finance,* the requirement to inspect Phase I facilities represents a shifting of state responsibility to inspect GIASP permittees to local agencies, a shifting which itself creates a state mandate. *Id.* at 771; *Hayes,* 11 Cal.App.4th at 1593-94.

Moreover, nothing in the federal regulations requires the County to confirm that an industrial facility maintains a WDID or No Exposure Certificate (requirements of the state-enforced GIASP) or to require additional BMPs for discharges into an SEA, a waterbody subject to TMDL provisions or a CWA § 303(d) listed waterbody. Because these facilities must obtain an independent NPDES permit through issuance of a state WDR (pursuant to Water Code § 13260), it is the responsibility of the State Board or a regional board, such as the LARWQCB, to ensure that the permit requires adequate BMPs to ensure compliance with discharge requirements. The Permit shifts that state responsibility to the local permittees, a shifting that, again, constitutes a state mandate. *Dept. of Finance,* 1 Cal. 5th at 770-771; *Hayes,* 11 Cal.App.4th at 1593-94.

4. Increased Costs of Mandate

As set forth in its Declaration in Section 6, the County incurred $161,000 in FY 2012-2013 and $592,000 in FY 2013-2014 in increased costs with respect to the above requirements. *See* County Declaration, ¶ 11(d).

G. Requirements Relating to Post-Construction BMPs

Part VI.D.7.d(iv) requires the County to implement a tracking system and inspection and enforcement program for new development and redevelopment post-construction BMPs.

As discussed above, the County can prepare a WMP or EWMP that would incorporate planning and land development provisions in a customized watershed-specific fashion. However, since such WMP or EWMP must assess the requirements of Part VI.D.7 and incorporate/customize all control measures set forth therein (Part VI.C.5.b(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

Permit Part VI.D.7.d(iv)(1)(a) and Attachment E, Part X, require the County to implement a GIS or other electronic system for tracking projects that have been conditioned for 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.

Part VI.D.7.d(iv)(1)(b) requires the County 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.

Part VI.D.7.d(iv)(1)(c) requires the County to develop a post-construction BMP maintenance inspection checklist and inspect at an interval of at least once every two years County-operated post-construction BMPs to assess operation conditions.

2. The Requirements are New Programs or Higher Levels of Service

The above-described requirements in the Permit represent new programs or a required higher level of service. This is demonstrated by comparing these requirements with the 2001 Permit, which had no requirement that the County establish a database for tracking projects with conditions for post-construction BMPs, had no requirement that permittees inspect development sites upon completion of construction to determine the proper installation of LID measures or BMPs and had no requirements to establish a post-construction BMP maintenance inspection checklists or to inspect permittee-operated post-construction BMPs.

3. The Requirements are State Mandates

The above-described requirements are state, not federal mandates, as they represent mandates not required by either the CWA or its regulations. Additionally, even were the requirements considered to be required under federal law, the LARWQCB's specification of how to comply with such requirements is itself a state mandate.

The federal CWA regulations require 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 municipal separate storm sewers which receive discharges from areas of new development and significant new redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

40 CFR § 122.26(d)(2)(iv)(A)(2). Nothing in this regulation requires that permittees develop a tracking system for post-construction BMPs or to inspect construction site BMPs for compliance with stormwater requirements. Similarly, nothing in the regulation requires routine inspections of post-construction BMPs operated by the permittees. Both in the exceedance of federal requirements, and in the specification of compliance set forth in the Permit that goes beyond federal requirements, state mandates have been created. *Dept. of Finance,* 1 Cal. 5th at 765, 771; *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at 172-73.

4. Increased Costs of Mandate

As set forth in its Declaration in Section 6, the County incurred $314,000 in FY 2012-2013 and $754,000 in FY 2013-2014 in increased costs with respect to the above requirements. *See* County Declaration, ¶ 12(d).

H. Construction Site Requirements

Part VI.D.8 of the Permit contains 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 for the review of those plans, the development of procedures to review and approve construction site plan documents, and the training of permittee employees. These requirements are applicable to the County.

As discussed above, the County can 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 County as not applicable (Part VI.C.5.b(iv)(c)), the provisions set forth below establishing new programs and/or a higher level of service are state mandates.

1. Mandate Requirements in the Permit

Permit Part VI.D.8.g(i) requires the County to develop an electronic system to inventory grading, encroachment, demolition, building, and 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) requires that the County 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 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.

Part VI.D.8.h requires the County 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, the County must develop and implement a checklist to conduct and document review of each ESCP.

Part VI.D.8.i(i) requires the County to develop and implement technical standards for the selection, installation and maintenance of construction BMPs for all sites within its jurisdiction.

Part VI.D.8.i(ii) requires that such construction BMPs must be tailored by the County to the risks posed by the project, as well as be in minimum conformance with standards in Permit Table 15, and 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 the County make technical standards "readily available" to the development community and that such standards must be "clearly referenced" within the County'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.

Part VI.D.8.j requires the County 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 its inspection obligations, the County must develop, implement and revise as necessary standard operating procedures that identify the inspection procedures to be followed by each permittee. Additionally, during inspections, the County must verify "active coverage" under the GCASP for specified projects; review the Erosion and Sediment Control Plan ("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.

Part VI.D.8.l(i-ii) requires the County 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 Qualified SWPPP Development ("QSD") program, and erosion sediment control/storm water inspectors in inspection procedures consistent with various standards. Additionally, if outside parties conduct inspections or review plans, each permittee is required to ensure that such staff is trained under the same requirements.

2. The Requirements are New Programs or Higher Levels of Service

The requirements described above are new programs and/or a higher level of service in that either they were not included as part of the County's obligations under the 2001 Permit or, if so, were determined by the Commission to represent a state mandate under the 2001 Permit. To the extent such latter requirements are carried forward in the Permit, they still represent state mandates.

The 2001 Permit did not require the County to develop a tracking system to track anything except grading permits. The 2001 Permit did not require the tracking system to be updated or to be populated with the items set forth in the Permit. The 2001 Permit did not require the County to develop and implement procedures for reviewing construction plan documents, or to develop a checklist to conduct and document the review of the ESCP (which itself was not required under the 2001 Permit.)

The 2001 Permit did not require the County to develop and implement technical standards for construction BMPs, did not specify the nature of such BMPs as set forth in the Permit, and did not require detailed installation designs or cut sheets or devising maintenance expectations.

The 2001 permit did not require that technical standards be made readily available to the development community or be referenced on the County's website, ordinance, permit approval or ESCP review forms.

Part 4.E.1 of the 2001 Permit required the permittees to implement a program to control runoff from construction activity at constructions sites within their jurisdiction, including sediment, construction-related materials, waste spills and residues, non-stormwater runoff from equipment and vehicle washing and erosion from slopes and channels. Part 4.E.2 of the 2001 Permit required that for construction sites of one acre or greater, permittees must require preparation and submittal of a Local Storm Water Pollution Prevention Plan ("SWPPP") for approval prior to 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. Part 4.E.3 of the 2001 Permit required construction sites of five acres or greater to meet the requirements of Parts 4.E.1 and 2 and further that permittees require proof of coverage under the GCASP, proof of coverage and a copy of the SWPPP if ownership transferred and use of "an effective system to track grading permits issued by each Permittee." Part 4.E.4 required referrals of violations of the state-issued GCASP and Part 4.E.5 required permittees to "train employees in target positions (whose jobs or activities are engaged in construction activities including construction inspection staff) concerning the requirements of the stormwater program.

The Commission determined that these requirements constituted a state mandate. Los Angeles County Test Claim, Statement of Decision at 46-48. The new Permit now greatly enhances the requirements for inspection of construction sites. While the 2001 Permit required only one inspection during the wet season, the new 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, including the County, 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. The 2001 Permit also did not require permittees to review the applicable ESCP (which was not required under the 2001 Permit) or 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; did not require that permittees make visual observations and keep records of non-stormwater water discharges, potential illicit discharges and connections and potential discharge of stormwater runoff; or require permittees to develop a written or electronic inspection report generated from an inspection checklist used in the field.

Finally, while the 2001 Permit required permittees to train employees regarding requirements of the stormwater management program, it did not require 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," nor did it require that inspectors be knowledgeable in inspection procedures consistent with the QSD program, to designate a staff person trained in the objectives of the QSD program or the Qualified SWPPP Practitioner program, or 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.

3. The Requirements are State Mandates

The federal stormwater regulations applicable to Phase I MS4s, such as that operated by the County, provide that a permittee's management program must contain:

"(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(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

(4) A description of appropriate educational and training measures for construction site operators."

40 C.F.R. §122.26(d)(2)(iv)(D)(1-4).

Nothing in this regulation specifies the requirements set forth in Permit Part VI.D.8, outlined above. The Permit requires specific, detailed actions by the permittees that are required by them in order to be in compliance with the requirements of the Permit, the "scope and detail" of which are not compelled by federal regulations. *Dept. of Finance,* 1 Cal. 5th at 771.

Additionally, the Permit requires the development and maintenance of an inventory of construction sites, which is not required by the regulations. As such, the requirements of Part VI.D.8 both exceed the requirements of the federal regulations and specify the means for permittees to comply with those regulations. The requirements therefore constitute state mandates. *Dept. of Finance,* 1 Cal. 5th at 771; *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at 172-73.

Moreover, the Supreme Court has affirmed the Commission's determination in the Los Angeles County Test Claim that less stringent, but comparable, requirements in the 2001 Permit

for the permittees to inspect construction sites constituted a state mandate. *Dept. of Finance,* 1 Cal. 5th at 770.

The Fact Sheet for the Permit does not cite 40 C.F.R. § 122.26(d)(2)(iv)(D)(1-4) as authority for these construction site requirements, even though it is the only applicable regulation for Phase I permits. Instead, the Fact Sheet cites 40 C.F.R. § 122.34(b)(4), which is applicable not to the Phase I MS4s, but to the smaller "Phase II" MS4s. Permit Attachment F at F-72 to F-73. This latter regulation does not apply to Claimants and was adopted under a different regulatory scheme which sets forth various "minimum control measures" for Phase II municipalities to adopt.

4. Claimants' Increased Costs

As set forth in its Declaration in Section 6, the County incurred $359,000 in FY 2012-2013 and $741,000 in FY 2013-2014 in increased costs with respect to the above requirements. *See* County Declaration, ¶ 13(i).

V. STATEWIDE COST ESTIMATE

This Joint Test Claim involves a permit issued to the County, the District and 84 cities in the urbanized areas of Los Angeles County south of the San Gabriel Mountains and within the jurisdiction of the LARWQCB. The County and District are only two of the permittees, and thus are not in a position to be able to verify costs incurred by other permittees. The County and District estimate that they incurred costs of $3,212,000 in FY 2012-13 and $10,692,000 in FY 2013-14. *See* Section 6, County Declaration, ¶¶ 8-15 and District Declaration, ¶¶ 8-11. In making a statewide estimate, the costs estimated by the Cities in Test Claim 13-TC-01 should be added to the County and District costs estimated here.

VI. FUNDING SOURCES

The County and District are not aware of any designated State, federal or non-local agency funds that are or will be available to fund the mandated activities set forth in this Test Claim.

The County and District are also restricted by the California Constitution with respect to their ability to assess fees or assessments sufficient to pay for the Permit's mandates.

First, in providing services or conferring benefits, the County and District cannot assess fees that cover more than the reasonable cost of providing the benefit, privilege, service or product and 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. 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. In this regard, the County and District 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).

The mandates at issue in this test claim are not the types of programs for which the County or District can assess a fee. The TMDL, non-stormwater discharge, information on illicit discharges, spill response plan, and public information programs, described in Sections IV.A, B, D, and E of this Narrative Statement, all are programs intended to improve the overall water quality in the 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 is receiving that is distinct from benefits that all other persons within the jurisdiction are receiving.

The Permit's requirements relating to public agencies, described in Section IV.C of this Narrative Statement, address requirements of the Claimants themselves. Again, therefore, there is no individual resident, business or property owner upon whom a fee can be assessed to pay for these requirements.

Likewise, no fee can be assessed 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 Water Resources Control Board already assesses a fee which includes a fee to pay for inspections. Water Code §13260(d)(2)(B). Because the State is already assessing a fee for these inspections, the County and the District are unlikely to be successful in demonstrating that their fees would bear a fair and reasonable relationship to the payor's burdens or benefits; the State has already collected a fee for that activity. Likewise, there is no party on which to assess the cost of creating the inventory and databases of industrial and commercial sites or to pay for the inspection of post-construction BMP requirements every two years into the future.

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 arguably apply here. As discussed above, any fee or assessment to pay for the TMDL non-stormwater discharge, information on illicit discharges, spill response plan, and public information programs 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 County and District's 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"[14] 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 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 1354-1355, 1357-1359.

Accordingly, the County and the District 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.

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

VII. PRIOR MANDATE DETERMINATIONS

A. Los Angeles County Test Claim

In 2003 and 2007, the County of Los Angeles and 14 cities within the county ("Los Angeles County claimants") submitted test claims 03-TC-04, 03-TC-19, 03-TC-19, 03-TC-20 and 03-TC-21. These test claims asserted that provisions of the 2001 Permit, LARWQCB Order No. 01-182, constituted unfunded state mandates. The 2001 Permit, like the 2012 Permit at issue in this Test Claim, was a renewal of an existing MS4 permit. The provisions challenged in these test claims concerned the requirement for the Los Angeles County claimants to install and maintain trash receptacles at transit stops and to inspect certain industrial, construction and commercial facilities for compliance with local and/or state storm water requirements.

The Commission, in a final decision issued on September 3, 2009, determined that the trash receptacle requirement was a reimbursable state mandate. *In re Test Claim on: Los Angeles Regional Quality Control Board Order No. 01-192*, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21. The Commission found that the portion of the test claims relating to the inspection requirement was a state mandate, but that the Los Angeles County claimants had fee authority sufficient to fund such inspections. In *Dept. of Finance*, the Supreme Court affirmed the Commission's findings that both the trash receptacle and inspection requirements were state mandates. 1 Cal. 5th at 770-772. The issue of whether the claimants can impose a fee to fund the inspections is still pending before the Superior Court.

The Commission approved parameters and guidelines for the trash receptacle mandate, and the State Controller's Office issued Claiming Instructions to the affected local agencies.

B. San Diego County Test Claim

In 2007, the County of San Diego and 21 cities within the county (the "San Diego County claimants") submitted test claim 07-TC-09. This test claim asserted that several provisions of San Diego RWQCB Order No. R9-2007-0001 constituted reimbursable state mandates. This order was the renewal of the existing MS4 permit for the San Diego County claimants.

On March 30, 2010, the Commission issued a final decision entitled *In re Test Claim on: San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, Case No. 07-TC-09. In that decision, the Commission found the following requirements to be reimbursable state mandates:

1. A requirement to conduct and report on street sweeping activities;

2. A requirement to conduct and report on storm sewer cleaning;

3. A requirement to conduct public education with respect to specific target communities and on specific topics;

4. A requirement to conduct mandatory watershed activities and collaborate in a Watershed Urban Management Program;

5. A requirement to conduct program effectiveness assessments;

6. A requirement to conduct long-term effectiveness assessments; and

7. A requirement for permittee collaboration.

The Commission also found requirements for hydromodification and low impact development programs to be state mandates, but determined that because local agencies could charge fees to pay for these programs, they were not reimbursable state mandates.

On January 5, 2012, the Commission's decision was overturned by the Sacramento County Superior Court and remanded to the Commission as the result of an action for writ of mandate brought by the State Department of Finance, the State Board and the San Diego RWQCB. The San Diego County Claimants appealed that decision to the California Court of Appeal, which has not yet heard argument on the appeal.

VIII. CONCLUSION

As noted in the Introduction, the County and District support the Permit and are working to implement its requirements. Claimants maintain a good working relationship with the LARWQCB and its staff and are committed to working together with the LARWQCB and other stakeholders to achieve the clean water goals set forth in the Permit.

Nonetheless, important elements of the Permit represent significant and expensive mandates at a time when the budgets of all local agencies, including those of Claimants, have been dramatically constrained. The Claimants submit that the mandates set forth in this Test Claim represent state mandates for which a subvention of funds is required, pursuant to article XIII B, section 6 of the California Constitution. The County and District respectfully request that the Commission make this finding as to each of the programs and activities set forth herein.

Section 6: Declarations in Support of Joint Test Claim of the County of Los Angeles and the Los Angeles County Flood Control District Concerning Los Angeles Regional Water Quality Control Board (Order No. R4-2012-0175 (NPDES No. CAS 004001)

DECLARATION OF PAUL ALVA, P.E.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

I, Paul Alva, P.E. hereby declare and state as follows:

1. I am a Principal Engineer for the Watershed Management Division of the County of Los Angeles Department of Public Works. In that capacity, I share responsibility for the compliance of the Los Angeles County Flood Control District ("District") with regard to the requirements of California Regional Water Quality Control Board, Los Angeles Region ("LARWQCB") Order No. R4-2012-0175 ("the Permit") as they apply to the District.

2. I have reviewed sections of the Permit and its attachments as set forth herein and am familiar with those provisions. I am also familiar with how the Permit changed requirements that were previously imposed on the District by the prior permit that had been issued to the District by the LARWQCB in 2001 ("2001 Permit").

3. I have an understanding of the District's sources of funding for programs and activities required to comply with the Permit.

4. I make this declaration based on my own personal knowledge, except for matters set forth herein based on information and belief, and as to those matters I believe them to be true. If called upon to testify, I could and would competently to the matters set forth herein.

5. In Section 5 and Section 7 of the Test Claim filed by the District and the County of Los Angeles, which contains exhibits to the Test Claim, the specific sections of the Permit at issue in the Test Claim have been set forth. I hereby incorporate such provisions of Sections 5 and 7 into this declaration as though fully set forth herein.

6. The District has elected to participate in Watershed Management Plans or Enhanced Watershed Management Plans ("WMP/EWMP") that will be designed to address, in whole or in part, the Total Maximum Daily Load ("TMDL") provisions of the Permit as well other requirements of the Permit, including those set forth in this Declaration.

7. Based on my understanding of the Permit, I believe that the Permit requires the District to undertake the following programs either directly or through the mechanism of a WMP/EWMP, which represent new programs and/or higher levels of service or the shifting of State responsibilities to the District, which activities were not required by the 2001 Permit and which are unique to local government entities:

8. **Implementation of TMDLs**:

(a) Part VI.E.1.c. requires the permittees, including the District, to "comply with the 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 WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR 122.44(d)(1)(vii)(B); Cal. Wat. Code § 13263(a))."

(b) Attachment K to the Permit sets forth the TMDLs with which the District must comply.

(c) Attachments L through Q of the Permit set forth the requirements of each TMDL and its associated "waste load allocations" with which the District must comply.

(d) Part VI.B of the Permit requires the District "to comply with the [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A of Attachment E and includes the elements set forth in Part II.E of Attachment E."

(e) Attachment E to the Permit requires the monitoring program to include monitoring at "TMDL receiving water compliance points" and other "TMDL monitoring requirements specified in approved TMDL Monitoring Plans." (Permit, Attachment E, Parts II.E.1 through 3 and Part V; *see also* Attachment E. Parts VI.A.1.b.(iii) and (iv), VI.B.2, VI.C.1.a, VI.D.1.a, VIII.B.1.b.(ii), IX.A.5, IX.C.1.a, IX.E.1.a and b, IX.G.1.b., and IX.G.2.)

(f) To the best of my information and belief, based on District records, the cost to the District to comply with these TMDL requirements in Fiscal Year (FY) 2012-2013, including costs in participating in the WMP/EWMP process, was approximately $361,000. These costs were first incurred by the District in January 2013, upon or shortly after the

Permit became effective. Based on District records, the cost to the District to comply with these requirements in FY 2013-2014 was approximately $1,173,000.

"

9. **Requirements Related to Discharge Prohibitions for Non-Stormwater**:

(a) Permit Part III.A.1 prohibits certain non-stormwater discharges through the municipal separate storm sewer system ("MS4") to receiving waters. I have been advised that this requirement exceeds the requirements of the Clean Water Act ("CWA").

(b) Part III.A.2 requires the District, with regard to unpermitted discharges by drinking water suppliers, to work with those suppliers on the conditions of their discharges.

(c) Part III.A.4.a requires the District to develop and implement procedures covering non-permitted discharges of non-stormwater to the District's MS4 in compliance with the requirements of Part III.A.4.a.(i-vi) of the Permit.

(d) Part III.A.4.c. requires the District to evaluate monitoring data collected pursuant to the Permit's Monitoring and Reporting Program (Permit Attachment E) and other associated data and information to determine, among other things, if authorized or conditionally authorized non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations and/or water quality based effluent limitations.

(e) Part III.A.4.d. requires the District to take action to address such non-stormwater discharges if they are found to be such a source of pollutants, through

effective prohibition, conditions, diversions or treatment. These tasks involve, among other things, meeting with non-stormwater dischargers, identifying and analyzing the nature of non-stormwater discharges, the development and implementation of discharge procedures, conducting public education efforts and evaluating monitoring data.

(f) To the best of my information and belief, based on District records, the cost to the District to comply with these non-stormwater prohibitions in FY 2012-2013 was approximately $24,000. These costs were first incurred by the District in January 2013, upon or shortly after the Permit became effective. Based on District records, the cost to the District to comply with these requirements in FY 2013-2014 was approximately $5,000.

10.. **Public Agency Requirements**:

(a) Permit Part VI.D.4.c.(iii) requires the District to maintain an "updated inventory" of all District-owned or operated facilities that are potential sources of stormwater pollution, including 8 separate categories of 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, 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.

(b) Part VI.D.4.c.(vi) requires the District 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, the District 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.

(c) Part VI.D.4.c.(x)(2) requires the District to train all employees and contractors "who use or have the potential to use pesticides or fertilizers" in 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.

(d) To the best of my information and belief, based on District records, the cost to the District to comply with these public agency activities in FY 2012-2013 was approximately $17,000. These costs were first incurred by the District in January 2013, upon or shortly after the Permit became effective. Based on District records, the cost to the District to comply with these requirements in FY 2013-2014 was approximately $27,000.

11.. **Illicit Connection and Discharge Requirements**:

(a) 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).

(b) Part VI.D.4.d.(v)(3) 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."

(c) Part VI.D.4.d.(v)(4) 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.

(d) Part VI.D.4.d.(vi)(1) 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 illicit discharges ("ID") 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) to report spills that may endanger health or the environment to appropriate public health agencies and the Office of Emergency Services.

(e) To the best of my information and belief, based on District records, the cost to the District to comply with these illicit connection and discharge requirements in FY 2012-2013 was approximately $39,000. These costs were first incurred by the District in January 2013, upon or shortly after the Permit became effective. Based on District records, the cost to the District to comply with these requirements in FY 2013-2014 was approximately $37,000.

12. I am informed and believe that there are no dedicated State, Federal or Regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the District would have the discretion to impose under California law to recover any portion of the cost of these programs and activities.

13. The District has filed a joint test claim with the County of Los Angeles. The District and the County agree on all issues of the test claim.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 22 day of August, 2017, at Alhambra, California.

Paul Alva, P.E.

SECTION 7

EXHIBIT G

(Supplemental Authorities)

Jacks v. City of Santa Barbara (2017)
3 Cal. 5th 248

Jacks v. City of Santa Barbara

Supreme Court of California

June 29, 2017, Filed

S225589

Reporter
3 Cal. 5th 248 *; 2017 Cal. LEXIS 4769 **; 2017 WL 2805638

ROLLAND JACKS et al., Plaintiffs and Appellants, v. CITY OF SANTA BARBARA, Defendant and Respondent.

Subsequent History: Reported at *Jacks v. City of Santa Barbara, 2017 Cal. LEXIS 5545 (Cal., June 29, 2017)*

Prior History: [1]** Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge. Court of Appeal, Second Appellate District, Division Six, No. B253474.

Jacks v. City of Santa Barbara, 234 Cal. App. 4th 925, 184 Cal. Rptr. 3d 539, 2015 Cal. App. LEXIS 178 (Cal. App. 2d Dist., Feb. 26, 2015)

Core Terms

customers, franchise, franchise fee, surcharge, charges, taxes, electricity, Ordinance, City's, purposes, ratepayers, local government, value of the franchise, voter approval, negotiations, costs, reasonable relation, courts, rates, requires, incidence, gross receipts, italics, voters, municipality, payor, collected, services, parties, bills

Case Summary

Overview
HOLDINGS: [1]-In a case in which plaintiffs challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the Supreme Court held that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred; [2]-Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Proposition 218; accordingly, the trial court erred in granting judgment on the pleadings to the city; [3]-However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax.

Outcome
Judgment of court of appeal affirmed in part and reversed in part; case remanded with directions.

LexisNexis® Headnotes

Governments > Local Governments > Finance

HN1[] **Local Governments, Finance**
A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

Governments > State & Territorial Governments > Finance

Governments > State & Territorial Governments > Legislatures

HN2[] **Local Governments, Finance** State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975-1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. *Cal. Const., art. XIII A, §§ 1*, *2*. In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes. *Cal. Const., art. XIII A, §§ 3*, *4*.

Governments > Local Governments > Finance

HN3[] **Local Governments, Finance** The term "special taxes" in *Cal. Const., art. XIII A, § 4*, means taxes which are levied for a specific purpose. In addition, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes. *Gov. Code, § 50076*.

Governments > Local Governments > Finance

HN4[] **Local Governments, Finance** Proposition 62, which added a new article to the California Government Code, *Gov. Code, §§ 53720-53730*, requires that all new local taxes be approved by a vote of the local electorate.

Governments > Local Governments > Charters

Governments > Local Governments > Finance

HN5[] **Local Governments, Charters** Proposition 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. *Cal. Const., art. XIII C, §§ 1*, *2*.

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN6[] **Burdens of Proof, Allocation** Proposition 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred. Cal. Const., art. XIII D, §§ 2,

subd. (b).

Constitutional Law > State Constitutional Operation

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN7[] **Constitutional Law, State Constitutional Operation**

Proposition 26 amended the California Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, "tax" means any levy, charge, or exaction of any kind imposed by a local government, *Cal. Const., art. XIII C, § 1, subd. (e)*, except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. *Cal. Const., art. XIII C, § 1, subd. (e)*.

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Real Property Taxes > Assessment & Valuation

HN8[] **Local Governments, Finance**

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

Governments > Local Governments > Finance

HN9[] **Local Governments, Finance**

Restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves Proposition 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN10[] **Public Improvements, Bridges & Roads**

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation

received for whatever purposes it chooses. *Cal. Const., arts. XIII A, § 3, subd. (b)(4)*, XIII C. This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the purpose of which was to reinforce the voter approval requirements set forth in Propositions 13 and 218. Although Proposition 26 strengthened restrictions on taxation by expansively defining "tax" as any levy, charge, or exaction of any kind imposed by a local government, *Cal. Const., art. XIII C, § 1, subd. (e)*, it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property. *Art. XIII C, § 1, subd. (e)(4)*.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

***HN11*[] Public Improvements, Bridges & Roads**

The Broughton Act's provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise - for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act - the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

***HN12*[] Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates

***HN13*[] Public Utility Commissions, Authorities & Powers**

The California Public Utilities Commission has established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Local Governments > Finance

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN14[] **Standards of Review, De Novo Review**
Whether a charge is a tax or a fee is a question of law for the appellate courts to decide on independent review of the facts.

Governments > Local Governments > Finance

Governments > Legislation > Interpretation

HN15[] **Local Governments, Finance**
The provisions of Proposition 218 shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Finance

HN16[] **Public Improvements, Bridges & Roads**
Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

Governments > Local Governments > Finance

HN17[] **Local Governments, Finance**
In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

Governments > Local Governments > Finance

HN18[] **Local Governments, Finance**
A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN19[] **Standards of Review, De Novo Review**
A motion for judgment on the pleadings presents the question of whether the plaintiff's complaint states facts sufficient to constitute a cause of action against the defendant. The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to

judicial notice. Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties. The court's primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory. An appellate court independently reviews a trial court's order on such a motion.

Headnotes/Syllabus

Summary

[*248] CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs filed a class action complaint challenging a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city. The utility transferred the revenues from the surcharge to the city. The city contended this separate charge was the fee paid by the utility for the privilege of using city property in connection with the delivery of electricity. The superior court granted the city's motion for judgment on the pleadings, concluding that the surcharge was not a tax and therefore was not subject to the voter approval requirements of Prop. 218. (Superior Court of Santa Barbara County, No. 1383959, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B253474, reversed the trial court's judgment, holding that the surcharge was a tax, and therefore required approval under Prop. 218.

The Supreme Court affirmed the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the city's motion for judgment on the pleadings, reversed the judgment to the extent the Court of Appeal directed the trial court to grant plaintiffs' motion for summary adjudication, and remanded the case with directions. The court held that to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. Liberally construed, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting judgment on the pleadings to the city. However, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge was a tax. (Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Krueger, JJ., concurring. Dissenting opinion by Chin, J. (see p. 274).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[⬇] (1)

> Municipalities § 96 > Franchise Fee > Tax > Reasonable Relationship > Value of Franchise.

A charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.

CA(2)[⬇] (2)

> Taxation § 1 > Constitutional Limitations > Voter Approval > Special Taxes.

State voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Prop. 13, which was adopted in 1978, set the assessed value of real property as the full cash value on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value (*Cal. Const., art. XIII A, §§ 1*, *2*). In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Prop. 13

required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose special taxes (*Cal. Const., art. XIII A, §§ 3*, *4*).

CA(3)[] (3)

Municipalities § 34 > Fiscal Affairs > Special Taxes > Reasonable Cost.

The term "special taxes" in *Cal. Const., art. XIII A, § 4*, means taxes which are levied for a specific purpose. In addition, a "special tax" does not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes (*Gov. Code, § 50076*).

CA(4)[] (4)

Municipalities § 34 > Fiscal Affairs > New Taxes > Voter Approval.

Prop. 62 requires that all new local taxes be approved by a vote of the local electorate.

CA(5)[] (5)

Municipalities § 34 > Fiscal Affairs > General and Special Taxes > Voter Approval > Charter Jurisdictions.

Prop. 218 amended the California Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions (*Cal. Const., art. XIII C, §§ 1*, *2*).

CA(6)[] (6)

Taxation § 1 > Assessment on Property > Special Benefit.

Prop. 13 was not intended to limit traditional benefit assessments. It requires an agency proposing an assessment on property to determine the proportionate special benefit to be derived by each parcel subject to the **[*250]** assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a special benefit and the assessment is proportional to the benefits conferred (Cal. Const., art. XIII D, §§ 2, subd. (b), 4).

CA(7)[] (7)

Municipalities § 34 > Fiscal Affairs > Local Taxes > Voter Approval > Specific Benefit > Reasonable Cost.

Prop. 26 amended the California Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, "tax" means any levy, charge, or exaction of any kind imposed by a local government (*Cal. Const., art. XIII C, § 1, subd. (e)*), except (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as

allowed under article XIII D. The local government bears the burden of establishing the exceptions (*Cal. Const., art. XIII C, § 1, subd. (e)*).

CA(8)[] (8)

Taxation § 1 > Assessment on Property > Special Benefit > Reasonable Cost.

If an assessment for improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. But if the assessment exceeds the actual cost of the improvement, the exaction is a tax and not an assessment. With respect to costs, Prop. 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes.

CA(9)[] (9)

Taxation § 1 > Special Benefit > Reasonable Cost > Payor's Activities.

Restricting allowable fees to the reasonable cost or value of the activity **[*251]** with which the charges are associated serves Prop. 13's purpose of limiting taxes. If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

CA(10)[] (10)

Municipalities § 96 > Franchise Fee > Use of Rights-of-way.

A franchise to use public streets or rights-of-way is a form of property, and a franchise fee is the purchase price of the franchise. Historically, franchise fees have not been considered taxes. Nothing in Prop. 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses (*Cal. Const., arts. XIII A, § 3, subd. (b)(4)*, XIII C). This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Prop. 26, the purpose of which was to reinforce the voter approval requirements set forth in Props. 13 and 218. Although Prop. 26 strengthened restrictions on taxation by expansively defining "tax" as any levy, charge, or exaction of any kind imposed by a local government (*Cal. Const., art. XIII C, § 1, subd. (e)*), it provided an exception for a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property (*Art. XIII C, § 1, subd. (e)(4)*).

CA(11)[] (11)

Municipalities § 96 > Franchise Fee > Calculation > Gross Receipts.

The Broughton Act's (*Pub. Util. Code, § 6001 et seq.*) provision that a franchise fee be based on the receipts from the use, operation, or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise in the same area in which it provides electricity under a franchise agreement

entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise.

CA(12)[] (12)

Public Utilities § 9 > Public Utilities Commission > Rates > Costs and Expenses.

The Public Utilities Commission sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. Among a utility's costs and expenses are government fees and taxes.

CA(13)[] (13)

Public Utilities § 9 > Public Utilities Commission > Rates > Surcharge.

The Public Utilities Commission has established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. When a local government imposes taxes or fees which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory, a utility may file an advice letter seeking approval to charge local government fee surcharges. Such surcharges must be included as a separate item or items to bills rendered to applicable customers. Each surcharge must be identified as being derived from the local governmental entity responsible for it.

CA(14)[] (14)

Municipalities § 34 > Fiscal Affairs > Taxes > Proposition 218 > Liberal Construction.

The provisions of Prop. 218 must be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

CA(15)[] (15)

Municipalities § 96 > Franchise Fee > Use of Rights-of-way > Value of Franchise.

Sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But to constitute compensation for the value received, the fees must reflect a reasonable estimate of the value of the franchise.

CA(16)[] (16)

Municipalities § 34 > Fiscal Affairs > Taxes > Revenue Purposes > Fee.

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. In determining whether a charge is a tax or a fee, a court looks to whether the primary purpose of a charge was to generate revenue. In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government asset rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment.

CA(17)[] (17)

Municipalities § 96 > Franchise Fee > Tax > Voter Approval > Reasonable Relationship > Value of Franchise.

A franchise fee must be based on the value of the franchise conveyed in order to come within the rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, to constitute a valid franchise fee under Prop. 218, the amount of the franchise fee must bear a reasonable

relationship to the value of the property interests transferred.

CA(18)[⬇] (18)

Municipalities § 34 > Fiscal Affairs > Tax > Surcharge > Sale of Electricity > Reasonable Relationship > Value of Franchise > Voter Approval.

In a case in which plaintiffs challenged a city's imposition of a 1 percent surcharge on an electric utility's gross receipts from the sale of electricity within the city, the first amended complaint and the stipulated facts adequately alleged the basis for a claim that the surcharge bore no reasonable relationship to the value of the franchise, and was therefore a tax requiring voter approval under Prop. 218. Accordingly, the trial court erred in granting judgment on the pleadings to the city.

[Cal. Forms of Pleading and Practice (2017) ch. 540, Taxes and Assessments, § 540.131; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1.]

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Judges: Opinion by Cantil-Sakauye, C. J., with Werdegar, Corrigan, Liu, Cuéllar, and Kruger, JJ., concurring. Dissenting Opinion by Chin, J.

Opinion by: Cantil-Sakauye

Opinion

[*254]

CANTIL-SAKAUYE, C. J.—Pursuant to an agreement between Southern California Edison (SCE) and defendant City of Santa Barbara (the City), SCE includes on its electricity **[**2]** bills to customers within the City a separate charge equal to 1 percent of SCE's gross receipts from the sale of electricity within the City, and transfers the revenues to the City. The City contends this separate charge, together with another charge equal to 1 percent of SCE's gross receipts that SCE includes in its electricity rates, is the fee paid by SCE for the privilege of using City property in connection with the delivery of electricity. Plaintiffs Rolland Jacks and Rove Enterprises, Inc., contend the 1 percent charge that is separately stated on electricity bills is not compensation for the privilege of using City property, but is instead a tax imposed without voter approval, in violation of Proposition 218. (Cal. Const., art. XIII C, § 2, added by Prop. 218.)

As we explain below, the right to use public streets or rights-of-way is a property interest, and Proposition 218 does not limit the authority of government to sell or lease its property and spend the compensation it receives for whatever purposes it chooses. Therefore, charges that constitute compensation for the use of government property are not subject to Proposition 218's voter approval requirements. To constitute compensation for a property **[**3]** interest, however, the amount of the charge must bear a reasonable relationship to the value of the property interest; to the extent the charge exceeds any reasonable value of the interest, it is a tax and therefore requires voter approval.

The litigation below did not address whether the charges bear a reasonable relationship to the value

of the property interests. Therefore, we affirm the judgment of the Court of Appeal to the extent it reversed the trial court's grant of the City's motion for judgment on the pleadings, but we reverse the Court of Appeal's order that the trial court grant summary adjudication to plaintiffs.

I. FACTS

The parties stipulated to the following facts in the trial court. Beginning in 1959, the City and SCE entered into a series of franchise agreements granting SCE the privilege to construct and use equipment along, over, and under the City's streets to distribute electricity. [1] At issue in this case is an agreement **[*255]** the City and SCE began negotiating in 1994, when their 1984 agreement was about to expire. The 1984 agreement required SCE to pay to the City a fee equal to 1 percent of the gross annual receipts from SCE's sale of electricity within the City in **[**4]** exchange for the franchise granted by the City. During the course of extended negotiations regarding a new agreement, the City and SCE extended the terms of the 1984 agreement five times, from September 1995 to December 1999.

In the negotiations for a long-term agreement, the City pursued a fee equal to 2 percent of SCE's gross annual receipts from the sale of electricity within the City. At some point in the negotiations, SCE proposed that it would remit to the City as a franchise fee 2 percent of its gross receipts if the Public Utilities Commission (PUC) consented to SCE's inclusion of the additional 1 percent as a surcharge on its bills to customers. Based on SCE's proposal, the City and SCE tentatively agreed to a 30-year agreement that included the provisions for payment of 2 percent of gross receipts. Following notice and a hearing, the City Council of Santa Barbara adopted the agreement as City Ordinance No. 5135 on December 7, 1999, with a term beginning on January 1, 2000 (the 1999 agreement). The ordinance was not submitted to the voters for their approval.

The 1999 agreement divides its 30-year period into two terms. The first two years **[**5]** were the "initial term," during which SCE was required to pay the City an "initial term fee" equal to 1 percent of its gross receipts from the sale of electricity within the City. The subsequent 28 years are the "extension term," during which SCE is to pay the additional 1 percent charge on its gross receipts, denominated the "recovery portion," for a total "extension term fee" of 2 percent of SCE's gross receipts from the sale of electricity within the City. At issue in this case is the recovery portion, which we, like the parties, refer to as the surcharge.

The agreement required SCE to apply to the PUC by April 1, 2001, for approval to include the surcharge on its bills to ratepayers within the City, and to use its best efforts to obtain PUC approval by April 1, 2002. Approval was to be sought in accordance with the PUC's "Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities." (*Investigation on the Commission's Own Motion To Establish Guidelines for the Equitable Treatment of Revenue-producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) *32 Cal.P.U.C.2d 60, 63* **[**6]** (*PUC Investigation*).) The agreement further provided that, in the event the PUC did not give its approval by the end of the initial term, either party could terminate the agreement. Thereafter, **[*256]** the City agreed to delay the time within which SCE was required to seek approval from the PUC, but SCE eventually obtained PUC approval, and began billing its customers within the City for the full extension term fee in November 2005.

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[1] A franchise is a privilege granted by the government to a particular individual or entity rather than to all as a common right. A utility franchise is a privilege to use public streets or rights-of-way in connection with the utility's provision of services to residents within the governmental entity's jurisdiction. (*Spring Valley W. W. v. Schottler (1882) 62 Cal. 69, 106–108*; *Santa Barbara County Taxpayer Assn. v. Board of Supervisors (1989) 209 Cal.App.3d 940, 949 [257 Cal.Rptr. 615]* (*Santa Barbara County Taxpayer Assn.*); 12 McQuillin, The Law of Municipal Corporations (3d ed. 2017) § 34.2, p. 15.)

The agreement provided that half of the revenues generated by the surcharge were to be allocated to the City's general fund and half to a City undergrounding projects fund. In November 2009, however, the City Council decided to reallocate the revenues from the surcharge, directing that all of the funds be placed in the City's general fund without any limitation on the use of these funds.

In 2011, plaintiffs filed a class action complaint challenging the surcharge. In their first amended complaint, they alleged the surcharge was an illegal tax under Proposition 218, which requires voter approval for all local taxes. (Cal. Const., art. XIII C.) Plaintiffs sought refunds of the charges collected, as well as declaratory relief and injunctive relief requiring the City to discontinue collection **[**7]** of the surcharge.

On cross-motions for summary adjudication and the City's motion for summary judgment, the trial court ruled that a franchise fee is not a tax under Proposition 218. Its ruling was based largely on *Santa Barbara County Taxpayer Assn., supra, 209 Cal.App.3d 940*, which held that franchise fees are not "proceeds of taxes" for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. Notwithstanding this ruling, the trial court denied the motions, based on its view that Proposition 26, which was approved by the voters in 2010, retroactively altered the definition of a tax under Proposition 218 to encompass franchise fees. Therefore, the court concluded, the City had failed to establish that the surcharge did not violate Proposition 218 during the period *after* Proposition 26 was adopted in 2010.

Thereafter, the City moved for judgment on the pleadings, contending that Proposition 26 does not apply retroactively to the surcharge. The trial court agreed, citing *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County (2013) 218 Cal.App.4th 195 [159 Cal. Rptr. 3d 424]*, which held that Proposition 26 does not apply retroactively. Based on its earlier conclusion that the surcharge, as a franchise fee, was not a tax under Proposition 218 (see *Santa Barbara County Taxpayer Assn., supra, 209 Cal.App.3d 940*), and its additional conclusion that a franchise fee, as negotiated compensation, need **[**8]** not be based on the government's costs, the trial court ruled that the surcharge was not subject to the voter approval requirements of Proposition 218. Therefore, it granted the City's motion for judgment on the pleadings.
[*257]

The Court of Appeal reversed the judgment. It looked to our opinion in *Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866 [64 Cal. Rptr. 2d 447, 937 P.2d 1350]* (*Sinclair Paint*), which considered whether a charge imposed by the state on those engaged in the stream of commerce of lead-containing products was a tax or a fee under Proposition 13, an earlier voter initiative that requires voter approval of various taxes. (Cal. Const., art. XIII A.) Noting that our analysis in *Sinclair Paint* focused on whether the primary purpose of the charge was to raise revenue or to regulate those charged, the Court of Appeal considered whether the primary purpose of the surcharge is to raise revenue or to compensate the City for allowing SCE to use its streets and rights-of-way. Based on its conclusion that the surcharge's "primary purpose is for the City to raise revenue from electricity users for general spending purposes rather than for SCE to obtain the right-of-way to provide electricity," the Court of Appeal held that the surcharge is a tax, and therefore requires voter approval under **[**9]** Proposition 218. (Cal. Const., art. XIII C, § 2, subd. (b).)

We granted review to address whether the surcharge is a tax subject to Proposition 218's voter approval requirement, or a fee that may be imposed by the City without voter consent.

II. DISCUSSION

CA(1)[↑] (1) Over the past four decades, California voters have repeatedly expanded voter approval requirements for the imposition of taxes

and assessments. These voter initiatives have not, however, required voter approval of certain charges related to a special benefit received by the payor or certain costs associated with an activity of the payor. Whether the surcharge required voter approval hinges on whether it is a valid charge under the principles that exclude certain charges from voter approval requirements. Our evaluation of this issue begins with a review of four voter initiatives that require voter approval of taxes, and the legal principles underlying the exclusion of certain charges from the initiatives' requirements. We then describe the historical characteristics of franchise fees, the Legislature's history of regulating the calculation of franchise fees, and the PUC's requirements concerning the imposition of franchise fees that exceed the average charges imposed by other **[**10]** local governments in the utility's service area. Finally, we analyze whether the surcharge is a valid franchise fee or a tax, and we hold that ***HN1***[↑] a charge imposed in exchange for franchise rights is a valid fee rather than a tax only if the amount of the charge is reasonably related to the value of the franchise.
[*258]

A. *Restrictions on Taxes and Other Charges*

1. *Voter Initiatives*

CA(2)[↑] (2) Beginning in 1978, ***HN2***[↑] state voters have imposed various limitations upon the authority of state and local governments to impose taxes and fees. Proposition 13, which was adopted that year, set the assessed value of real property as the "full cash value" on the owner's 1975–1976 tax bill, limited increases in the assessed value to 2 percent per year unless there was a change in ownership, and limited the rate of taxation on real property to 1 percent of its assessed value. (*Cal. Const., art. XIII A, §§ 1*, *2*.) In addition, to prevent tax savings related to real property from being offset by increases in state and local taxes, Proposition 13 required approval by two-thirds of the members of the Legislature in order to increase state taxes, and required approval by two-thirds of the local electors of a city, county, or special district in order for such **[**11]** a local entity to impose special taxes. (*Cal. Const., art. XIII A, §§ 3*, *4*; *Sinclair Paint, supra, 15 Cal.4th at p. 872*; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 231 [149 Cal. Rptr. 239, 583 P.2d 1281]* (*Amador Valley*).)

CA(3)[↑] (3) Proposition 13 did not define "special taxes," but this court addressed the initiative's restrictions on such taxes in two early cases. In *Los Angeles County Transportation Com. v. Richmond (1982) 31 Cal.3d 197 [182 Cal. Rptr. 324, 643 P.2d 941]*, we held that the requirement that "special districts" obtain two-thirds voter approval for special taxes applied only to those special districts empowered to levy property taxes. (*Id. at p. 207*.) In *City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47 [184 Cal. Rptr. 713, 648 P.2d 935]* (*Farrell*), "we construe[d] ***HN3***[↑] the term 'special taxes' in *section 4 [of article XIII A]* to mean taxes which are levied for a specific purpose." (*Id. at p. 57*.) In addition, the Legislature provided that "'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (*Gov. Code, § 50076*.)

CA(4)[↑] (4) Thereafter, in 1986, the voters approved ***HN4***[↑] Proposition 62, which "added a new article to the Government Code (*§§ 53720–53730*) requiring that all new local taxes be approved by a vote of the local electorate." (*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 231 [45 Cal. Rptr. 2d 207, 902 P.2d 225]*, fn. omitted.) The initiative embraced the definition of special taxes set forth in *Farrell, supra, 32 Cal.3d 47* (*Gov. Code, § 53721*; see *Guardino, at p. 232*), but applied its voter approval requirements to any district rather than only to special districts, and defined "district" **[**12]** broadly. (*Gov. Code, § 53720, subd. (b)* ["'district' means an agency of the state, formed … for the local performance of governmental **[*259]** or proprietary functions within limited boundaries"].) By the time

Proposition 62 was proposed, courts as well as the Legislature had recognized that various fees were not taxes for purposes of Proposition 13 (see *Beaumont Investors v. Beaumont-Cherry Valley Water Dist. (1985) 165 Cal.App.3d 227 [211 Cal. Rptr. 567]*; *Mills v. County of Trinity (1980) 108 Cal.App.3d 656 [166 Cal. Rptr. 674]*), but Proposition 62 was silent with respect to the imposition of fees.

CA(5)[⬆] (5) Next, in 1996, state voters approved Proposition 218, known as the "Right to Vote on Taxes Act." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 835 [102 Cal. Rptr. 2d 719, 14 P.3d 930]* (*Apartment Assn.*).) Proposition 218 addressed two principal concerns. First, it was not clear whether Proposition 62, which enacted statutory provisions, bound charter jurisdictions. [2] (*Howard Jarvis Taxpayers Assn. v. City of San Diego (2004) 120 Cal.App.4th 374, 390–391 [15 Cal. Rptr. 3d 457]*.) Therefore, ***HN5***[⬆] Proposition 218 amended the Constitution to add voter approval requirements for general and special taxes, thereby binding charter jurisdictions. (Cal. Const., art. XIII C, §§ 1, 2.)

CA(6)[⬆] (6) Second, ***HN6***[⬆] Proposition 13 was "not intended to limit 'traditional' benefit assessments." (*Knox v. City of Orland (1992) 4 Cal.4th 132, 141 [14 Cal. Rptr. 2d 159, 841 P.2d 144]* (*Knox*) [upholding property-based assessments for public landscaping and lighting improvements].) Proposition 218 was adopted in part to address *Knox*'s holding. (*Greene v. Marin County Flood Control & Water Conservation Dist. (2010) 49 Cal.4th 277, 284 [109 Cal. Rptr. 3d 620, 231 P.3d 350]*.) It requires an agency proposing an assessment on property to determine the proportionate special **[**13]** benefit to be derived by each parcel subject to the assessment; to support the assessment with an engineer's report; to give written notice to each parcel owner of the amount of the proposed assessment and the basis of the calculation; and to provide each owner with a ballot to vote in favor of or against the proposed assessment. It also requires the agency to hold a public hearing, and bars imposition of the assessment if a majority of parcel owners within the assessment area submit ballots in opposition to the assessment, with each ballot weighted based on the proposed financial obligation of the affected parcel. In the event legal action is brought contesting an assessment, the agency has the burden to establish that the burdened properties receive a **[*260]** special benefit and the assessment is proportional to the benefits conferred. (Cal. Const., art. XIII D, §§ 2, subd. (b), 4; see *Apartment Assn., supra, 24 Cal.4th 830*.) [3]

CA(7)[⬆] (7) Most recently, in 2010, after the charge at issue in this case was adopted, state voters approved Proposition 26. ***HN7***[⬆] That measure amended the Constitution to provide that for purposes of article XIII C, which addresses voter approval of local taxes, " 'tax' means any levy, charge, or exaction of any kind imposed by a local government" (Cal. Const., art. XIII C, § 1, subd. (e)), *except* ***[**14]*** (1) a charge imposed for a specific benefit or privilege received only by those charged, which does not exceed its reasonable cost, (2) a charge for a specific government service or product provided directly to the payor and not

[2] "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question." (*Cal. Const., art. XI, § 3, subd. (a)*.) County charters "supersede … all laws inconsistent therewith" (*ibid.*), and city charters supersede all inconsistent laws "with respect to municipal affairs." (*Id.*, *§ 5, subd. (a)*; see *Johnson v. Bradley (1992) 4 Cal.4th 389, 394–400 [14 Cal. Rptr. 2d 470, 841 P.2d 990]*.)

[3] Proposition 218 also imposed restrictions on the imposition of fees and charges for property-related services, such as sewer and water services, but provided that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." (Cal. Const., art. XIII D, § 3, subd. (b); *id.*, § 6; see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 443 [79 Cal. Rptr. 3d 312, 187 P.3d 37]*.) Based on its conclusion that the charges imposed by the 1999 agreement are compensation for the franchise rights conveyed to SCE, the trial court further concluded the charges are for the provision of electrical service, and therefore are not imposed as an incident of property ownership. Plaintiffs do not contend on appeal that the surcharge is a property-related fee.

provided to those not charged, which does not exceed its reasonable cost, (3) charges for reasonable regulatory costs related to the issuance of licenses, permits, investigations, inspections, and audits, and the enforcement of agricultural marketing orders, (4) charges for access to or use, purchase, rental, or lease of local government property, (5) fines for violations of law, (6) charges imposed as a condition of developing property, and (7) property-related assessments and fees as allowed under article XIII D. The local government bears the burden of establishing the exceptions. (Cal. Const., art. XIII C, § 1, subd. (e).) [4]

2. *Characteristics of Valid Fees*

As noted above, following the enactment of Proposition 13, the Legislature and courts viewed various fees as outside the scope of the initiative. (*Gov. Code, § 50076*; *Evans v. City of San Jose (1992) 3 Cal.App.4th 728, 736–737 [4 Cal. Rptr. 2d 601]* (*Evans*), and cases cited therein.) In *Sinclair Paint, supra, 15 Cal.4th 866*, we summarized three categories of charges that are fees rather than taxes, and therefore are not subject to the voter approval requirements of Proposition **[**15]** 13. First, special assessments may be imposed "in amounts reasonably reflecting the value of the benefits conferred by improvements." (*Sinclair Paint, at p. 874*.) Second, development fees, which are **[*261]** charged for building permits and other privileges, are not considered taxes "if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer." (*Id. at p. 875*.) Third, regulatory fees are imposed under the police power to pay for the reasonable cost of regulatory activities. (*Id. at pp. 875–876*.)

CA(8)[↑] (8) The commonality among these categories of charges is the relationship between the charge imposed and a benefit or cost related to the payor. With respect to charges for benefits received, we explained in *Knox, supra, 4 Cal.4th 132*, that ***HN8***[↑] "if an assessment for … improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive." (*Id. at p. 142*; see *Evans, supra, 3 Cal.App.4th at p. 738* [when a "discrete group is specially benefitted … [, t]he public should not be required to finance an expenditure through taxation which benefits only a small segment of the population"].) But "if the assessment exceeds the actual cost of the improvement, the exaction is a **[**16]** tax and not an assessment." (*Knox, at p. 142, fn. 15*.) With respect to costs, we explained in *Sinclair Paint, supra, 15 Cal.4th 866, 879*, that Proposition 13's goal of providing effective property tax relief is promoted rather than subverted by shifting costs to those who generate the costs. (See *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist. (1988) 203 Cal.App.3d 1132, 1148 [250 Cal. Rptr. 420]*.) However, if the charges exceed the reasonable cost of the activity on which they are based, the charges are levied for unrelated revenue purposes, and are therefore taxes. (*Sinclair Paint, at pp. 874, 881*.)

CA(9)[↑] (9) In sum, ***HN9***[↑] restricting allowable fees to the reasonable cost or value of the activity with which the charges are associated serves Proposition 13's purpose of limiting taxes. (See *Amador Valley, supra, 22 Cal.3d at p. 231* [Prop. 13's restrictions on real property taxes "could be withdrawn or depleted by additional or increased state or local levies of other than property taxes"].) If a state or local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees. Therefore, to the extent charges exceed the rationale underlying the charges, they are taxes.

Although *Sinclair Paint, supra, 15 Cal.4th 866*,

[4] Plaintiffs and the City both view Proposition 26 as confirming their view of the law before Proposition 26 was enacted, but no party contends that it applies to the charges in this case, which were imposed prior to the enactment of Proposition 26.

focused on restrictions imposed by Proposition 13, its analysis **[**17]** of the characteristics of fees that may be imposed without voter approval remains sound. According to Proposition 218's findings and declarations, "Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to *excessive* tax, assessment, fee **[*262]** and charge increases that … frustrate the purposes of voter approval for tax increases … ." (Prop. 218, § 2, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013) foll. art. XIII C, § 1, p. 363, italics added.) As relevant here, this finding reflects a concern with excessive fees, not fees in general. In addition, although Proposition 218 imposed additional restrictions on the imposition of assessments, that initiative did not impose additional restrictions on other fees. (Cal. Const., arts. XIII C, §§ 1, 2, XIII D, § 4.) Finally, *Sinclair Paint*'s understanding of fees as charges reasonably related to specific costs or benefits is reflected in Proposition 26, which exempted from its expansive definition of tax (1) charges imposed for a specific benefit or privilege which do not exceed its reasonable cost, (2) charges for a specific government service or product provided which do not exceed **[**18]** its reasonable cost, and (3) charges for reasonable regulatory costs related to specified regulatory activities. [5] (Cal. Const., art. XIII C, § 1, subd. (e).)

To determine how franchise fees fit within these principles, we next consider the nature of franchise fees. We also describe the regulatory framework related to their calculation and imposition.

B. *Franchise Fees*

1. *Nature of Franchise Fees*

HN10[↑] ***CA(10)***[↑] (10) A franchise to use public streets or rights-of-way is a form of property (*Stockton Gas etc. Co. v. San Joaquin Co. (1905) 148 Cal. 313, 319 [83 P. 54]*), and a franchise fee is the purchase price of the franchise. (*City & Co. of S. F. v. Market St. Ry. Co. (1937) 9 Cal.2d 743, 749 [73 P.2d 234]*.) Historically, franchise fees have not been considered taxes. (See *County of Tulare v. City of Dinuba (1922) 188 Cal. 664, 670 [206 P. 983]* [franchise fee based on gross receipts of utility is not a tax]; *City & Co. of S. F. v. Market St. Ry. Co., supra, 9 Cal.2d at p. 749* [payments for franchises are not taxes]; *Santa Barbara County Taxpayer Assn., supra, 209 Cal.App.3d 940, 949–950* [franchise fees are not proceeds of taxes].) Nothing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses. (See *Cal. Const., arts. XIII A, § 3, subd. (b)(4)*, XIII C.)

This understanding that restrictions on taxation do not encompass amounts paid in exchange for property interests is confirmed by Proposition 26, the **[*263]** purpose of which was to *reinforce* the voter approval requirements set forth in **[**19]** Propositions 13 and 218. (Prop. 26, § 1, subd. (f), Historical Notes, reprinted at 2B West's Ann. Cal. Const., *supra*, foll. *art. XIII A, § 3*, p. 297 ["'to ensure the effectiveness of these constitutional limitations, [Proposition 26] defines a "tax" … so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as "fees"'"].) Although Proposition 26 strengthened restrictions on taxation by expansively defining "tax" as "any levy, charge, or exaction of any kind imposed by a local government" (Cal. Const., art. XIII C, § 1, subd. (e)), it provided an exception for "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (*Id.*, subd. (e)(4).) [6]

[5] Proposition 26's description of valid charges based on regulatory costs does not mirror our discussion of such costs in *Sinclair Paint, supra, 15 Cal.4th 866*. (See Cal. Const., art. XIII C, § 1, subd. (e)(3).) We express no opinion on the breadth of the regulatory costs that Proposition 26 allows to be imposed without voter approval.

[6] We are concerned only with the validity of the surcharge under Proposition 218. Proposition 26's exception from its definition of "tax" with respect to local government property is not before us. (See

2. *Laws Governing the Calculation of Franchise Fees*

The Legislature has taken several approaches to the issue of the amount of compensation to be paid to local jurisdictions in exchange for rights-of-way over the jurisdictions' land relating to the provision of services such as electricity. As described more fully below, it initially barred the imposition of franchise fees due to perceived abuses by local governments. Thereafter, it authorized local agencies to grant franchises, **[**20]** and established two formulas with which to calculate franchise fees. These formulas do not bind charter jurisdictions, such as the City, but they provide helpful background to the PUC's regulation of charges imposed on ratepayers.

The California Constitution as adopted in 1879 provided that "[i]n any city where there are no public works owned and controlled by the municipality for the supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose … , shall … have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." (*Cal. Const., former art. XI, § 19*.) The provision was intended to prevent a municipality from creating a monopoly within its jurisdiction by imposing burdens on parties who wanted to compete with an existing private utility. Although **[**21]** cities could not impose franchise fees on these "constitutional franchises," they were authorized to tax a franchise on the basis that a franchise constitutes real property within the city. (*Stockton Gas etc. Co. v. San Joaquin [*264] Co., supra, 148 Cal. at pp. 315–321*; *City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal.App.4th 1167 [1171, 99 Cal. Rptr. 2d 198]*.) In 1911, this constitutional provision was replaced with a provision that authorized the private establishment of public works for providing services such as light, water, and power "upon such conditions and under such regulations as the municipality may prescribe under its organic law." (Sen. Const. Amend. No. 49, Stats. 1911 (1911 Reg. Sess.) res. ch. 67, p. 2180.) The constitutional amendment did not impair rights under existing constitutional franchises. (*Russell v. Sebastian (1914) 233 U.S. 195, 210 [58 L.Ed. 912, 34 S.Ct. 517]*.)

In the meantime, in 1905, the Legislature enacted the Broughton Act (*Pub. Util. Code, § 6001 et seq.*), which authorized cities and counties to enter franchise agreements for the provision of electricity and various other services not encompassed by the constitutional restrictions on franchise fees. (Stats. 1905, ch. 578, p. 777; *County of Alameda v. Pacific Gas & Electric Co. (1997) 51 Cal.App.4th 1691, 1694–1695 [60 Cal. Rptr. 2d 187]* (*County of Alameda*).) The legislation provided that when an application for a franchise was received by a city or county, the governing body was to advertise for bids and award the franchise to the highest bidder. The successful bidder was **[**22]** required to pay, in addition to the amount bid, 2 percent of the gross annual receipts from the "use, operation or possession" of the franchise after the first five years of the term of the franchise agreement had passed. (Stats. 1905, ch. 578, §§ 2–3, pp. 777–778.)

HN11[↑] ***CA(11)***[↑] (11) The Broughton Act's provision that the fee be based on the receipts from the use, operation or possession of the franchise results in a complicated calculation of franchise fees. Usually, some portion of a utility's rights-of-way are on private property or property outside the jurisdiction of the city or county granting the franchise, and the utility's gross receipts attributable to a particular franchise must be reduced in proportion to the utility's rights-of-way that are not within the franchise agreement. (*County of Tulare v. City of Dinuba, supra, 188 Cal. at pp. 673–676*.)

Cal. Const., art. XIII C, § 1, subd. (e)(4).)

In addition, because gross receipts arise from all of a utility's operative property, such as equipment and warehouses, the portion of gross receipts attributable to property other than the franchise must be excluded from the calculation of the franchise fee. (*County of L. A. v. Southern etc. Gas Co. (1954) 42 Cal.2d 129, 133–134 [266 P.2d 27]*.) Finally, if a utility also provides service under a constitutional franchise—for example, where it provides artificial light under a constitutional franchise **[**23]** in the same area in which it provides electricity under a franchise agreement entered pursuant to the Broughton Act—the franchise fee applies only to the gross receipts from the provision of services under the nonconstitutional franchise. (*Oakland v. Great Western Power Co. (1921) 186 Cal. 570, 578–583 [200 P. 395]*.)
[*265]

In 1937, apparently due in part to the complexity involved in calculating franchise fees under the Broughton Act, the Legislature enacted an alternative scheme by which cities could grant franchises for the transmission of electricity and gas. [7] (Stats. 1937, ch. 650, p. 1781; see *Pub. Util. Code, § 6201 et seq.* (1937 Act); *County of Alameda, supra, 51 Cal.App.4th at pp. 1695–1696*.) Instead of a bidding process, the 1937 Act requires only a public hearing before the local government that will decide whether to grant an application for a franchise, at which objections to the granting of the franchise may be made. (*Pub. Util. Code, §§ 6232–6234*.) In addition, although the 1937 Act reiterates the Broughton Act formula for calculating franchise fees, it also provides an alternative formula: "this payment shall be not less than 1 percent of the applicant's gross annual receipts derived from the sale within the limits of the municipality of the utility service for which the franchise is awarded." (*Pub. Util. Code, § 6231, subd. (c)*.) [8] According to a review of that year's legislation, the new franchise **[**24]** system was "expected to bring more adequate returns to cities, while lessening disputes concerning amounts to be paid." (David, *The Work of the 1937 California Legislature: Municipal Matters* (1937–1938) 11 S.Cal. L.Rev. 97, 107.)

As noted above, these statutory provisions do not bind jurisdictions governed by a charter, such as the City, but charter jurisdictions are free to follow the procedures set forth in the 1937 Act. (*Pub. Util. Code, § 6205*.) [9] However, the 1937 Act's provisions "relating to the payment of a percentage of gross receipts shall not be construed as a declaration of legislative judgment as to the proper compensation to be paid a chartered municipality for the right to exercise franchise privileges therein." (*Pub. Util. Code, § 6205*.) We explain below that although a charter jurisdiction's franchise fees are not limited by these statutory formulas, the PUC has concluded that it is not fair or reasonable to allow a utility to recoup from all of its utility customers charges imposed by a jurisdiction whose charges exceed the average amount of charges imposed by other local governments. Therefore, the PUC has established a procedure by which a utility may obtain approval **[*266]** to impose a surcharge on the bills of only those customers within the particular **[**25]** jurisdiction that imposes higher-than-average charges.

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[7] In 1971, the Legislature amended the act to provide that "municipality includes counties." (*Pub. Util. Code, § 6201.5*.) In addition, the Act has been extended to franchises for the transmission of oil and oil products, and the transmission of water. (*Pub. Util Code, § 6202*.)

[8] The 1937 Act includes a second alternative formula if the franchise is "complementary to a franchise derived under" the California Constitution. In that circumstance, the alternative payment is "one-half of 1 percent of the applicant's gross annual receipts from the sale of electricity within the limits of the municipality under both the electric franchises." (*Pub. Util. Code, § 6231, subd. (c)*.)

[9] The trial court ruled that as a charter jurisdiction, the City is not subject to general laws concerning franchises. (See *Southern Pacific Pipe Lines, Inc. v. City of Long Beach (1988) 204 Cal.App.3d 660, 667–670 [251 Cal. Rptr. 411]* [except where the nature of the utility services reflects a matter of statewide concern, the granting of franchises is a municipal affair].) Plaintiffs do not challenge that conclusion.

3. *PUC Scrutiny of Utility Charges*

HN12[↑] CA(12)[↑] (12) The PUC sets the rates of a publicly regulated utility to permit the utility to recover its costs and expenses in providing its service, and to receive a fair return on the value of the property it uses in providing its service. (*Southern Cal. Gas Co. v. Public Utilities Com. (1979) 23 Cal.3d 470, 474–476 [153 Cal. Rptr. 10, 591 P.2d 34]*.) Among a utility's costs and expenses are government fees and taxes. Historically, "fees and taxes imposed upon the utility itself by the various governmental entities within the utility's service territory … tended to average out, with the total derived from each taxing jurisdiction tending to be approximately equal. Therefore, rather than impose a special billing procedure upon utilities to account for the small differences historically involved, the [PUC] … permitted a utility to simply average them and allowed them to be 'buried' in the rate structure applicable to the entire system." (*PUC Investigation, supra, 32 Cal.P.U.C.2d at p. 63*.) As voters restricted the taxing authority of local governments, however, some local jurisdictions increased the charges they imposed in connection with the provision of utility services. "As the number and increasing amounts of these local revenue-producing mechanisms **[**26]** began to multiply, the [PUC] became concerned that averaging these costs among all ratepayers would create inequities among ratepayers." (*Ibid.*)

CA(13)[↑] (13) In response to this concern, HN13[↑] the PUC established a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. (*PUC Investigation, supra, 32 Cal.P.U.C.2d at pp. 62, 69*.) When a local government imposes taxes or fees "which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory," a utility may file an advice letter seeking approval to charge "local government fee surcharges." (*Id. at p. 73*.) Such surcharges "shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it." (*Ibid.*)

The purpose of the PUC's procedure concerning local government fee surcharges is to ensure that utility rates are just, reasonable, and nondiscriminatory. (*PUC Investigation, supra, 32 Cal.P.U.C.2d at p. 69*; see *Pub. Util. Code, §§ 451* [all public utility charges shall be just and reasonable], *453* [no public utility shall discriminate], *728* [if PUC **[**27]** finds rates are unreasonable or discriminatory, it shall order just and reasonable rates].) "Basic rates … are those designed to recoup a utility's costs incurred to serve all its customers." **[*267]** (*PUC Investigation, supra, 32 Cal.P.U.C.2d at p. 69*.) If disproportionate taxes and fees are incorporated into all customers' basic rates, "some of these ratepayers would be subsidizing others but are not themselves benefiting from such increased taxes or fees." (*Ibid.*)

The PUC's decision does not concern the validity of any charges imposed by local government. The PUC explained that it "[did] not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general or judicial decision, has jurisdiction to impose, levy, or increase. Any issue relating to such local authority is a matter for the Superior Court, not this Commission." (*PUC Investigation, supra, 32 Cal.P.U.C.2d at p. 69*.)

C. *Validity of the Surcharge*

1. *Relationship Between Franchise Rights and Franchise Fees*

CA(14)[↑] (14) Plaintiffs contend the surcharge is a tax rather than a fee under Proposition 218, and therefore requires voter approval. HN14[↑] Whether a charge is a tax or a fee **[**28]** "is a question of law for the appellate courts to decide on

independent review of the facts." (*Sinclair Paint, supra, 15 Cal.4th at p. 874*.) In resolving this issue, ***HN15***[⬆] the provisions of Proposition 218 "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted at Historical Notes, *supra*, 2B West's Ann. Cal. Const., foll. Art. XIII C, § 1, at p. 363; see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra, 44 Cal.4th at pp. 446, 448* [express purpose of Prop. 218 was to limit methods of exacting revenue from taxpayers; its provisions are to be liberally construed].)

CA(15)[⬆] (15) As explained earlier, a franchise is a form of property, and a franchise fee is the price paid for the franchise. Moreover, historically, franchise fees have not been considered taxes, and nothing in Proposition 218 reflects an intention to treat amounts paid in exchange for property interests as taxes. Finally, like the receipt by a discrete group of a special benefit from the government, the receipt of an interest in public property justifies the imposition of a charge on the recipient to compensate the public for the value received. Therefore, ***HN16***[⬆] sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes. But as explained below, to constitute compensation for the value **[**29]** received, the fees must reflect a reasonable estimate of the value of the franchise.

Each of the categories of valid fees we recognized in *Sinclair Paint, supra, 15 Cal.4th 866*, was restricted to an amount that had a reasonable relationship **[*268]** to the benefit or cost on which it was based. We observed that special assessments were allowed "in amounts reasonably reflecting the value of the benefits conferred" (*id. at p. 874*), development fees were allowed "if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer" (*id. at p. 875*), and regulatory fees were allowed where the fees reflected bear a "reasonable relationship to the social or economic 'burdens' that [the payor's] operations generated" (*id. at p. 876*; see *Pennell v. City of San Jose (1986) 42 Cal.3d 365, 375 [228 Cal. Rptr. 726, 721 P.2d 1111]*). To the extent fees exceed a reasonable amount in relation to the benefits or costs underlying their imposition, they are taxes. (*Sinclair Paint, at p. 881*; *Knox, supra, 4 Cal.4th at p. 142, fn. 15*.)

CA(16)[⬆] (16) In the course of our analysis, we observed that, ***HN17***[⬆] "[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted," and we looked to whether the primary purpose of a charge was to generate revenue. (*Sinclair Paint, supra, 15 Cal.4th at p. 874*; see *id. at pp. 879–880*.) The issue of whether the funds generated by the types of fees **[**30]** considered in *Sinclair Paint* were used primarily for revenue purposes was relevant because the fees were related to an expenditure by the government or a cost borne by the public. More particularly, in connection with special assessments, the government seeks to recoup the costs of the program that results in a special benefit to particular properties, and in connection with development fees and regulatory fees, the government seeks to offset costs borne by the government or the public as a result of the payee's activities.

In contrast, a fee paid for an interest in government property is compensation for the use or purchase of a government *asset* rather than compensation for a cost. Consequently, the revenue generated by the fee is available for whatever purposes the government chooses rather than tied to a public cost. The aspect of the transaction that distinguishes the charge from a tax is the receipt of value in exchange for the payment. (See *Sinclair Paint, 15 Cal.4th at p. 874* [contrasting taxes from charges imposed in return for a special benefit or privilege]; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 1, p. 25 ["in taxation, … no compensation is given to the taxpayer except by way of governmental **[**31]** protection and other general benefits"].)

Plaintiffs observe, however, that SCE customers pay the surcharge, but SCE receives the franchise rights; therefore, they contend, the ratepayers do not receive any value in exchange for their payment of the charge. As noted above, publicly regulated utilities are allowed to recover their costs and expenses by passing them on to their ratepayers. Among the charges included in the rates charged to customers within the City is the initial 1 percent of **[*269]** gross receipts paid in exchange for franchise rights, yet plaintiffs do not contend that this initial 1 percent is a tax because ratepayers do not receive the franchise rights. The fact that the surcharge is placed on customers' bills pursuant to the franchise agreement rather than a unilateral decision by SCE does not alter the substance of the surcharge; like the initial 1 percent charge, it is a payment made in exchange for a property interest that is needed to provide electricity to City residents. [10] Because a publicly regulated utility is a conduit through which government charges are ultimately imposed on ratepayers, we would be placing form over substance if we precluded the City from establishing **[**32]** that the surcharge bears a reasonable relationship to the value of the property interest it conveyed to SCE because the City expressed in its ordinance what was implicit—that once the PUC gave its approval, SCE would place the surcharge on the bills of customers within the City.

Although *Sinclair Paint*'s consideration of the purposes to which revenues will be put is not relevant in the context of transfers of public property interests, its broader focus on the relationship between a charge and the rationale underlying the charge provides guidance in evaluating whether the surcharge is a tax. Just as the amount of fees imposed to compensate for the expense of providing government services or the cost to the public associated with a payer's activities must bear a reasonable relationship to the costs and benefits that justify their imposition, fees imposed in exchange for a property interest must bear a reasonable relationship to the value received from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the **[**33]** excessive portion is a tax. If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees. In light of the PUC's investigation of local governments' attempts to produce revenue through charges imposed on public utilities, this concern is more than merely speculative. (See *PUC Investigation, supra, 32 Cal.P.U.C.2d 60*.)

We recognize that determining the value of a franchise may present difficulties. Unlike the cost of providing a government improvement or program, which may be calculated based on the expense of the personnel and materials used to perform the service or regulation, the value of property may vary greatly, depending on market forces and negotiations. Where a utility has an incentive to negotiate a lower fee, the negotiated fee may reflect the **[*270]** value of the franchise rights, just as the negotiated rent paid by the lessor of a publicly owned building reflects its market value, despite the fact that a different lessor might have negotiated a different rental rate. In the absence of bona fide negotiations, however, or in addition to such negotiations, an agency may look to other indicia of value to establish a reasonable value of franchise rights. [11]

CA(17)[⬆] (17) In **[**34]** sum, *HN18*[⬆] a franchise fee must be based on the value of the franchise conveyed in order to come within the

[10] As explained above, the division of the charge into two parts, with one included in the rates paid by customers and the other separately stated on the bill, was driven by the PUC's effort to ensure that a local government's higher-than-average charges are not unfairly imposed on ratepayers outside of the local government's jurisdiction; this division of the charges is unrelated to the character or validity of the charges.

[11] The parties' briefs do not consider the means by which franchise rights might be valued. We leave this issue to be addressed by expert opinion and subsequent case law.

rationale for its imposition without approval of the voters. Its value may be based on bona fide negotiations concerning the property's value, as well as other indicia of worth. Consistent with the principles that govern other fees, we hold that to constitute a valid franchise fee under Proposition 218, the amount of the franchise fee must bear a reasonable relationship to the value of the property interests transferred. (See *Sinclair Paint, supra, 15 Cal.4th at pp. 874–876*.)

2. *The City's Alternative Theories To Support the Surcharge*

We find the City's remaining arguments in defense of the surcharge to be without merit.

The City contends that the surcharge is not a tax imposed on ratepayers because it is a burden SCE voluntarily assumed. The terms of the 1999 agreement belie the contention that SCE assumed a burden to pay the surcharge. The 1999 agreement states that SCE "shall collect" the surcharge from all SCE customers within the City, and the collection shall be based on electricity consumption. Arguably, these provisions are ambiguous as to whether the mandatory language imposes a duty to collect the surcharge, or imposes a **[**35]** duty, *if* it collects the surcharge, to apply it to all customers within the City based on consumption. However, the next paragraph of the 1999 agreement refers to "[t]he conditions precedent to *the obligation of* [*SCE*] *under this Section 5 to levy, collect, and deliver* to City the [surcharge]." In addition, the parties stipulated that "[t]he SCE assessments, collections and remittance of the [surcharge] were required by Santa Barbara Ordinance 5135." Finally, as noted above, public utilities are allowed to pass along to their customers expenses the utilities incur in producing their services, and SCE could terminate the 1999 agreement if the PUC did not agree to the inclusion of the surcharge on customers' bills. Thus, it does not appear that SCE assumed any burden to pay the surcharge from its assets.

We also reject the City's contention that imposition of the surcharge on customers is the result of a decision by SCE and the PUC. As discussed **[*271]** above, the purpose of the PUC's involvement in the process was to ensure that higher-than-average fees were not imposed on customers who reside outside the City. The fact that the 1999 agreement required SCE to seek the approval of the PUC to include the charge on **[**36]** customers' bills, and allowed either party to terminate the agreement if the PUC's approval was not obtained, reflects that SCE was not willing to assume the burden of paying the surcharge, and that both parties to the agreement understood that the charge would be collected from ratepayers. These conclusions are confirmed by the parties' negotiations, which reflect that SCE was willing only to collect the charge from its customers and remit the revenue to the City. Finally, the City stipulated that the parties reached their agreement on the condition that the surcharge would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge. In sum, the City and SCE agreed that SCE would impose the surcharge on customers and remit the revenues to the City.

In a similar vein, the City contends we should look to a revenue measure's legal incidence—who is required to pay the revenues—rather than its economic incidence—who bears the economic burden of the measure. The City's contention is based on its view that SCE bears the legal incidence of the charges and, therefore, the charges are not a tax on the ratepayers. In support of its theory, the City **[**37]** cites case law holding that nonresidents do not have taxpayer standing under *Code of Civil Procedure section 526a* to challenge a jurisdiction's actions based on their payment of taxes within the jurisdiction. (See *Cornelius v. Los Angeles County etc. Authority (1996) 49 Cal.App.4th 1761, 1777–1778 [57 Cal. Rptr. 2d 618]* [plaintiff who did not live in Los Angeles County was denied taxpayer standing to challenge a county affirmative action program based in part on payment of sales and gasoline taxes in Los Angeles County]; *Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1048 [17 Cal. Rptr. 2d 400]*

[plaintiffs who did not live within a city were denied taxpayer standing to challenge a redevelopment plan based on the payment of sales taxes in the city].) These cases would support an argument that individuals who live outside the City do not have taxpayer standing to challenge the surcharge, but they do not provide guidance concerning what constitutes a tax under various voter initiatives restricting taxation.

In any event, all that the City ultimately contends in this regard is that the economic incidence of a charge does not determine whether it is a tax. We agree. Valid fees do not become taxes simply because their cost is passed on to the ratepayers. As our discussion above reflects, the determination of whether a charge that is nominally a franchise fee constitutes a tax depends on whether it is **[**38]** reasonably related to the value of the franchise rights.
[*272]

Finally, the City asserts that the negotiated value of the franchise is entitled to deference because the City's adoption of the 1999 agreement was a legislative act and because charter jurisdictions have broad discretion to enter franchise agreements. (See *Gov. Code, § 50335* [the legislative body of a local agency may grant utility easements "upon such terms and conditions as the parties thereto may agree"].) The record does not adequately disclose the negotiations that occurred with respect to the value of the franchise, and we are therefore unable to evaluate what deference, if any, might be due.

III. THE JUDGMENT OF THE COURT OF APPEAL

As noted above, the Court of Appeal concluded that the surcharge's primary purpose was to raise revenue for general spending purposes rather than to compensate the City for the rights-of-way. Therefore, it held, the surcharge is a tax, and requires voter approval under Proposition 218. Based on these conclusions, it reversed the trial court's grant of the City's motion for judgment on the pleadings, and "directed the trial court to grant [plaintiffs'] motion for summary adjudication because the City imposed the **[**39]** 1% surcharge without complying with Proposition 218." As explained below, we agree that the judgment on the pleadings must be reversed, but we conclude that plaintiffs did not establish a right to summary adjudication.

HN19[↑] A motion for judgment on the pleadings presents the question of whether "the plaintiff's complaint state[s] facts sufficient to constitute a cause of action against the defendant." (*Smiley v. Citibank (1995) 11 Cal.4th 138, 145 [44 Cal. Rptr. 2d 441, 900 P.2d 690]*.) The trial court generally considers only the allegations of the complaint, but may also consider matters that are subject to judicial notice. (*Id. at p. 146*.) "'Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties.' [Citation.] 'Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.'" (*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1232 [44 Cal. Rptr. 2d 352, 900 P.2d 601]*.) "An appellate court independently reviews a trial court's order on such a motion." (*Smiley, supra, at p. 146*.)

CA(18)[↑] (18) The first amended complaint alleges that the surcharge is not a franchise fee, but is instead a tax that requires voter approval under Proposition 218. In addition, with the parties' consent, the trial court took judicial notice of the written stipulation of facts submitted in connection **[**40]** with the motions for summary adjudication and summary judgment, and a second stipulation of facts submitted in connection with the City's motion for judgment on the pleadings. As described above, the stipulated facts reflect that the City and SCE agreed to double the amount to be paid for the privilege of using the rights-of-way and to pass these charges on to the **[*273]** ratepayers, but they do not address the relationship, if any, between the surcharge and the value of the franchise. Liberally construed, the first amended

complaint and the stipulated facts adequately allege the basis for a claim that the surcharge bears no reasonable relationship to the value of the franchise, and is therefore a tax requiring voter approval under Proposition 218. Accordingly, the trial court erred in granting judgment on the pleadings to the City.

Next we consider the Court of Appeal's direction to the trial court to grant plaintiffs' motion for summary adjudication. A plaintiff moving for summary adjudication with respect to a claim must establish each element of the claim. The burden then shifts to the defendant to demonstrate a triable issue of fact exists as to the claim. (*Code Civ. Proc., § 437c, subd. (p)(1)*.) Like a ruling on a motion **[**41]** for judgment on the pleadings, a ruling on a motion for summary adjudication is reviewed de novo. (*Kendall v. Walker (2009) 181 Cal.App.4th 584, 591 [104 Cal. Rptr. 3d 262]*.)

Plaintiffs sought summary adjudication of the allegation that the surcharge is a tax. (*Code Civ. Proc., § 437c, subd. (f)*.) They asserted that the tests set forth in *Sinclair Paint, supra, 15 Cal.4th 866*, remain good law, but like the Court of Appeal, they drew from *Sinclair Paint* the principle that if the primary purpose of a charge is to raise revenue, the charge is a tax. Plaintiffs also challenged the surcharge on the ground that it was not based on a determination that there was a reasonable relationship between the charge and any costs borne by the City. In response, the City noted that *Sinclair Paint, supra, 15 Cal.4th 866*, addressed the distinction between regulatory fees and taxes. The City relied instead on *Santa Barbara County Taxpayer Assn., supra, 209 Cal.App.3d 940*, which held that franchise fees are not "proceeds of taxes" for purposes of calculating limits on state and local appropriations under article XIII B of the California Constitution. The trial court concluded that "[b]ecause the measure of compensation [for a franchise] is a matter of contractual negotiation, the amount of the franchise fee need not be based on costs."

Although plaintiffs' allegations and the stipulated facts adequately allege the basis for a contention that the surcharge bears no reasonable relationship to the value **[**42]** of the franchise, plaintiffs' motion for summary adjudication did not *establish* this contention. As explained in our discussion of franchise fees, cities are free to sell or lease their property, and the fact that a franchise fee is collected for the purpose of generating revenue does not establish that the compensation paid for the property interests is a tax. In addition, in contrast to fees imposed for the purpose of recouping the costs of government services or programs, which are limited to the reasonable costs of the services or programs, franchise fees are not based on the costs incurred in affording a **[*274]** utility access to rights-of-way. Therefore, the facts on which plaintiffs relied in seeking summary adjudication did not establish their claim that the surcharge is a tax.

IV. DISPOSITION

We affirm the judgment of the Court of Appeal to the extent it reversed the trial court's judgment, and we reverse the judgment to the extent it directed the trial court to grant plaintiffs' motion for summary adjudication. The case is remanded to the Court of Appeal with directions to remand the matter to the trial court for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., **[**43]** Werdegar, J., Corrigan, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

Dissent by: Chin

Dissent

CHIN, J., Dissenting.—Since 1970, the City of Santa Barbara (the City) has imposed "a tax" on those using electricity in the City. Since 1977, the amount of the tax has been "six percent (6%) of the charges made for" energy use. (Santa Barbara Mun. Code, § 4.24.030.) In 1999, the City, in order to

raise revenues for general governmental purposes, passed an ordinance—City Ordinance No. 5135 (the Ordinance)—separately requiring those receiving electricity within the City from Southern California Edison (SCE) to pay *an additional* 1 percent of the amount of their electrical bill. I conclude that this additional charge constitutes a tax that the City imposed in violation of the voter approval requirements of article XIII C of the California Constitution, as adopted by the voters at the November 5, 1996 General Election through passage of Proposition 218 (Proposition 218). The City's arguments to the contrary are unpersuasive.

The majority agrees that most of the City's arguments fail, but it largely agrees with the City that the charge is a "valid franchise fee … rather than a tax." (Maj. opn., *ante*, at p. 257.) Putting its own gloss on the City's argument—a gloss the City expressly **[**44]** rejects—the majority concludes that the charge is a valid franchise fee to the extent it "bear[s] a reasonable relationship to," as alternatively phrased, "the value of the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id*. at p. 271).

There is a fundamental problem with this approach: The electricity users upon whom the City imposes the charge, and who actually pay it, do not receive the franchise, any franchise rights, or any property interests. The Ordinance grants those valuable rights and interests *only to SCE*, the electricity supplier. Because the Ordinance requires SCE's customers to pay for rights and interests the City has granted to SCE, the charge does not **[*275]** constitute a "franchise fee" for purposes of the rule that "franchise fees [are not] considered taxes." (Maj. opn., *ante*, at p. 262.) In reality, it is just an increase in the City's user tax, which the City *calls* a franchise fee. It thus constitutes *precisely* what the voters adopted article XIII C of the California Constitution to preclude: a "tax increase[] disguised via euphemistic relabeling as 'fees,' 'charges,' or 'assessments.'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 839 [102 Cal. Rptr. 2d 719, 14 P.3d 930]*.) Consistent with our *duty*, as established **[**45]** by the voters themselves, to "liberally construe[]" article XIII C of the California Constitution "to effectuate [the] purpose[] of limiting local government revenue and enhancing taxpayer consent" (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299), I conclude that the charge is invalid because the City imposed it on SCE's customers without voter approval.

The majority cites no support for its conclusion that a charge imposed on and paid by someone who is granted nothing in return is not tax as to that person so long as *someone else* receives franchise rights for the payment. Indeed, as I explain below, the majority's analysis is inconsistent with our case law. And the line the majority draws between a valid franchise fee and a tax—whether the amount of the charge to a utility's customers bears a reasonable relationship to the value the entity receives—is problematic in many ways and renders long-standing statutory provisions regarding utility franchises vulnerable to constitutional challenge. For all of these reasons, I dissent.

I. Factual and Legal Background

In 1887, SCE's predecessor, the Santa Barbara Electric Company, began supplying electricity in the City. In 1959, the City, pursuant to an agreement with SCE, adopted Ordinance **[**46]** No. 2728 granting SCE a 25-year franchise to use public property to transmit and distribute electricity. The ordinance required SCE to pay the City 2 percent of its "gross annual receipts … arising from the use, operation or possession of [the] franchise," with a minimum payment of one-half percent of SCE's "gross annual receipts derived … from the sale of electricity within the [City's] limits … under both" the franchise being granted by the ordinance and SCE's separate and preexisting "constitutional franchise." The ordinance specified that the City was granting the franchise "under and in accordance with the

provisions of [the] Franchise Act of 1937." [1]

In 1985, after the 1959 franchise expired, the City, pursuant to another agreement with SCE, adopted Ordinance No. 4312 granting SCE a 10-year **[*276]** franchise to use public property to transmit and distribute electricity. "[A]s compensation," the ordinance required SCE to pay to the City 2 percent of its "annual gross receipts … arising from the use, operation or possession of th[e] franchise," with a minimum payment of 1 percent of SCE's "annual gross receipts derived … from the sale of electricity within the limits of [the] **[**47]** City under both" the franchise being granted by the ordinance and SCE's separate and preexisting "constitutional franchise." The 1985 ordinance also required SCE to "collect for [the] City any utility users tax imposed by [the] City." This provision reflected the City's imposition in 1970 of "a tax" on "every person in" the City using electricity in the City. (Santa Barbara Ord. No. 3436.) The amount of the tax was initially three percent "of the charges made for" use of electricity. (*Ibid.*) In 1977, the City doubled the tax to 6 percent. (Santa Barbara Ord. No. 3927, amending Santa Barbara Mun. Code, § 4.24.030; see Santa Barbara Ord. No. 4289 (1984), amending Santa Barbara Mun. Code, tit. 4.)

The year after the City doubled its electricity users tax, California voters passed Proposition 13. As the majority notes, Proposition 13 amended our Constitution to limit increases in the assessed value of real property to 2 percent per year (absent a change in ownership) and to limit the rate of taxation on real property to 1 percent of its assessed value. (Maj. opn., *ante*, at p. 258.) In order to prevent these tax savings from being offset by increases in state and local taxes, Proposition 13 also amended **[**48]** our Constitution to require approval by two-thirds of the local electors of a city, county, or special district in order for such a local entity to impose or raise special taxes. (Maj. opn., *ante*, at p. 258.) Since the voters enacted these limits on the City's taxing powers, the City has not *formally* increased the percentage of its electricity users tax.

However, in 1999, the City informally and effectively increased this tax by passing the Ordinance, which codified a new franchise agreement with SCE and required users of electricity within the City to pay an additional 1 percent of their electrical bill. According to the parties' stipulated facts, this charge began as a proposal from "City staff," "[d]uring the negotiations for the new franchise agreement," to "increase[] [the] annual 'franchise fee'" from 1 percent of SCE's gross receipts for electricity sold within the City—the amount under the expiring agreement—to 2 percent. "City staff" proposed the increase in order "to raise additional revenues for the City for general City governmental purposes." "After a period of negotiations," SCE said it would agree "to remit to the City a two percent … franchise fee provided that the City **[**49]** agreed that the increase in the franchise fee would be payable to the City only if the California Public Utilities Commission … consented to SCE's request that it be allowed to include the additional 1% amount as a customer surcharge on the bills of SCE to its customers in the City." City staff and SCE **[*277]** reached agreement "[o]n that basis" and the City Council later adopted the tentative agreement as Ordinance No. 5135 (Dec. 7, 1999).

The Ordinance granted SCE a franchise to use public property to construct and operate an electric transmission system. It provided for an: "'Initial Term'" of three years—January 1, 2000, through December 31, 2002—and set the payment for that term at 1 percent of SCE's "Gross Annual Receipts." (Ord., §§ 3.A, 5.) The Ordinance also provided for an "'Extension Term'" beginning 60 days after the Public Utilities Commission (PUC) approved an "Extension Term Fee" and ending December 31, 2029. (Ord., § 3.B.) The total Extension Term Fee was 2 percent of SCE's Gross

[1] Charter cities are not required to apply the Franchise Act of 1937 (the 1937 Act) (*Pub. Util. Code, § 6201 et seq.*), but may voluntarily follow its provisions. (*Pub. Util. Code, § 6205*; all further unlabeled statutory references are to the Public Utilities Code.)

Annual Receipts, and comprised two elements: (1) the 1 percent Initial Term Fee; and (2) a 1 percent "Recovery Portion." (Ord., § 5.B.) Like the City's electricity users tax, the Recovery Portion **[**50]** was to be collected from "all electric utility customers served by [SCE] within the boundaries of the City" and was "based on consumption or use of electricity." (*Ibid.*) SCE's "obligation" was "to levy" the Recovery Portion on its customers, "collect" this payment from its customers, and "deliver" the collected amount "to [the] City." (Ord., § 5.C.) In other words, according to the parties' stipulated facts, the Ordinance "obligate[d]" all persons in the City receiving electricity from SCE "to pay" the Recovery Portion, and "require[d] [SCE] to collect" the Recovery Portion "from" its City customers "and remit [it] to" the City. The Ordinance made PUC approval of the Extension Term Fee a "condition[] precedent to" SCE's "obligation … to levy, collect, and deliver to [the] City the Recovery Portion." [2] If that approval was not obtained by the end of the Initial Term—December 31, 2002—the franchise would "continue on a year to year basis at the Initial Term Fee"—1 percent of gross revenues—until terminated by either party upon written notice.

In April 2001, the City and **[**51]** SCE agreed to delay for up to two years the filing with the PUC of a request for approval of the Extension Term Fee. In December 2004, almost three years later, the City directed SCE to submit the request. During that period, the only compensation SCE paid the City for the franchise was the Initial Term Fee. SCE eventually submitted the request on March 30, 2005, asking for approval "to bill and collect from its customers within the City … a 1.0% electric franchise surcharge to be remitted to the City by SCE as a pass-through fee, pursuant to SCE's new franchise agreement with the City." The request explained that the new franchise **[*278]** agreement "expressly provides for the additional amount to be surcharged to SCE's customers within the City," and requires PUC approval "in order for SCE to bill and collect the additional franchise surcharge for the City." The request also explained that, upon the PUC's approval, SCE would "bill and collect the surcharge revenues and pass through the revenues directly to the City." On April 20, 2005, the PUC granted SCE's request.

In November 2005, SCE began billing the Recovery Portion to, and collecting it from, customers in the City, and remitting **[**52]** those revenues in their entirety to the City. At first, the City apportioned the revenues in accordance with the Ordinance, i.e., half to the City's general fund and half to a City undergrounding projects fund. In November 2009, the City directed that all revenues from the Recovery Portion be placed in its general fund without any limitation on use.

II. Discussion

Plaintiffs Rolland Jacks and Rove Enterprises, Inc., claim that the City, by imposing the Recovery Portion through adoption of the Ordinance, violated article XIII C of the California Constitution. As here relevant, article XIII C provides that "local government[s]" may not "impose … any general tax … until that tax is submitted to the electorate and approved by a majority vote" (Cal. Const., art. XIII C, § 2, subd. (b)), and may not "impose … any special tax … until that tax is submitted to the electorate and approved by a two-thirds vote" (*id.*, § 2, subd. (d)). Plaintiffs argue that the Recovery Portion is a tax within the meaning of these provisions and that the City violated article XIII C by imposing it without voter approval.

In opposition to this argument, the City focuses heavily on the word "impose" in California Constitution, article XIII C's provisions, asserting

[2] A utility may, "at its discretion," request permission from the PUC to set forth separate charges on certain of their customers' bills when a local governmental entity imposes upon the utility "[f]ranchise, general business license, or special taxes and/or fees … [that] in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory." (*Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities* (1989) 32 Cal.P.U.C.2d 60, 73.)

that the Recovery Portion was not "imposed" *by the City* on anyone. According **[**53]** to the City, the Recovery Portion is, as to SCE, a "voluntary" payment to which SCE, a "sophisticated, commercial entit[y] with substantial market power," "willingly agreed" in order "to obtain use of valuable public rights of way in its for-profit business." As to SCE's customers, SCE and/or the PUC "imposed" the Recovery Portion, and the City "played no part in" the decisions of those entities.

The majority correctly rejects these arguments, explaining that the terms of the agreement and the Ordinance require that the Recovery Portion "be collected from" SCE's customers and impose on SCE only an obligation "to collect the charge from its customers and remit the revenue to the City." (Maj. opn., *ante*, at p. 271.) Indeed, the City's arguments necessarily fail in light of its stipulation that "[p]ursuant to City Ordinance [No.] 5135, all **[*279]** persons in the City receiving electricity from SCE *are obligated to pay* the 1% Recovery Portion." (Italics added.)

In a related argument, the City asserts that the Recovery Portion is not "imposed" on SCE's customers because its "legal incidence"—i.e., the "legal duty to pay it"—"is on SCE." According to the City, that SCE's customers in fact "ultimately bear[]" the Recovery **[**54]** Portion's "economic burden" is irrelevant because, under the law, "whether a charge is a tax is determined by its legal incidence."

The City is correct to focus on the Recovery Portion's legal incidence, but its argument fails because, under the Ordinance, both the legal incidence and the economic burden of the Recovery Portion fall on SCE's customers, not on SCE. The rule in California is that where the government *mandates* payment of a charge by one party, and imposes a duty on some other party to collect the payment and remit it to the government, the legal incidence of the charge falls, not on the party collecting the payment—who acts merely as the government's collection agent or conduit—but on the party from whom the payment is, by law, collected. (*Western States Bankcard Assn. v. City and County of San Francisco (1977) 19 Cal.3d 208, 217 [137 Cal. Rptr. 183, 561 P.2d 273]* (*Western States*) [tax ordinances lacked "mandatory pass-on provisions" that would "shift the legal incidence of the tax"]; *Bunker Hill Associates v. City of Los Angeles (1982) 137 Cal.App.3d 79, 87 [186 Cal. Rptr. 719]* ["'the legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to the state,'" and charge imposed on tenants, that lessors were legally required to collect and transmit to the government, was not a tax on lessors]; *Occidental Life Ins. Co. v. State Bd. of Equalization (1982) 135 Cal.App.3d 845, 850 [185 Cal. Rptr. 779]* (*Occidental Life*) [whether "'pass **[**55]** on'" of charge is "mandatory" is "legally significant" in determining who bears the charge's "legal incidence"].) Consistent with this rule, in *City of Modesto v. Modesto Irrigation Dist. (1973) 34 Cal.App.3d 504, 506 [110 Cal. Rptr. 111]*, the court held that a monthly charge imposed by the City of Modesto for use of water, gas, electricity, and telephone service, "paid by the service user (the consumer), but … collected by the service supplier," was "a tax against the utility user, not the utility supplier."

Under these principles, the legal incidence of the Recovery Portion falls on SCE's customers, not, as the City asserts, on SCE. As noted above, the City has stipulated that SCE's customers "are obligated to pay" the Recovery Portion "[p]ursuant to City Ordinance [No.] 5135," and that SCE's duty under the Ordinance is "to collect" the Recovery Portion "from all SCE electricity users in the City and remit those funds to the City." The terms of the Ordinance and the representations in SCE's application for PUC approval, **[*280]** as set forth above, fully support this stipulation. On this record, it is clear that the Ordinance mandates payment of the Recovery Portion by SCE's customers and makes SCE the City's collection agent and conduit regarding this payment. Accordingly, the legal incidence **[**56]** of the Recovery Portion is on SCE's customers.

The City's final argument is that the Recovery Portion is a "franchise fee"—i.e., "a bargained-for price for use of the City's rights of way in SCE's search for profits"—and that under California case law, a franchise fee "is not a tax." The majority essentially agrees with the City. "Historically," the majority begins, "franchise fees have not been considered" by California courts to be "taxes," and "[n]othing in Proposition 218 reflects an intent to change" this rule. (Maj. opn., *ante*, at p. 262.) Putting its own gloss on the City's argument, the majority then concludes that the Recovery Portion is a "franchise fee" and not a tax insofar as its amount "is reasonably related to the value of the franchise." (Maj. opn., *ante*, at p. 257.) "To the extent [it] exceeds any reasonable value of the franchise," it "is a tax" rather than a "franchise fee," because "the excessive portion … does not come within the rationale that justifies the imposition of fees without voter approval." (*Id*. at p. 269.)

Whether a charge constitutes a "tax" for purposes of the Constitution "is a question of law for the appellate courts to decide on independent review of the facts." **[**57]** (*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874 [64 Cal. Rptr. 2d 447, 937 P.2d 1350]*.) In answering this question, we should not, as the majority appears to do, rely on the circumstance that the charge is "nominally a franchise fee." (Maj. opn., *ante*, at p. 271.) In determining whether a charge is a tax, courts "are not bound by what the parties may have called the liability" (*Bank of America v. State Bd. of Equal. (1962) 209 Cal.App.2d 780, 801 [26 Cal. Rptr. 348]* (*Bank of America*)), and are "not to be guided by labels" (*Beamer v. Franchise Tax Board (1977) 19 Cal.3d 467, 475 [138 Cal. Rptr. 199, 563 P.2d 238]*) or "bare legislative assertion" (*Flynn v. San Francisco (1941) 18 Cal.2d 210, 215 [115 P.2d 3]*). Instead, their "task is to determine the[] true nature" of the charge (*Beamer v. Franchise Tax Board, supra, at p. 475*), based on "'its incidents'" and "'the natural and legal effect of the language employed in'" the enactment (*Ainsworth v. Bryant (1949) 34 Cal.2d 465, 473 [211 P.2d 564]*). This general principle is especially applicable here for two reasons: (1) Proposition 218's "main concern" was "perhaps" the "euphemistic relabeling" of taxes "as 'fees,' 'charges,' or 'assessments'" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra, 24 Cal.4th at p. 839*), and (2) Proposition 218 expressly required courts to "liberally construe[]" article XIII C "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent" (Prop. 218, § 5, reprinted at 1 Stats. 1996, p. A-299).
[*281]

Given the City's argument, the question here is whether the Recovery Portion, in light of its incidents, constitutes the type of charge we have declared **[**58]** to be a franchise fee instead of a tax. One of our earliest decisions to discuss this type of charge is *County of Tulare v. City of Dinuba (1922) 188 Cal. 664 [206 P. 983]* (*Tulare*). There, we held that the annual payment imposed by the Broughton Act (*§ 6001 et seq.*) on the successful bidder for a franchise to provide electricity—2 percent of gross annual receipts from the use, operation or possession of the franchise—is "neither a tax nor a license." (*Tulare, at p. 670*.) Instead, it is a "charge" that "the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility … . [¶] It is purely a matter of contract. … [I]t is a matter of option with the applicant whether he will accept the franchise on those terms. His obligation to pay is not imposed by law but by his acceptance of the franchise." (*Ibid.*)

Tulare makes clear that the Recovery Portion, irrespective of its relationship to the value of the franchise SCE received, is not a franchise fee for purposes of the rule that a franchise fee is not a tax. As explained above, the Recovery Portion is not a charge that "the holder of the franchise"—SCE—"undert[ook] to pay." (*Tulare, supra, 188 Cal. at p. 670*.) Indeed, as the majority correctly states, the terms **[**59]** of the Ordinance "belie" this

characterization, establishing instead that SCE did not "assume[] a burden to pay" the Recovery Portion. (Maj. opn., *ante*, at p. 270.) And the City's factual stipulation that the Ordinance "obligated" SCE's customers "to pay" the Recovery Portion conclusively establishes that *their* "obligation to pay" the Recovery Portion was, in fact, "imposed by law," not by *their* "acceptance of the franchise." (*Tulare, at p. 670*.) Indeed, SCE's customers did not receive a franchise, which, as the majority explains, "is a privilege granted by the government to a particular individual or entity rather than to all as a common right." (Maj. opn., *ante*, at p. 254, fn. 1.) The Ordinance granted them no legal right to make any use of the City's property or to conduct a franchise for supplying electricity. In short, the Recovery Portion simply lacks the incidents of a franchise fee for purposes of the rule that franchise fees are not taxes. "To call it a fee" rather than a tax is simply "a transparent evasion." (*Fatjo v. Pfister (1897) 117 Cal. 83, 85 [48 P. 1012]*.)

Although the majority recognizes the principles underlying the rule that franchise fees are not taxes, it fails to apply them. The majority observes that "a franchise fee is the **[**60]** purchase price of the franchise" (maj. opn., *ante*, at p. 262), but it does not explain how the Recovery Portion, which the City has imposed on someone *other than the purchaser* of the franchise, meets this test. The majority explains that "sums paid for the right to use a jurisdiction's rights-of-way are fees rather than taxes" because "the receipt of an interest in public property justifies the imposition of a charge *on the recipient* to compensate the public for the value received." (*Id.* at p. 267, italics added.) **[*282]** But the Recovery Portion is not imposed "on the recipient" of the interest in public property. (*Ibid.*) The majority explains that "restrictions on taxation do not encompass amounts *paid in exchange for* property interests" (*id.* at p. 262, italics added), and that what "distinguishes" a valid charge "from a tax is the receipt of value *in exchange for the payment*" (*id.* at p. 268, italics added). But SCE's customers do not receive any property interest or value "in exchange for" paying the Recovery Portion. (*Ibid.*) In short, the Recovery Portion lacks the "historical characteristics of franchise fees" that the majority identifies from our decisions. (*Id.* at p. 257.) It therefore **[**61]** does not, to use the majority's own words, "come within the rationale that justifies" (*id.* at p. 269) the rule that franchise fees are not taxes.

According to the majority, in determining whether the Recovery Portion is a franchise fee rather than a tax, it is irrelevant that SCE's customers "pay the surcharge" while "SCE receives the franchise rights," that SCE's customers "do not receive any value in exchange for their payment," and that the City is requiring SCE's customers "to compensate the City for *the utility's* use of public property." (See maj. opn., *ante*, at pp. 268–269, italics added.) The stated basis for this view is that "publicly regulated utilities are allowed to recover their costs and expenses by passing them on to their ratepayers," and are therefore merely "conduit[s] through which government charges are ultimately imposed on ratepayers." (*Ibid.*) Given this circumstance, the majority reasons, it makes no difference that the Recovery Portion is an obligation the City imposes directly on SCE's customers, instead of a contractual obligation of SCE that SCE "unilateral[ly]" decides to pass on to its customers. (*Id.* at p. 269.) The City, the majority asserts, should not be "precluded" from showing that the Recovery Portion **[**62]** bears a reasonable relationship to the value of the property interest it conveyed to SCE merely because the Ordinance *expressly mandates* what would have been "implicit" had SCE agreed to pay the Recovery Portion itself—"that once the PUC gave its approval, SCE would place the surcharge on the bills of customers within the City." (*Ibid.*)

For a number of reasons, I disagree. First, the majority's view is inconsistent with our case law, which, as explained above, establishes that a franchise fee—as distinguished from a tax—is a "charge [that] *the holder of the franchise undertakes to pay*," i.e., an "obligation to pay" that is "purely a matter of contract" and that is

"imposed" on the payor "not … by law but by *his* acceptance of the franchise." (*Tulare, supra, 188 Cal. at p. 670*, italics added.) As also explained above, the Recovery Portion is *not* a charge that "the holder of the franchise undert[ook] to pay," and it *is* imposed by the City on SCE's customers "by law" instead of by *their* "acceptance of [any] franchise." (*Ibid.*) The majority cites no authority for its conclusion that a **[*283]** charge imposed by law on one person to pay for *someone else's* right to use public property in a business is a franchise fee rather than a tax. **[**63]** [3]

Second, the majority fails to explain why SCE's purported unfettered ability to pass on to customers charges it contractually agrees to pay means that whether the charge is a tax *on its customers* depends on the value of the franchise *to SCE*. Had SCE contractually agreed to pay the Recovery Portion itself, it could *not* assert that the charge was a tax to the extent it exceeds the value of the franchise rights. As we have explained, because a municipality's power to permit utilities to use public property "on such terms as are satisfactory to it" includes the power to "'require the payment of such compensation as seems proper,'" courts do not "question whether or not the amount charged is a reasonable charge." (*Sunset Tel. and Tel. Co. v. Pasadena (1911) 161 Cal. 265, 285 [118 P. 796]* (*Sunset*).) And if, as the majority asserts, the utility in this scenario is merely "a conduit through which government charges are ultimately imposed on ratepayers" (maj. opn., *ante*, at p. 269), then there is no logical reason why the value of the benefit *to the utility* would be the proper measure of whether the charge is a tax *as to the utility's customers*. Nor is there any logical reason for making this the test where, as here, a municipality imposes **[**64]** the charge directly on those customers.

Indeed, the majority's conclusion in this regard is inconsistent with its own discussion of the very case law on which it principally relies. As the majority explains, our prior decisions identify "categories of charges" that constitute valid "fees rather than taxes" for purposes of applying Proposition 13. (Maj. opn., *ante*, at p. 260.) "The commonality among these categories," the majority states, "is the relationship between the charge imposed and a benefit … *to the payor*." (*Id.* at p. 261, italics added.) For example, the majority observes, "we [have] explained … that 'if an assessment for … improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit *they receive*.'" (*Ibid.*, italics added.) Under these cases, the majority states, a purported fee is a tax for **[*284]** purposes of Proposition 13 to the extent it exceeds "the special benefit received *by the payor*." (Maj. opn., *ante*, at p. 261, italics added.)

A closer look at our assessment decisions reveals that a nexus between the benefit conferred and the person *paying the charge* is a prerequisite to concluding that the charge is not a tax. As we explained **[**65]** over 100 years ago, "the compensating benefit to the property owner" on whom the government imposes a charge for an improvement "is the warrant, and the sole warrant, for" finding that the charge is a valid assessment rather than a tax. (*Spring Street Co. v. City of Los Angeles (1915) 170 Cal. 24, 30 [148 P. 217]*.) Thus, "if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax." (*Ibid.*) In other

[3] According to the majority, by adding a definition of "tax" to California Constitution, article XIII C and excepting from that definition "'[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property,'" Proposition 26, approved by voters at the November 2, 2010 General Election, "confirmed" that "restrictions on taxation do not encompass amounts paid in exchange for property interests." (Maj. opn., *ante*, at p. 263.) As the majority elsewhere acknowledges, Proposition 26 is not at issue here because "no party contends that it applies to the charges in this case." (Maj. opn., *ante*, at p. 260, fn. 4.) Moreover, nothing in Proposition 26 indicates that a charge imposed on one party for *someone else's* use of government property comes within the exception the majority quotes. To the extent the majority's analysis suggests otherwise, it is dictum. Nor does anything in Proposition 26 support the majority's rule that payments for the privilege to use public property *are* taxes to the extent they exceed "the value of the franchise conveyed." (Maj. opn., *ante*, at p. 270.)

words, an assessment levied upon property owners "without regard to the benefit actually accruing *to them* by means of the improvement, is a tax." (*Creighton v. Manson (1865) 27 Cal. 613, 627*, italics added.) The majority purports to reaffirm and follow these decisions insofar as they set forth "the characteristics of fees that may be imposed without voter approval" (maj. opn., *ante*, at p. 261), but it then eliminates the *principal* characteristic it itself identifies: "the relationship between the charge imposed and a benefit … *to the payor*" (*ibid*., italics added). [4]

The charge the majority here says is a valid fee differs in another significant respect from the charges we have previously held to be permissible fees instead of taxes: the **[**66]** measure of what is permissible. As the majority observes, as to all of the charges for benefits we have dealt with in prior cases, we have held that they are "taxes" to the extent they "exceed the reasonable *cost* of the activity on which they are based." (Maj. opn., *ante*, at p. 261, italics added.) This is true even of property assessments; although a given property may be assessed based on the proportionate share of the benefit it receives from a government improvement, the assessment is a valid fee rather than a tax only to the extent it does not exceed the proportionate *cost* of the improvement to the government. (*Knox v. City of Orland (1992) 4 Cal.4th 132, 142, fn. 15 [14 Cal. Rptr. 2d 159, 841 P.2d 144]*.) In other words, "an assessment is not measured by the precise amount of special benefits enjoyed by the assessed property," but "reflects costs allocated according to relative benefit received." (*Town of Tiburon v. Bonander (2009) 180 **[*285]** Cal.App.4th 1057, 1081 [103 Cal. Rptr. 3d 485]*.) Thus, "an assessment exceeding the cost of the improvement, so as to furnish revenue to the city" constitutes a tax. (*City of Los Angeles v. Offner (1961) 55 Cal.2d 103, 109 [10 Cal. Rptr. 470, 358 P.2d 926]*.) Consistent with these common law principles, Proposition 218 amended the state Constitution to provide that "[n]o assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Cal. Const., art. XIII D, § 4, subd. (a).) Thus, **[**67]** were a city, in order to raise revenue for general purposes, to impose a charge to recover the amount by which the benefit conferred by a government improvement exceeds the cost, the charge would be a tax.

The majority here affords different treatment to the general revenue-raising measure at issue. It holds that cost is irrelevant, and that a charge labeled a "franchise fee" becomes a tax as to a utility's customers only to the extent the charge exceeds "the value" to the utility of "the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id*. at pp. 270–271). Contrary to the majority's analysis, our prior decisions clearly do *not* provide support for the line the majority draws between a valid fee and a tax, or for its conclusion that the method the City used here to raise money for general purposes is, uniquely, not a tax. And because there is no existing authority for the majority's newly minted approach, the majority is incorrect that focusing on the fact the Recovery Portion is directly imposed by the City on SCE's customers "preclude[s]" the City from doing something it otherwise could, i.e., proving the charge **[**68]** is a fee rather than a tax by "establishing that [it] bears a reasonable relationship to the value of the property interest it conveyed to SCE." (*Id.* at p. 269.)

Third, there is no factual or legal basis for the majority's assumption that a utility, through price increases, *necessarily* can and will pass on to its customers charges it is legally required to pay.

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[4] The majority's analysis is likewise out of step with decisions from other jurisdictions holding that, to constitute a valid fee instead of a tax, a charge must be "based on a special benefit conferred *on the person paying the fee*." (*Home Builders Assn. v. West Des Moines (Iowa 2002) 644 N.W.2d 339, 347*, italics added; see *American Council of Life Insurers v. DC Health (D.C. Cir. 2016) 815 F.3d 17, 19* [whether charge is a fee or a tax depends on whether there is a "match between the sum paid and the … benefit provided, *as seen from the payers' perspective*" (italics added)].)

With respect to the sales tax, we have observed that a retailer "may choose simply to absorb the sales tax" imposed by statute instead of passing it on to its customers. (*Loeffler v. Target Corp. (2014) 58 Cal.4th 1081, 1103 [171 Cal. Rptr. 3d 189, 324 P.3d 50]*.) A utility could make a similar business decision with respect to higher payments it has become contractually obligated to pay in exchange for its right to operate; it could, for reasons related to the marketplace, simply decline to pass the increase on to its customers.

Moreover, in order to pass charges on to customers through a price increase, a utility would have to apply for and obtain approval from the PUC. Under our Constitution, the PUC has both the power and the duty to "fix rates" for California public utilities (*Cal. Const., art. XII, § 6*), such that the **[*286]** charges they demand for service are "just and reasonable" (*§ 451*; see *Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 792 [3 Cal. Rptr. 3d 703, 74 P.3d 795]*). This constitutional power, we have observed, **[**69]** includes the "power to prevent a utility from passing on to the ratepayers unreasonable costs for materials and services." (*Pac. Tel. & Tel. Co. v. Public Utilities Com. (1950) 34 Cal.2d 822, 826 [215 P.2d 441]* (*Pac. Tel.*).) We have also observed that where "the safeguards provided by arms-length bargaining are absent," the PUC, in exercising its constitutional power, has "been vigilant to protect the rate-payers from excessive rates reflecting excessive payments." (*Ibid.*)

In one especially relevant example of its exercise of this power, the PUC disallowed, for purposes of a requested rate increase, contractual payments a utility made to its controlling parent company for various services. (*Pac. Tel., supra, 34 Cal.2d at p. 825*.) The contract between the two entities specified that the amount of the payment was 1 percent of the utility's gross receipts. (*Ibid.*) In disallowing these payments as a basis for a rate increase, the PUC reasoned that the utility "exercise[d] no real, untrammeled and independent judgment in its negotiations" with its parent company and that "arms-length bargaining" between the two entities was "not, in fact, engaged in, although … in some instances" they had "made [an attempt] to simulate the same." (Dec. No. 42529 (1949) 48 Cal.P.U.C. 461, 470.) The PUC further reasoned that the formula for the amount **[**70]** of the payments—a "percentage of gross revenues"—was "a false measuring rod": it was "totally unrealistic and [bore] no rational relationship to the reasonable cost of services rendered, reflect[ed] no causal or proximate connection or relationship between payments made thereunder and reasonable value of the services rendered and [was] neither supported by law, logic nor elementary common sense." (*Id.* at p. 472.) The utility's "payment of these excessive amounts," the PUC concluded, did not support the utility's request for a rate increase. (*Ibid.*)

Nothing would preclude the PUC from finding, for similar reasons, that it would not be just and reasonable for a utility, having agreed to pay a city double what it had paid for many years as compensation for using public property, to raise its rates in order to recoup from customers the doubled cost to which it agreed. Nor would anything preclude the PUC from finding that where the utility's duty to pay the increase was expressly made contingent on the utility's ability to recoup the expense from its customers, the increase was not "based on bona fide negotiations." (Maj. opn., *ante*, at p. 270.) Indeed, the majority rightly questions whether "the negotiations" **[**71]** here, which placed responsibility for paying the Recovery Portion on SCE's ratepayers and imposed no financial responsibility for that charge on SCE, reasonably reflect "the value" of what SCE received from the City. (*Id.* at p. 271.) And where the payment is set as a percentage of a utility's gross annual receipts, the PUC could also find that the formula is "a false measuring rod," i.e., it "bears **[*287]** no rational relationship to" the value of what the utility is receiving. (Dec. No. 42529, *supra*, 48 Cal.P.U.C. at p. 472.) In short, had SCE agreed to pay the Recovery Portion and then applied for a rate increase to pass on the charge to

its customers, the PUC could have "disallow[ed] expenditures that it [found] unreasonable, thus insuring that any excessive costs [would] be met from [SCE's] profits. The effect of the payments on rates and services [would have been] no greater than in any other case where the [PUC] and management disagree on the reasonableness of an expenditure, and the management concludes that it is good business judgment to make such payments from its profits despite the fact that it cannot recoup them from its rate payers." (*Pac. Tel., supra, 34 Cal.2d at p. 832*.) The majority ignores this precedent in assuming that **[**72]** a utility, through rate increases, necessarily can pass on to its customers any and all charges it has agreed to pay.

Indeed, the facts in the record indicate that SCE and the City did not share the majority's assumption. As the majority explains, the record shows "that SCE was not willing to assume the burden of paying" the additional 1 percent the City demanded, and "was willing only to collect the charge from its customers and remit the revenue to the City." (Maj. opn., *ante*, at p. 271.) It is for this reason that the agreement and the Ordinance provided that "the charge would be collected from ratepayers" and "would become payable only if SCE obtained the PUC's consent to include the surcharge as a customer surcharge." (Maj. opn., *ante*, at p. 271.) Moreover, as explained above, although the agreement required SCE to *obtain* PUC approval by December 31, 2002, SCE and the City agreed not even to *apply* for PUC approval until over two years later, in March 2005. According to a letter from the City to SCE, the delay was "[b]ased" in part "upon the tremendous uncertainty associated with the end of the [California] deregulation transition period … and the volatility and uncertainty of rates." Were it true, as the **[**73]** majority assumes, that SCE necessarily could have passed on the Recovery Portion to its customers, there would have been no reason for SCE to have refused legal responsibility for the proposed charge, for SCE and the City to have made the Recovery Portion contingent on "the PUC's consent to include the surcharge as a customer surcharge" (maj. opn., *ante*, at p. 271), or for SCE and the City to have delayed submission of the application for PUC approval. In other words, as plaintiffs assert, the facts in the record indicate that, unlike the majority, SCE and the City did not consider the PUC to be "a mere rubber stamp of financial burdens" SCE and the City "might try to impose upon utility users."

Fourth, the majority's approach, in addition to being inconsistent with our case law, is fundamentally inconsistent with Proposition 218's purpose. The majority, partially quoting the first two sentences of Proposition 218's findings and declarations, suggests that the voters were "concern[ed] with excessive fees, not fees in general." (Maj. opn., *ante*, at p. 262.) But the **[*288]** majority ignores the very next sentence of the findings and declarations: "This measure protects taxpayers by limiting the methods by **[**74]** which local governments exact revenue from taxpayers without their consent." (Prop. 218, § 2, reprinted at 1 Stats. 1996, p. A-295.) Proposition 218 expressly provided that article XIII C "shall be liberally construed to effectuate" this goal, i.e., "limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5, reprinted at Historical Notes, 2B West's Ann. Cal. Const. (2013), foll. Art. XIII C, § 1, at p. 363.) The majority also ignores the ballot arguments in favor of Proposition 218, which (1) warned that "politicians [had] created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees,'" and (2) stated that "Proposition 218 guarantees your right to vote on local tax increases—even when they are called something else, like 'assessments' or 'fees' and imposed on homeowners." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 218, p. 76.) The record here shows that the City imposed the Recovery Portion on SCE's customers in order to raise revenue for general governmental purposes. The charge clearly constitutes one of the "'revenue-producing mechanisms'" that, as the majority explains, local governments **[**75]** adopted because "voters restricted [their] taxing

authority." (Maj. opn., *ante*, at p. 266.) By holding that the City may raise revenue from SCE's consumers by calling the charge a franchise fee, even though those paying the fee receive no franchise, the majority sanctions this obvious evasion of Proposition 218 and allows the City to use the utility as a middleman for what is a tax disguised as a fee, in derogation of Proposition 218's express purpose and liberal construction clause.

Fifth, the majority's concern about the *possible* treatment of charges passed on to ratepayers by a utility's "unilateral decision" does not justify its refusal to recognize the significance under our case law of the fact that SCE's customers do not receive franchise rights in exchange for paying the Recovery Portion, and its focus instead on the value of those rights to an entity that is not paying for them. (Maj. opn., *ante*, at p. 269.) Initially, the facts of this case do not present that scenario, and holding here that the Recovery Portion is a tax rather than a franchise fee because SCE's customers receive no franchise rights in return for their payment would not preclude ratepayers from arguing *in a* **[**76]** *future case* that we should *expand* California Constitution, article XIII C's reach to franchise charges that a utility, having contractually agreed to pay, unilaterally decides to pass on to its customers. The majority's concern about this scenario does not justify its *contraction* of article XIII C so as to make it inapplicable where it clearly does and should apply: direct government imposition of a charge on those who receive nothing in return.

In any event, the majority's analysis is contrary to decades of California case law establishing that, for purposes of determining whether a charge is a tax or a fee as to the payor, charges passed on to the payor by the unilateral **[*289]** and discretionary decision of some third party are, in fact, different from charges legally imposed on the payor by the government. (E.g. *Western States, supra, 19 Cal.3d at pp. 217–218*; *Western L. Co. v. State Bd. of Equalization (1938) 11 Cal.2d 156, 162–164 [78 P.2d 731]* (*Western L.*).) The majority simply ignores these cases in reasoning that the two types of charges must be treated the same. (Maj. opn., *ante*, at p. 269.)

Indeed, the effect of the majority's approach is to allow claims that this long-standing and unbroken line of precedent precludes. Under that precedent, a charge that is not imposed by the government on the payor—either directly or by inclusion of a **[**77]** *mandatory* pass-on provision—and that is passed on to the payor by the unilateral and discretionary decision of some third party, is not a tax, even if it is "implicit" (maj. opn., *ante*, at p. 269) that the third party on whom the charge is imposed will pass it on to the payor. Notably, in *Howard Jarvis Taxpayers Assn. v. City of Fresno (2005) 127 Cal.App.4th 914, 927 [26 Cal. Rptr. 3d 153]*, the court applied this principle to hold that a charge the City of Fresno had imposed on a utility, and that the utility had passed on to its customers, was not "a tax *on utilities consumers*" within the meaning of California Constitution article XIII C. The court explained that "[a]n exaction imposed on any particular ratepayer in an amount established in the discretion of the utility … is not an exercise of the city's taxing power." (*Howard Jarvis, at p. 927*.) Applying this principle, it held that the charge at issue was "not a tax upon consumers of utilities" because the legislation establishing it placed "the 'levy' directly upon the utility" and did "not require[]" the utility "to recover the … fee from ratepayers in any particular manner." (*Ibid.*) [5]

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[5] See *Western States, supra, 19 Cal.3d at page 217* (charge imposed on nonprofit corporation providing services to banks, that was "recoup[ed]" from banks "by raising" fees, was not a tax on the banks because local ordinance imposing the charge did not "requir[e]" that it "be passed on" to customers); *Western L., supra, 11 Cal.2d at page 163* (state sales tax is not a tax on consumers even though retailers pass it on to consumers, because tax statute laid "the tax solely on the retailer"); *Occidental Life, supra, 135 Cal.App.3d at page 849* (sales tax on retailer is a tax on purchasers from whom retailer recoups the charge only if it "'*must*,'" "'by its terms,'" "'be passed on to the purchaser'"); *Rio Grande Oil Co. v. Los Angeles (1935) 6 Cal.App.2d 200, 201 [44 P.2d 451]* (charge on sale of gasoline is a tax as to the seller, but not as to the consumer, even though statute allows sellers to add the charge to the sale process and

Courts applying the federal Constitution's prohibition on state taxation of the federal government have used the same analysis specifically with respect to so-called utility **[**78]** franchise fees. In *U.S. v. City of Leavenworth, Kan. (D.Kan. 1977) 443 F.Supp. 274, 280–281*, a city ordinance provided that an electrical **[*290]** utility would pay, as a franchise fee, "'three percent (3%) of its gross revenue from the sale of electric energy to all customers within city limits, and the utility in turn billed its customers 'a three percent franchise fee.' The United States, as a purchaser of electricity from the utility, argued that the fee it had been charged constituted 'an impermissible tax upon the federal government.' (*Id. at p. 281*.) The court rejected the argument because the ordinance imposed '[l]egal liability for payment of the exaction' on the utility and 'contain[ed] no provisions for collection directly from' the utility's customers and 'no requirement that [the utility] pass on to' its customers 'all or any part of the financial burden of the franchise fee.'" (*Id. at p. 282*.)

Following this decision, in *U.S. v. State of Md. (D.Md. 1979) 471 F.Supp. 1030, 1032*, another federal court rejected the claim of the United States, again as a purchaser of electricity, that an environmental surcharge the State of Maryland had imposed was a constitutionally invalid tax on the federal government. Although agreeing that the surcharge was a tax—i.e., "an 'enforced contribution to provide for the support of [the] government'" (*id. at p. 1036*)—the court **[**79]** denied relief because the surcharge was not a tax *on the federal government* (*id. at pp. 1037–1041*). By statute, the court first reasoned, the surcharge was "directly imposed on the electric companies" and was their "'direct obligation.'" (*Id. at p. 1038*.) As to whether the surcharge was a tax on customers of the electric companies, the determinative factor, the court explained, was whether the law "*required* [the companies] to pass [the charge] on to their customers for payment." (*Ibid.*, italics added.) The surcharge was not a tax on the federal government, the court then held, because the utilities, although "[authorized] … to pass [it] on to their customers" (*id. at p. 1039*), were "not required" by law to do so (*id. at p. 1038*.) Notably, in reaching this conclusion, the court both followed the Kansas franchise fee decision discussed above and distinguished a Minnesota decision holding that "a franchise fee imposed" upon a gas company by a city *was* an unconstitutional tax "as applied to purchases of natural gas by an agency of the United States … because the city *required* the utility to add the franchise tax to its rates." (*Id. at p. 1040*, italics added.)

This long-standing and consistent precedent from both California and elsewhere no doubt explains why, as the majority **[**80]** notes, "plaintiffs do not contend" in this case that the Initial Term Fee "is a tax" that was imposed in violation of the state Constitution. (Maj. opn., *ante*, at p. 269.) However, under the majority's holding that charges passed on by utilities are the same, for tax purposes, as charges imposed directly on ratepayers, plaintiffs now can, and surely will, make this argument. Indeed, the majority expressly states that the differences between the Initial Term Fee and the Recovery **[*291]** Portion are "unrelated to the character or validity" of these charges. (Maj. opn., *ante*, at p. 269, fn. 10.) Thus, plaintiffs may now allege that even the Initial Term Fee is a tax because it is passed on to them through SCE's rates and it exceeds the value of the franchise rights SCE received. [6]

"'in effect collect the tax from the consumer'"); see also *Bank of America, supra, 209 Cal.App.2d at pages 792–793* (bank's statutory liability for use tax on checks it sold to customers, which by statute was imposed upon the purchaser rather than the seller, was not a tax on the bank).

[6] According to the majority, the Ordinance's treatment of the Recovery Portion "was driven by the PUC's effort to ensure that a local government's higher-than-average charges are not unfairly imposed on ratepayers outside of the local government's jurisdiction." (Maj. opn., *ante*, at p. 269, fn. 10.) As far as the record discloses, this is true only in the sense that the separate billing procedure the PUC permits, but does not require, utilities to employ enabled the City *to use SCE* to collect the additional 1 percent—which is a disguised tax—only from the City's taxpayers, and not

In the same way, the majority's holding renders both the Broughton Act and the 1937 Act vulnerable to constitutional challenge. Notwithstanding our holding almost 100 years ago that the fees utilities must pay under the Broughton Act are *not* taxes under the state Constitution (*Tulare, supra, 188 Cal. at p. 670*), under the majority's holding, both these payments and similar payments required by the 1937 Act are invalid taxes to the extent **[**81]** they are passed on by utilities to customers through rates and they exceed the value of the franchise rights conveyed. Notably, nothing suggests that these statutorily established charges reflect the value of a franchise. Moreover, the majority's holding that the Constitution *requires* courts to determine the value of a franchise would seem to render the 1937 Act unconstitutional insofar as it provides that "[n]o franchise granted under this chapter shall ever be given any value before any court … in any proceeding of any character in excess of the cost to the grantee of the necessary publication and any other sum paid by it to the municipality therefor at the time of acquisition." (*§ 6263*.)

Finally, as a practical matter, the majority's approach is problematic in a number of ways. The majority mentions one: the inherent "difficulties" in "determining the value of a franchise." (Maj. opn., *ante*, at p. 269.) The majority references several factors it says may bear on value: "market forces" and "bona fide negotiations." (*Id.* at pp. 269–270.) It suggests there may be "other indicia of value" (*id.* at p. 270), but it declines to offer any guidance as to what those other indicia might be, instead "leav[ing] th[e] issue to be addressed **[**82]** by expert opinion and subsequent case law" (*id*. at p. 270, fn. 11). But as we noted over 100 years ago, "[t]here are few subjects on which witnesses are more likely to differ than that of the value of property, and few are more difficult of satisfactory determination." (*O'Hara v. Wattson (1916) 172 Cal. 525, 528 [157 P. 608]*.) We also long ago recognized that "the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time." (*San Jose Gas Co. v. January (1881) 57 Cal. 614, 616*.) There are also uncertainties **[*292]** regarding the other side of the majority's equation, i.e., the amount of the payment. As we have recognized, a utility's annual receipts are "a most indefinite," "elusive," and "uncertain quantity" that is "dependent upon many conditions." (*Thompson v. Board of Supervisors (1896) 111 Cal. 553, 558 [44 P. 230]*.) Moreover, the total compensation the Ordinance requires for granting the franchise is *2* percent of SCE's "Gross Annual Receipts." Given the majority's view that all costs are necessarily passed along to customers, this entire 2 percent—not just the one percent Recovery Portion—will have to be considered in determining the amount of the charge and whether it bears a "reasonable relationship" to "value." (Maj. opn., *ante*, at p. 254.) And even were it possible to determine **[**83]** with any certainty the value of the franchise and the amount of the charge, the majority fails to explain what constitutes a "reasonable relationship" between these amounts. (*Ibid.*) Presumably, exact correspondence is unnecessary, but what is necessary, the majority does not say. As we have explained, "the question whether a contract" that impacts a utility's rates and services "is reasonable is one on which, except in clear cases, there is bound to be conflicting evidence and considerable leeway for conflicting opinions." (*Pac. Tel., supra, 34 Cal.2d at p. 828*.)

Perhaps to justify its failure to offer any real guidance on this admittedly "difficult[]" issue (maj. opn., *ante*, at p. 269), the majority notes that "[t]he parties' briefs do not consider the means by which franchise rights might be valued." (*Id*. at p. 270, fn. 11.) But there is a simple explanation for this silence: Neither party has suggested that the value of the franchise should even be a consideration in determining whether the Recovery Portion is a tax or a fee. On the contrary, upon the court's inquiry at oral argument, the City expressly disclaimed this approach. It asserted that, as to fees voluntarily negotiated for the use of government property,

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from those who do not pay taxes to the City.

courts should not be concerned **[**84]** about whether the fee is reasonably related to the benefits, and should not second-guess what a utility is willing to pay for its use of public property. Nor, the City argued, are courts well positioned to second-guess the economic decisions of other branches of government. The City also noted, like the majority, the inherent difficulties of making this kind of determination, asking rhetorically, "what's the fair and rational rate of a parking meter," or "to rent a duck boat on the lake at the county fairgrounds," or "to rent a meeting room at the community center?" Bringing the question back to the facts of this case, the City rightly asked, "What are the limits of [a municipality's] ability to monetize its rights of way?" Instead, the City urges us to follow "well settled" law by focusing on the "legal incidence" of the Recovery Portion, "i.e., who has a legal duty to pay it." This test, the City asserts, is "logical" and "predictable," is "within the competence of courts to distinguish fees from taxes," and "better serves the needs of courts and the society they serve."
[*293]

I agree with the City. Indeed, regarding the City's comment about monetizing its rights of way, we have explained, **[**85]** as noted above, that a municipality's power to permit utilities to use public property "on such terms as are satisfactory to it" includes the power to "'require the payment of such compensation as seems proper,'" and that courts therefore do not "question whether or not the amount charged is a reasonable charge." (*Sunset, supra, 161 Cal. at p. 285*.) It is for these reasons, among others, that I focus my analysis, as our precedent directs, on the legal incidence of the Recovery Portion, and do not endorse a vague, unprecedented, unworkable, and standardless test that requires courts to determine the extent to which a charge "bear[s] a reasonable relationship to the value of the property interests transferred" (maj. opn., *ante*, at p. 270), "the value of the franchise conveyed" (*ibid.*), or "the value of the franchise rights" (*id*. at p. 271).

There are myriad other ways in which the majority's approach—determining whether the amount of the charge bears a reasonable relationship to the value of the franchise conveyed—is problematic. It essentially requires courts to determine the adequacy of consideration, in contravention of the well-established "'general contract principle that courts should *not* inquire into the adequacy of consideration.'" **[**86]** (*Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 679 [254 Cal. Rptr. 211, 765 P.2d 373]*, italics added; see *Whelan v. Swain (1901) 132 Cal. 389, 391 [64 P. 560]* ["'The law does not weigh the *quantum* of the consideration'"].) The majority's approach also essentially transfers responsibility for determining the reasonableness of a utility's rates from the PUC to the courts, thus usurping the PUC's *constitutional* power and duty to "fix [utility] rates" (*Cal. Const., art. XII, § 6*) and supplanting the PUC's far superior ability, relative to courts, to review the reasonableness of rates (*Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1183 [233 Cal. Rptr. 22, 729 P.2d 186]* ["judicial review of rates is not comparable to regulation by the P.U.C."]; *County of Inyo v. Public Utilities Com. (1980) 26 Cal.3d 154, 159–160 [161 Cal. Rptr. 172, 604 P.2d 566]* ["PUC maintains an expert, independent staff to investigate rate requests" and "renders an independent decision on each record that it examines," whereas courts "must limit … review to the rates established by the involved utility and must depend upon the expert testimony presented by the parties"]; *Sale v. Railroad Commission (1940) 15 Cal.2d 612, 617–618 [104 P.2d 38]*).

Given these difficulties and the lack of authority for the majority's approach, I disagree with the majority's conclusion that the Recovery Portion is not a tax unless it exceeds the reasonable value of the franchise. Instead, based on long-standing precedent, the purpose of Proposition 218 to limit local government revenue and enhance taxpayer consent, and the command **[*294]** that we liberally **[**87]** construe California Constitution, article XIII C to effectuate this purpose, I conclude

that the Recovery Portion is a tax that the City may not impose without voter approval. I therefore dissent.

General Industrial Storm Water Permit

State Water Resources Control Board Order No. 2014-0057-DWQ

(w/o Attachments or Appendices)

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

GENERAL PERMIT FOR
STORM WATER DISCHARGES
ASSOCIATED WITH INDUSTRIAL ACTIVITIES

ORDER
NPDES NO. CAS000001

This Order was adopted by the State Water Resources Control Board on:	**April 1, 2014**
This Order shall become effective on:	**July 1, 2015**
This Order shall expire on:	**June 30, 2020**

IT IS HEREBY ORDERED that as of July 1, 2015 this Order supersedes Order 97-03-DWQ except for Order 97-03-DWQ's requirement to submit annual reports by July 1, 2015 and except for enforcement purposes. As of July 1, 2015, a Discharger shall comply with the requirements in this Order to meet the provisions contained in Division 7 of the California Water Code (commencing with section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act and regulations and guidelines adopted thereunder.

CERTIFICATION

I, Jeanine Townsend, Clerk to the Board, do hereby certify that this Order, including its fact sheet, attachments, and appendices is a full, true, and correct copy of an Order adopted by the State Water Resources Control Board, on April 1, 2014.

AYE:	Chair Felicia Marcus Vice Chair Frances Spivy-Weber Board Member Tam M. Doduc Board Member Steven Moore
NAY:	None
ABSENT:	Board Member Dorene D'Adamo
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board

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ATTACHMENTS AND APPENDICES

I. FINDINGS

A. General Findings

The State Water Resources Control Board (State Water Board) finds that:

1. The Federal Clean Water Act (Clean Water Act) prohibits certain discharges of storm water containing pollutants except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. (33 U.S.C. §§ 1311, 1342 (also referred to as Clean Water Act §§ 301, 402).) The United States Environmental Protection Agency (U.S. EPA) promulgates federal regulations to implement the Clean Water Act's mandate to control pollutants in storm water discharges. (40 C.F.R. § 122, et seq.) The NPDES permit must require implementation of Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT) to reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges (NSWDs). The NPDES permit must also include additional requirements necessary to implement applicable water quality objectives or water quality standards (water quality standards, collectively).

2. On November 16, 1990, U.S. EPA promulgated Phase I storm water regulations in compliance with section 402(p) of the Clean Water Act. (55 Fed. Reg. 47990, codified at 40 C.F.R. § 122.26.) These regulations require operators of facilities subject to storm water permitting (Dischargers), that discharge storm water associated with industrial activity (industrial storm water discharges), to obtain an NPDES permit. Section 402(p)(3)(A) of the Clean Water Act also requires that permits for discharges associated with industrial activity include requirements necessary to meet water quality standards.

3. Phase II storm water regulations[1] require permitting for storm water discharges from facilities owned and operated by a municipality with a population of less than 100,000. The previous exemption from the Phase I permitting requirements under section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 was eliminated.

4. This Order (General Permit) is an NPDES General Permit issued in compliance with section 402 of the Clean Water Act and shall take effect on July 1, 2015, provided that the Regional Administrator of U.S. EPA has no objection. If the U.S. EPA Regional Administrator has an objection, this General Permit will not become effective until the objection is withdrawn.

5. This action to adopt an NPDES General Permit is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, § 21000, et seq.) in accordance with section 13389 of the Water Code. (See *County of*

[1] U.S. EPA. Final NPDES Phase II Rule. <http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm>. [as of February 4, 2014]

Los Angeles v. California State Water Resources Control Bd. (2006) 143 Cal.App.4th 985.)

6. State Water Board Order 97-03-DWQ is rescinded as of the effective date of this General Permit (July 1, 2015) except for Order 97-03-DWQ's requirement that annual reports be submitted by July1, 2015 and except for enforcement purposes.

7. Effective July 1, 2015, the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) (Water Boards, collectively) will enforce the provisions herein.

8. This General Permit authorizes discharges of industrial storm water to waters of the United States, so long as those discharges comply with all requirements, provisions, limitations, and prohibitions in this General Permit.

9. Industrial activities covered under this General Permit are described in Attachment A.

10. The Fact Sheet for this Order is incorporated as findings of this General Permit.

11. Acronyms are defined in Attachment B and terms used in this General Permit are defined in Attachment C.

12. This General Permit regulates industrial storm water discharges and authorized NSWDs from specific categories of industrial facilities identified in Attachment A hereto, and industrial storm water discharges and authorized NSWDs from facilities designated by the Regional Water Boards to obtain coverage under this General Permit. This General Permit does not apply to industrial storm water discharges and NSWDs that are regulated by other individual or general NPDES permits

13. This General Permit does not preempt or supersede the authority of municipal agencies to prohibit, restrict, or control industrial storm water discharges and authorized NSWDs that may discharge to storm water conveyance systems or other watercourses within their jurisdictions as allowed by state and federal law.

14. All terms defined in the Clean Water Act, U.S. EPA regulations, and the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000, et seq.) will have the same definition in this General Permit unless otherwise stated.

15. Pursuant to 40 Code of Federal Regulations section 131.12 and State Water Board Resolution 68-16, which incorporates the requirements of 40 Code of Federal Regulations section 131.12 where applicable, the State Water Board finds that discharges in compliance with this General Permit will not result in the lowering of water quality to a level that does not achieve water quality objectives and protect beneficial uses. Any degradation of water quality from existing high quality water to a level that achieves water quality objectives and

protects beneficial uses is appropriate to support economic development. This General Permit's requirements constitute best practicable treatment or control for discharges of industrial storm water and authorized non-storm water discharges, and are therefore consistent with those provisions.

16. Compliance with any specific limits or requirements contained in this General Permit does not constitute compliance with any other applicable permits.

17. This General Permit requires that the Discharger certify and submit all Permit Registration Documents (PRDs) for Notice of Intent (NOI) and No Exposure Certification (NEC) coverage via the State Water Board's Storm Water Multiple Application and Report Tracking System (SMARTS) website. (See Attachment D for an example of the information required to be submitted in the PRDs via SMARTS.) All other documents required by this General Permit to be electronically certified and submitted via SMARTS can be submitted by the Discharger or by a designated Duly Authorized Representative on behalf of the Discharger. Electronic reporting is required to reduce the state's reliance on paper, to improve efficiency, and to make such General Permit documents more easily accessible to the public and the Water Boards.

18. All information provided to the Water Boards shall comply with the Homeland Security Act and all other federal law that concerns security in the United States, as applicable.

B. Industrial Activities Not Covered Under this General Permit

19. Discharges of storm water from areas on tribal lands are not covered under this General Permit. Storm water discharges from industrial facilities on tribal lands are regulated by a separate NPDES permit issued by U.S. EPA.

20. Discharges of storm water regulated under another individual or general NPDES permit adopted by the State Water Board or Regional Water Board are not covered under this General Permit, including the State Water Board NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities.

21. Storm water discharges to combined sewer systems are not covered under this General Permit. These discharges must be covered by an individual permit. (40 C.F.R. § 122.26(a)(7).)

22. Conveyances that discharge storm water runoff combined with municipal sewage are not covered under this General Permit.

23. Discharges of storm water identified in Clean Water Act section 402(l) (33 U.S.C. § 1342(l)) are not covered under this General Permit.

24. Facilities otherwise subject to this General Permit but for which a valid Notice of Non-Applicability (NONA) has been certified and submitted via SMARTS, by the Entity are not covered under this General Permit. Entities (See Section XX.C.1 of this General Permit) who are claiming "No Discharge"

through the NONA shall meet the eligibility requirements and provide a No Discharge Technical Report in accordance with Section XX.C.

25. This General Permit does not authorize discharges of dredged or fill material regulated by the US Army Corps of Engineers under section 404 of the Clean Water Act and does not constitute a water quality certification under section 401 of the Clean Water Act.

C. Discharge Prohibitions

26. Pursuant to section 13243 of the Water Code, the State Water Board may specify certain conditions or areas where the discharge of waste, or certain types of waste, is prohibited.

27. With the exception of certain authorized NSWDs as defined in Section IV, this General Permit prohibits NSWDs. The State Water Board recognizes that certain NSWDs should be authorized because they are not generated by industrial activity, are not significant sources of pollutants when managed appropriately, and are generally unavoidable because they are related to safety or would occur regardless of industrial activity. Prohibited NSWDs may be authorized under other individual or general NPDES permits, or waste discharge requirements issued by the Water Boards.

28. Prohibited NSWDs are referred to as unauthorized NSWDs in this General Permit. Unauthorized NSWDs shall be either eliminated or permitted by a separate NPDES permit. Unauthorized NSWDs may contribute significant pollutant loads to receiving waters. Measures to control sources of unauthorized NSWDs such as spills, leakage, and dumping, must be addressed through the implementation of Best Management Practices (BMPs).

29. This General Permit incorporates discharge prohibitions contained in water quality control plans, as implemented by the Water Boards.

30. Direct discharges of waste, including industrial storm water discharges, to Areas of Special Biological Significance (ASBS) are prohibited unless the Discharger has applied for and the State Water Board has granted an exception to the State Water Board's 2009 Water Quality Control Plan for Ocean Waters of California as amended by State Water Board Resolution 2012-0056 (California Ocean Plan)[2] allowing the discharge.

[2] State Water Resources Control Board. Ocean Standards Web Page. <http://www.waterboards.ca.gov/water_issues/programs/ocean/>. [as of February 4, 2014].
State Water Resources Control Board. Water Quality Control Plan for Ocean Waters of California 2009. <http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/2009_cop_adoptedeffective_usepa.pdf>. [as of February 4, 2014].
State Water Resources Control Board. Resolution 2012-0056. <http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0056.pdf>. [as of February 4, 2014].

D. Effluent Limitations

31. Section 301(b) of the Clean Water Act and 40 Code of Federal Regulations section require NPDES permits to include technology-based requirements at a minimum, and any more stringent effluent limitations necessary for receiving waters to meet applicable water quality standards. Clean Water Act section 402(p)(3)(A) requires that discharges of storm water runoff from industrial facilities comply with Clean Water Act section 301.

32. This General Permit requires control of pollutant discharges using BAT and BCT to reduce and prevent discharges of pollutants, and any more stringent effluent limitations necessary for receiving waters to meet applicable water quality standards.

33. It is not feasible for the State Water Board to establish numeric technology based effluent limitations for discharges authorized by this General Permit at this time. The rationale for this determination is discussed in detail in the Fact Sheet of this General Permit. Therefore, this General Permit requires Dischargers to implement minimum BMPs and applicable advanced BMPs as defined in Section X.H (collectively, BMPs) to comply with the requirements of this General Permit. This approach is consistent with U.S. EPA's 2008 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (2008 MSGP).

34. 40 Code of Federal Regulations section 122.44(d) requires that NPDES permits include Water Quality Based Effluent Limitations (WQBELs) to attain and maintain applicable numeric and narrative water quality standards for receiving waters.

35. Where numeric water quality criteria have not been established, 40 Code of Federal Regulations section 122.44(d)(1)(vi) provides that WQBELs may be established using U.S. EPA criteria guidance under section 304(a) of the Clean Water Act, a proposed state criteria or policy interpreting narrative criteria supplemented with other relevant information, and/or an indicator parameter.

36. This General Permit requires Dischargers to implement BMPs when necessary, in order to support attainment of water quality standards. The use of BMPs to control or abate the discharge of pollutants is authorized by 40 Code of Federal Regulations section 122.44(k)(3) because numeric effluent limitations are infeasible and implementation of BMPs is reasonably necessary to achieve effluent limitations and water quality standards, and to carry out the purposes and intent of the Clean Water Act. (40 C.F.R. § 122.44(k)(4).)

E. Receiving Water Limitations

37. This General Permit requires compliance with receiving water limitations based on water quality standards. The primary receiving water limitation requires that industrial storm water discharges and authorized NSWDs not

cause or contribute to an exceedance of applicable water quality standards. Water quality standards apply to the quality of the receiving water, not the quality of the industrial storm water discharge. Therefore, compliance with the receiving water limitations generally cannot be determined solely by the effluent water quality characteristics. If any Discharger's storm water discharge causes or contributes to an exceedance of a water quality standard, that Discharger must implement additional BMPs or other control measures in order to attain compliance with the receiving water limitation. Compliance with water quality standards may, in some cases, require Dischargers to implement controls that are more protective than controls implemented solely to comply with the technology-based requirements in this General Permit.

F. Total Maximum Daily Loads (TMDLs)

38. TMDLs relate to the maximum amount of a pollutant that a water body can receive and still attain water quality standards. A TMDL is defined as the sum of the allowable loads of a single pollutant from all contributing point sources (the waste load allocations) and non-point sources (load allocations), plus the contribution from background sources. (40 C.F.R. § 130.2(i).) Discharges addressed by this General Permit are considered to be point source discharges, and therefore must comply with effluent limitations that are "consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the state and approved by U.S. EPA pursuant to 40 Code of Federal Regulations section 130.7. (40 C.F.R. § 122.44 (d)(1)(vii).) In addition, Water Code section 13263, subdivision (a), requires that waste discharge requirements implement any relevant water quality control plans. Many TMDLs contained in water quality control plans include implementation requirements in addition to waste load allocations. Attachment E of this General Permit lists the watersheds with U.S. EPA-approved and U.S. EPA-established TMDLs that include requirements, including waste load allocations, for Dischargers covered by this General Permit.

39. The State Water Board recognizes that it is appropriate to develop TMDL-specific permit requirements derived from each TMDL's waste load allocation and implementation requirements, in order to provide clarity to Dischargers regarding their responsibilities for compliance with applicable TMDLs. The development of TMDL-specific permit requirements is subject to public noticing requirements and a corresponding public comment period. Due to the number and variety of Dischargers subject to a wide range of TMDLs, development of TMDL-specific permit requirements for each TMDL listed in Attachment E will severely delay the reissuance of this General Permit. Because most of the TMDLs were established by the Regional Water Boards, and because some of the waste load allocations and/or implementation requirements may be shared by multiple Dischargers, the development of TMDL-specific permit requirements is best coordinated at the Regional Water Board level.

40. State and Regional Water Board staff will develop proposed TMDL-specific permit requirements (including monitoring and reporting requirements) for each of the TMDLs listed in Attachment E. After conducting a 30-day public comment period, the Regional Water Boards will submit to the State Water Board proposed TMDL-specific permit requirements for adoption by the State Water Board into this General Permit by July 1, 2016. The Regional Water Boards may also include proposed TMDL-specific monitoring requirements for inclusion in this General Permit, or may issue Regional Water Board orders pursuant to Water Code section 13383 requiring TMDL-specific monitoring. The proposed TMDL-specific permit requirements shall have no force or effect until adopted, with or without modification, by the State Water Board. Consistent with the 2008 MSGP, Dischargers are not required to take any additional actions to comply with the TMDLs listed in Attachment E until the State Water Board reopens this General Permit and includes TMDL-specific permit requirements, unless notified otherwise by a Regional Water Board.

41. The Regional Water Boards shall submit to the State Water Board the following information for each of the TMDLs listed in Attachment E:

    a. Proposed TMDL-specific permit, monitoring and reporting requirements applicable to industrial storm water discharges and NSWDs authorized under this General Permit, including compliance schedules and deliverables consistent with the TMDLs. TMDL-specific permit requirements are not limited by the BAT/BCT technology-based standards;

    b. An explanation of how the proposed TMDL-specific permit requirements, compliance schedules, and deliverables are consistent with the assumptions and requirements of any applicable waste load allocation and implement each TMDL; and,

    c. Where a BMP-based approach is proposed, an explanation of how the proposed BMPs will be sufficient to implement applicable waste load allocations.

42. Upon receipt of the information described in Finding 40, and no later than July 1, 2016, the State Water Board will issue a public notice and conduct a public comment period for the reopening of this General Permit to amend Attachment E, the Fact Sheet, and other provisions as necessary for incorporation of TMDL-specific permit requirements into this General Permit. Attachment E may also be subsequently reopened during the term of this General Permit to incorporate additional TMDL-specific permit requirements.

G. Discharges Subject to the California Ocean Plan

43. On October 16, 2012 the State Water Board amended the California Ocean Plan. The amended California Ocean Plan requires industrial storm water dischargers with outfalls discharging to ocean waters to comply with the

California Ocean Plan's model monitoring provisions. These provisions require Dischargers to: (a) monitor runoff for specific parameters at all outfalls from two storm events per year, and collect at least one representative receiving water sample per year, (b) conduct specified toxicity monitoring at certain types of outfalls at a minimum of once per year, and (c) conduct marine sediment monitoring for toxicity under specific circumstances. The California Ocean Plan provides conditions under which some of the above monitoring provisions may be waived by the Water Boards.

44. This General Permit requires Dischargers with outfalls discharging to ocean waters that are subject to the model monitoring provisions of the California Ocean Plan to develop and implement a monitoring plan in compliance with those provisions and any additional monitoring requirements established pursuant to Water Code section 13383. Dischargers that have not developed and implemented a monitoring program in compliance with the California Ocean Plan's model monitoring provisions by July 1, 2015 (the effective date of this General Permit), or seven (7) days prior to commencing operations, whichever is later, are ineligible to obtain coverage under this General Permit.

45. The California Ocean Plan prohibits the direct discharge of waste to ASBS. ASBS are defined in California Ocean Plan as "those areas designated by the State Water Board as ocean areas requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."

46. The California Ocean Plan authorizes the State Water Board to grant an exception to Ocean Plan provisions where the board determines that the exception will not compromise protection of ocean waters for beneficial uses and the public interest will be served.

47. On March 20, 2012, the State Water Board adopted Resolution 2012-0012 which contains exceptions to the California Ocean Plan for specific discharges of storm water and non-point sources. This resolution also contains the special protections that are to be implemented for those discharges to ASBS.

48. This General Permit requires Dischargers who have been granted an exception to the Ocean Plan authorizing the discharges to ASBS by the State Water Board to comply with the requirements contained in Section VIII.B of this General Permit.

H. Training

49. To improve compliance and maintain consistent implementation of this General Permit, Dischargers are required to designate a Qualified Industrial Storm Water Practitioner (QISP) for each facility the Discharger operates that has entered Level 1 status in the Exceedance Response Action (ERA) process as described in Section XII of this General Permit. A QISP may be assigned to more than one facility. In order to qualify as a QISP, a State

Water Board-sponsored or approved training course must be completed. A competency exam may be required by the State Water Board to demonstrate sufficient knowledge of the QISP course material.

50. A QISP must assist the Discharger in completing the Level 1 status and Level 2 status ERA requirements as specified in Section XII of this General Permit. A QISP is also responsible for assisting New Dischargers that will be discharging to an impaired water body with a 303(d) listed impairment, demonstrate eligibility for coverage through preparing the data and/or information required in Section VII.B.

51. A Compliance Group Leader, as defined in Section XIV of this General Order must complete a State Water Board sponsored or approved training program for Compliance Group Leaders.

52. All engineering work subject to the Professional Engineers Act (Bus. & Prof. Code § 6700, et seq.) and required by this General Permit shall be performed by a California licensed professional engineer.

53. California licensed professional civil, industrial, chemical, and mechanical engineers and geologists have licenses that have professional overlap with the topics of this General Permit. The California Department of Consumer Affairs, Board for Professional Engineers, Land Surveyors and Geologists (CBPELSG) provides the licensure and regulation of professional civil, industrial, chemical, and mechanical engineers and professional geologists in California. The State Water Board is developing a specialized self-guided State Water Board-sponsored registration and training program specifically for these CPBELSG licensed engineers and geologists in good standing with CBPELSG.

I. Storm Water Pollution Prevention Plan (SWPPP) Requirements

54. This General Permit requires the development of a site-specific SWPPP in accordance with Section X of this General Permit. The SWPPP must include the information needed to demonstrate compliance with the requirements of this General Permit. The SWPPP must be submitted electronically via SMARTS, and a copy be kept at the facility. SWPPP revisions shall be completed in accordance with Section X.B of this General Permit

J. Sampling, Visual Observations, Reporting and Record Keeping

55. This General Permit complies with 40 Code of Federal Regulations section 122.44(i), which establishes monitoring requirements that must be included in storm water permits. Under this General Permit, Dischargers are required to: (a) conduct an Annual Comprehensive Facility Compliance Evaluation (Annual Evaluation) to identify areas of the facility contributing pollutants to industrial storm water discharges, (b) evaluate whether measures to reduce or prevent industrial pollutant loads identified in the Discharger's SWPPP are adequate and properly implemented in accordance with the terms of this

General Permit, and (c) determine whether additional control measures are needed.

56. This General Permit contains monitoring requirements that are necessary to determine whether pollutants are being discharged, and whether response actions are necessary. Data and information resulting from the monitoring will assist in Dischargers' evaluations of BMP effectiveness and compliance with this General Permit. Visual observations are one form of monitoring. This General Permit requires Dischargers to perform a variety of visual observations designed to identify pollutants in industrial storm water discharges and their sources. To comply with this General Permit Dischargers shall: (1) electronically self-report any violations via SMARTS, (2) comply with the Level 1 status and Level 2 status ERA requirements, when applicable, and (3) adequately address and respond to any Regional Water Board comments on the Discharger's compliance reports.

57. Dischargers that meet the requirements of the No Exposure Certification (NEC) Conditional Exclusion set forth in Section XVII of this General Permit are exempt from the SWPPP requirements, sampling requirements, and visual observation requirements in this General Permit.

K. Facilities Subject to Federal Storm Water Effluent Limitation Guidelines (ELGs)

58. U.S. EPA regulations at 40 Code of Federal Regulations Chapter I Subchapter N (Subchapter N) establish technology-based Effluent Limitation Guidelines and New Source Performance Standards (ELGs) for industrial storm water discharges from facilities in specific industrial categories. For these facilities, compliance with the BAT/BCT and ELG requirements constitutes compliance with technology-based requirements of this General Permit.

59. 40 Code of Federal Regulations section 122.44(i)(3) and (4) require storm water permits to require at least one Annual Evaluation and any monitoring requirements for applicable ELGs in Subchapter N. This General Permit requires Dischargers to comply with all applicable ELG requirements found in Subchapter N.

L. Sampling and Analysis Reduction

60. This General Permit reduces the number of qualifying sampling events required to be sampled each year when the Discharger demonstrates: (1) consistent compliance with this General Permit,(2) consistent effluent water quality sampling, and (3) analysis results that do not exceed numerical action levels.

M. Role of Numeric Action Levels (NALs) and Exceedance Response Actions (ERAs)

61. This General Permit incorporates a multiple objective performance measurement system that includes NALs, new comprehensive training requirements, Level 1 ERA Reports, Level 2 ERA Technical Reports, and Level 2 ERA Action Plans. Two objectives of the performance measurement system are to inform Dischargers, the public and the Water Boards on: (1) the overall pollutant control performance at any given facility, and (2) the overall performance of the industrial statewide storm water program. Additionally, the State Water Board expects that this information and assessment process will provide information necessary to determine the feasibility of numeric effluent limitations for industrial dischargers in the next reissuance of this General Permit, consistent with the State Water Board Storm Water Panel of Experts' June 2006 Recommendations.[3]

62. This General Permit contains annual and instantaneous maximum NALs. The annual NALs are established as the 2008 MSGP benchmark values, and are applicable for all parameters listed in Table 2. The instantaneous maximum NALs are calculated from a Water Board dataset, and are only applicable for Total Suspended Solids (TSS), Oil and Grease (O&G), and pH. An NAL exceedance is determined as follows:

    a. For annual NALs, an exceedance occurs when the average of all analytical results from all samples taken at a facility during a reporting year for a given parameter exceeds an annual NAL value listed in Table 2 of this General Permit; or,

    b. For the instantaneous maximum NALs, an exceedance occurs when two or more analytical results from samples taken for any parameter within a reporting year exceed the instantaneous maximum NAL value (for Total Suspended Solids, and Oil and Grease), or are outside of the instantaneous maximum NAL range (for pH) listed in Table 2 of this General Permit. For the purposes of this General Permit, the reporting year is July 1 through June 30.

63. The NALs are not intended to serve as technology-based or water quality-based numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit. A Discharger that does not fully comply with the Level 1 status and/or Level 2 status ERA requirements, when required by the terms of this General Permit, is in violation of this General Permit.

64. ERAs are designed to assist Dischargers in complying with this General Permit. Dischargers subject to ERAs must evaluate the effectiveness of their

[3] State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 19, 2006) <http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/numeric/swpanel_final_report.pdf> [as of February 4, 2014].

BMPs being implemented to ensure they are adequate to achieve compliance with this General Permit.

65. U.S. EPA regulations at Subchapter N establish ELGs for storm water discharges from facilities in 11 industrial categories. Dischargers subject to these ELGs are required to comply with the applicable requirements.

66. Exceedances of the NALs that are attributable solely to pollutants originating from non-industrial pollutant sources (such as run-on from adjacent facilities, non-industrial portions of the Discharger's property, or aerial deposition) are not a violation of this General Permit because the NALs are designed to provide feedback on industrial sources of pollutants. Dischargers may submit a Non-Industrial Source Pollutant Demonstration as part of their Level 2 ERA Technical Report to demonstrate that the presence of a pollutant causing an NAL exceedance is attributable solely to pollutants originating from non-industrial pollutant sources.

67. A Discharger who has designed, installed, and implemented BMPs to reduce or prevent pollutants in industrial storm water discharges in compliance with this General Permit may submit an Industrial Activity BMPs Demonstration, as part of their Level 2 ERA Technical Report.

68. This General Permit establishes design storm standards for all treatment control BMPs. These design standards are directly based on the standards in State Water Board Order 2000-0011 regarding Standard Urban Storm Water Mitigation Plans (SUSMPs). These design standards are generally expected to be consistent with BAT/BCT, to be protective of water quality, and to be effective for most pollutants. The standards are intended to eliminate the need for most Dischargers to further treat/control industrial storm water discharges that are unlikely to contain pollutant loadings that exceed the NALs set forth in this General Permit.

N. Compliance Groups

69. Compliance Groups are groups of Dischargers (Compliance Group Participants) that share common types of pollutant sources and industrial activity characteristics. Compliance Groups provide an opportunity for the Compliance Group Participants to combine resources and develop consolidated Level 1 ERA Reports for Level 1 NAL exceedances and appropriate BMPs for implementation in response to Level 2 status ERA requirements that are representative of the entire Compliance Group. Compliance Groups also provide the Water Boards and the public with valuable information as to how industrial storm water discharges are affected by non-industrial background pollutant sources (including natural background) and geographic locations. When developing the next reissuance of this General Permit, the State Water Board expects to have a better understanding of the feasibility and benefits of sector-specific and watershed-based permitting alternatives, which may include technology- or water quality-based numeric effluent limitations. The effluent data, BMP performance data

and other information provided from Compliance Groups' consolidated reporting will further assist the State Water Board in addressing sector-specific and watershed-based permitting alternatives.

O. Conditional Exclusion – No Exposure Certification (NEC)

70. Pursuant to U.S. EPA Phase II regulations, all Dischargers subject to this General Permit may qualify for a conditional exclusion from specific requirements if they submit a NEC demonstrating that their facilities have no exposure of industrial activities and materials to storm water discharges.

71. This General Permit requires Dischargers who seek the NEC conditional exclusion to obtain coverage in accordance with Section XVII of this General Permit. Dischargers that meet the requirements of the NEC are exempt from the SWPPP, sampling requirements, and monitoring requirements in this General Permit.

72. Dischargers seeking NEC coverage are required to certify and submit the applicable permit registration documents. Annual inspections, re-certifications, and fees are required in subsequent years. Light industry facility Dischargers excluded from coverage under the previous permit (Order 97-03-DWQ) must obtain the appropriate coverage under this General Permit. Failure to comply with the Conditional Exclusion conditions listed in this General Permit may lead to enforcement for discharging without a permit pursuant to sections 13385 or 13399.25, et seq., of the Water Code. A Discharger with NEC coverage that anticipates a change (or changes) in circumstances that would lead to exposure should register for permit coverage prior to the anticipated changes.

P. Special Requirements for Facilities Handling Plastic Materials

73. Section 13367 of the Water Code requires facilities handling preproduction plastic to implement specific BMPs aimed at minimizing discharges of such materials. The definition of Plastic Materials for the purposes of this General Permit includes the following types of sources of Plastic Materials: virgin and recycled plastic resin pellets, powders, flakes, powdered additives, regrind, dust, and other types of preproduction plastics with the potential to discharge or migrate off-site.

Q. Regional Water Board Authorities

74. Regional Water Boards are primarily responsible for enforcement of this General Permit. This General Permit recognizes that Regional Water Boards have the authority to protect the beneficial uses of receiving waters and prevent degradation of water quality in their region. As such, Regional Water Boards may modify monitoring requirements and review, comment, approve or disapprove certain Discharger submittals required under this General Permit.

IT IS HEREBY ORDERED that all Dischargers subject to this General Permit shall comply with the following conditions and requirements.

II. RECEIVING GENERAL PERMIT COVERAGE

A. Certification

1. For Storm Water Multiple Application and Report Tracking System (SMARTS) electronic account management and security reasons, as well as enforceability of this General Permit, the Discharger's Legally Responsible Person (LRP) of an industrial facility seeking coverage under this General Permit shall certify and submit all Permit Registration Documents (PRDs) for Notice of Intent (NOI) or No Exposure Certification (NEC) coverage. All other documents shall be certified and submitted via SMARTS by the Discharger's (LRP) or by their Duly Authorized Representative in accordance with the Electronic Signature and Certification Requirements in Section XXI.K. All documents required by this General Permit that are certified and submitted via SMARTS shall be in accordance with Section XXI.K.

2. Hereinafter references to certifications and submittals by the Discharger refer to the Discharger's LRP and their Duly Authorized Representative.

B. Coverages

This General Permit includes requirements for two (2) types of permit coverage, NOI coverage and NEC coverage. State Water Board Order 97-03-DWQ (previous permit) remains in effect until July 1, 2015. When PRDs are certified and submitted and the annual fee is received, the State Water Board will assign the Discharger a Waste Discharger Identification (WDID) number.

1. General Permit Coverage (NOI Coverage)

   a. Dischargers that discharge storm water associated with industrial activity to waters of the United States are required to meet all applicable requirements of this General Permit.

   b. The Discharger shall register for coverage under this General Permit by certifying and submitting PRDs via SMARTS (http://smarts.waterboards.ca.gov), which consist of:

      i. A completed NOI and signed certification statement;

      ii. A copy of a current Site Map from the Storm Water Pollution Prevention Plan (SWPPP) in Section X.E;

      iii. A SWPPP (see Section X); and,

c. The Discharger shall pay the appropriate Annual Fee in accordance with California Code of Regulations, title 23, section 2200 et seq.[4]

2. General Permit Coverage (NEC Coverage)

a. Dischargers that certify their facility has no exposure of industrial activities or materials to storm water in accordance with Section XVII qualify for NEC coverage and are not required to comply with the SWPPP or monitoring requirements of this General Permit.

b. Dischargers who qualify for NEC coverage shall conduct one Annual Facility Comprehensive Compliance Evaluation (Annual Evaluation) as described in Section XV, pay an annual fee, and certify annually that their facilities continue to meet the NEC requirements.

c. The Discharger shall submit the following PRDs on or before October 1, 2015 for NEC coverage via SMARTS:

i. A completed NEC Form (Section XVII.F.1) and signed certification statement (Section XVII.H);

ii. A completed NEC Checklist (Section XVII.F.2); and

iii. A current Site Map consistent with requirements in Section X.E.;

d. The Discharger shall pay the appropriate annual fee in accordance with California Code of Regulations, title 23, section 2200 et seq.[5]

3. General PRD Requirements

a. Site Maps

Dischargers registering for NOI or NEC coverage shall prepare a site map(s) as part of their PRDs in accordance with Section X.E. A separate copy of the site map(s) is required to be in the SWPPP. If there is a significant change in the facility layout (e.g., new building, change in storage locations, boundary change, etc.) a revision to the site map is required and shall be certified and submitted via SMARTS.

b. A Discharger shall submit a single set of PRDs for coverage under this General Permit for multiple industrial activities occurring at the same facility.

c. Any information provided to the Water Boards by the Discharger shall comply with the Homeland Security Act and other federal law that

[4] Annual fees must be mailed or sent electronically using the State Water Boards' Electronic Funds Transfer (EFT) system in SMARTS.
[5] See footnote 4.

addresses security in the United States; any information that does not comply should not be submitted in the PRDs. The Discharger must provide justification to the Regional Water Board regarding redacted information within any submittal.

d. Dischargers may redact trade secrets from information that is submitted via SMARTS. Dischargers who certify and submit redacted information via SMARTS must include a general description of the redacted information and the basis for the redaction in the version that is submitted via SMARTS. Dischargers must submit complete and un-redacted versions of the information that are clearly labeled "CONFIDENTIAL" to the Regional Water Board within 30 days of the submittal of the redacted information. All information labeled "CONFIDENTIAL" will be maintained by the Water Boards in a separate, confidential file.

4. Schedule for Submitting PRDs - Existing Dischargers Under the Previous Permit.

a. Existing Dischargers[6] with coverage under the previous permit shall continue coverage under the previous permit until July 1, 2015. All waste discharge requirements and conditions of the previous permit are in effect until July 1, 2015.

b. Existing Dischargers with coverage under the previous permit shall register for NOI coverage by July 1, 2015 or for NEC coverage by October 1, 2015. Existing Dischargers previously listed in Category 10 (Light Industry) of the previous permit, and continue to have no exposure to industrial activities and materials, have until October 1, 2015 to register for NEC coverage.

c. Existing Dischargers with coverage under the previous permit, that do not register for NOI coverage by July 1, 2015, may have their permit coverage administratively terminated as soon as July 1, 2015.

d. Existing Dischargers with coverage under the previous permit that are eligible for NEC coverage but do not register for NEC coverage by October 1, 2015 may have their permit coverage administratively terminated as soon as October 1, 2015.

e. Existing Dischargers shall continue to comply with the SWPPP requirements in State Water Board Order 97-03-DWQ up to, but no later than, June 30, 2015.

[6] Existing Dischargers are Dischargers with an active Notice of Intent (permit coverage) under the previous permit (97-03-DWQ) prior to the effective date of this General Permit.

f. Existing Dischargers shall implement an updated SWPPP in accordance with Section X by July 1, 2015.

g. Existing Dischargers that submit a Notice of Termination (NOT) under the previous permit prior to July 1, 2015 and that receive NOT approval from the Regional Water Board are not subject to this General Permit unless they subsequently submitted new PRDs.

5. Schedule for Submitting PRDs - New Dischargers Obtaining Coverage On or After July 1, 2015

   New Dischargers registering for NOI coverage on or after July 1, 2015 shall certify and submit PRDs via SMARTS at least seven (7) days prior to commencement of industrial activities or on July 1, 2015, whichever comes later.

   a. New Dischargers registering for NEC coverage shall electronically certify and submit PRDs via SMARTS by October 1, 2015, or at least seven (7) days prior to commencement of industrial activities, whichever is later.

C. Termination and Changes to General Permit Coverage

1. Dischargers with NOI or NEC coverage shall request termination of coverage under this General Permit when either (a) operation of the facility has been transferred to another entity, (b) the facility has ceased operations, completed closure activities, and removed all industrial related pollutants, or (c) the facility's operations have changed and are no longer subject to the General Permit. Dischargers shall certify and submit a Notice of Termination via SMARTS. Until a valid NOT is received, the Discharger remains responsible for compliance with this General Permit and payment of accrued annual fees.

2. Whenever there is a change to the facility location, the Discharger shall certify and submit new PRDs via SMARTS. When ownership changes, the prior Discharger (seller) must inform the new Discharger (buyer) of the General Permit applications and regulatory coverage requirements. The new Discharger must certify and submit new PRDs via SMARTS to obtain coverage under this General Permit.

3. Dischargers with NOI coverage where the facility qualifies for NEC coverage in accordance with Section XVII of this General Permit, may register for NEC coverage via SMARTS. Such Dischargers are not required to submit an NOT to cancel NOI coverage.

4. Dischargers with NEC coverage, where changes in the facility and/or facility operations occur, which result in NOI coverage instead of NEC coverage, shall register for NOI coverage via SMARTS. Such Dischargers are not required to submit an NOT to cancel NEC coverage.

5. Dischargers shall provide additional information supporting an NOT, or revise their PRDs via SMARTS, upon request by the Regional Water Board.

6. Dischargers that are denied approval of a submitted NOT or registration for NEC coverage by the Regional Water Board, shall continue compliance with this General Permit under their existing NOI coverage.

7. New Dischargers (Dischargers with no previous NOI or NEC coverage) shall register for NOI coverage if the Regional Water Board denies NEC coverage.

D. Preparation Requirements

1. The following documents shall be certified and submitted by the Discharger via SMARTS:

   a. Annual Reports (Section XVI) and SWPPPs (Section X);

   b. NOTs;

   c. Sampling Frequency Reduction Certification (Section XI.C.7);

   d. Level 1 ERA Reports (Section XII.C) prepared by a QISP;

   e. Level 2 ERA Technical Reports and Level 2 ERA Action Plans (Sections XII.D.1-2) prepared by a QISP; and,

   f. SWPPPs for inactive mining operations as described in Section XIII, signed (wet signature and license number) by a California licensed professional engineer.

2. The following documents shall be signed (wet signature and license number) by a California licensed professional engineer:

   a. Calculations for Dischargers subject to Subchapter N in accordance with Section XI.D;

   b. Notice of Non-Applicability (NONA) Technical Reports described in Section XX.C for facilities that are engineered and constructed to have contained the maximum historic precipitation event (or series of events) using the precipitation data collected from the National Oceanic and Atmospheric Agency's website;

   c. NONA Technical Reports described in Section XX.C for facilities located in basins or other physical locations that are not tributaries or hydrologically connected to waters of the United States; and,

   d. SWPPPs for inactive mines described in Section XIII.

III. DISCHARGE PROHIBITIONS

A. All discharges of storm water to waters of the United States are prohibited except as specifically authorized by this General Permit or another NPDES permit.

B. Except for non-storm water discharges (NSWDs) authorized in Section IV, discharges of liquids or materials other than storm water, either directly or indirectly to waters of the United States, are prohibited unless authorized by another NPDES permit. Unauthorized NSWDs must be either eliminated or authorized by a separate NPDES permit.

C. Industrial storm water discharges and authorized NSWDs that contain pollutants that cause or threaten to cause pollution, contamination, or nuisance as defined in section 13050 of the Water Code, are prohibited.

D. Discharges that violate any discharge prohibitions contained in applicable Regional Water Board Water Quality Control Plans (Basin Plans), or statewide water quality control plans and policies are prohibited.

E. Discharges to ASBS are prohibited in accordance with the California Ocean Plan, unless granted an exception by the State Water Board and in compliance with the Special Protections contained in Resolution 2012-0012.

F. Industrial storm water discharges and NSWDs authorized by this General Permit that contain hazardous substances equal to or in excess of a reportable quantity listed in 40 Code of Federal Regulations sections 110.6, 117.21, or 302.6 are prohibited.

IV. AUTHORIZED NON-STORM WATER DISCHARGES (NSWDs)

A. The following NSWDs are authorized provided they meet the conditions of Section IV.B:

1. Fire-hydrant and fire prevention or response system flushing;

2. Potable water sources including potable water related to the operation, maintenance, or testing of potable water systems;

3. Drinking fountain water and atmospheric condensate including refrigeration, air conditioning, and compressor condensate;

4. Irrigation drainage and landscape watering provided all pesticides, herbicides and fertilizers have been applied in accordance with the manufacturer's label;

5. Uncontaminated natural springs, groundwater, foundation drainage, footing drainage;

6. Seawater infiltration where the seawater is discharged back into the source: and,

7. Incidental windblown mist from cooling towers that collects on rooftops or adjacent portions of your facility, but not intentional discharges from the cooling tower (e.g., “piped” cooling tower blowdown or drains).

B. The NSWDs identified in Section IV.A are authorized by this General Permit if the following conditions are met:

1. The authorized NSWDs are not in violation of any Regional Water Board Water Quality Control Plans (Basin Plans) or other requirements, or statewide water quality control plans or policies requirement;

2. The authorized NSWDs are not in violation of any municipal agency ordinance or requirements;

3. BMPs are included in the SWPPP and implemented to:

   a. Reduce or prevent the contact of authorized NSWDs with materials or equipment that are potential sources of pollutants;

   b. Reduce, to the extent practicable, the flow or volume of authorized NSWDs;

   c. Ensure that authorized NSWDs do not contain quantities of pollutants that cause or contribute to an exceedance of a water quality standards; and,

   d. Reduce or prevent discharges of pollutants in authorized NSWDs in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

4. The Discharger conducts monthly visual observations (Section XI.A.1) of NSWDs and sources to ensure adequate BMP implementation and effectiveness; and,

5. The Discharger reports and describes all authorized NSWDs in the Annual Report.

C. Firefighting related discharges are not subject to this General Permit and are not subject to the conditions of Section IV.B. These discharges, however, may be subject to Regional Water Board enforcement actions under other sections of the Water Code. Firefighting related discharges that are contained and are later discharged may be subject to municipal agency ordinances and/or Regional Water Board requirements.

V. EFFLUENT LIMITATIONS

A. Dischargers shall implement BMPs that comply with the BAT/BCT requirements of this General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

B. Industrial storm water discharges from facilities subject to storm water ELGs in Subchapter N shall not exceed those storm water ELGs. The ELGs for industrial storm water discharges subject to Subchapter N are in Attachment F of this General Permit.

C. Dischargers located within a watershed for which a Total Maximum Daily Load (TMDL) has been approved by U.S. EPA, shall comply with any applicable TMDL-specific permit requirements that have been incorporated into this General Permit in accordance with Section VII.A. Attachment E contains a reference list of potential TMDLs that may apply to Dischargers subject to this General Permit.

VI. RECEIVING WATER LIMITATIONS

A. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not cause or contribute to an exceedance of any applicable water quality standards in any affected receiving water.

B. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not adversely affect human health or the environment.

C. Dischargers shall ensure that industrial storm water discharges and authorized NSWDs do not contain pollutants in quantities that threaten to cause pollution or a public nuisance.

VII. TOTAL MAXIMUM DAILY LOADS (TMDLs)

A. Implementation

1. The State Water Board shall reopen and amend this General Permit, including Attachment E, the Fact Sheet and other applicable Permit provisions as necessary, in order to incorporate TMDL-specific permit requirements, as described in Findings 38 through 42. Once this General Permit is amended, Dischargers shall comply with the incorporated TMDL-specific permit requirements in accordance with any specified compliance schedule(s). TMDL-specific compliance dates that exceed the term of this General Permit may be included for reference, and are enforceable in the event that this General Permit is administratively extended or reissued.

2. The State Water Board may, at its discretion, reopen this General Permit to add TMDL-specific permit requirements to Attachment E, or to incorporate new TMDLs adopted during the term of this General Permit that include requirements applicable to Dischargers covered by this General Permit.

B. New Dischargers applying for NOI coverage under this General Permit that will be discharging to a water body with a 303(d) listed impairment are ineligible for coverage unless the Discharger submits data and/or information, prepared by a QISP, demonstrating that:

1. The Discharger has eliminated all exposure to storm water of the pollutant(s) for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such documentation with the SWPPP at the facility;

2. The pollutant for which the water body is impaired is not present at the Discharger's facility, and the Discharger has retained documentation of this finding with the SWPPP at the facility; or,

3. The discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard. This is demonstrated if: (1) the discharge complies with water quality standard at the point of discharge, or (2) if there are sufficient remaining waste load allocations in an approved TMDL and the discharge is controlled at least as stringently as similar discharges subject to that TMDL.

VIII. DISCHARGES SUBJECT TO THE CALIFORNIA OCEAN PLAN

A. Discharges to Ocean Waters

1. Dischargers with outfalls discharging to ocean waters that are subject to the model monitoring provisions of the California Ocean Plan shall develop and implement a monitoring plan in compliance with those provisions and any additional monitoring requirements established pursuant to Water Code section 13383. Dischargers who have not developed and implemented a monitoring program in compliance with the California Ocean Plan's model monitoring provisions by July 1, 2015, or seven (7) days prior to commencing of operations, whichever is later, are ineligible to obtain coverage under this General Permit.

2. Dischargers are ineligible for the methods and exceptions provided in Section XI.C of this General permit for any of the outfalls discharging to ocean waters subject to the model monitoring provisions of the California Ocean Plan.

B. Discharge Granted an Exceptions for Areas of Special Biological Significance (ASBS)

Dischargers who were granted an exception to the California Ocean Plan prohibition against direct discharges of waste to an ASBS pursuant to Resolution 2012-0012[7] amended by Resolution 2012-0031[8] shall comply with the conditions and requirements set forth in Attachment G of this General Permit. Any Discharger that applies for and is granted an exception to the California Ocean Plan prohibition after July 1, 2013 shall comply with the conditions and requirements set forth in the granted exception.

IX. TRAINING QUALIFICATIONS

A. General

1. A Qualified Industrial Storm Water Practitioner (QISP) is a person (either the Discharger or a person designated by the Discharger) who has completed a State Water Board-sponsored or approved QISP training course[9], and has registered as a QISP via SMARTS. Upon completed registration the State Water Board will issue a QISP identification number.

2. The Executive Director of the State Water Board or an Executive Officer of a Regional Water Board may rescind any QISP's registration if it is found that the QISP has repeatedly demonstrated an inadequate level of performance in completing the QISP requirements in this General Permit. An individual whose QISP registration has been rescinded may request that the State Water Board review the rescission. Any request for review must be received by the State Water Board no later than 30 days of the date that the individual received written notice of the rescission.

3. Dischargers with Level 1 status shall:

   a. Designate a person to be the facility's QISP and ensure that this person has attended and satisfactorily completed the State Water Board-sponsored or approved QISP training course.

   b. Ensure that the facility's designated QISP provides sufficient training to the appropriate team members assigned to perform activities required by this General Permit.

[7] State Water Resources Control Board. Resolution 2012-0012. <http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0012.pdf>. [as of February 4, 2014].
[8] State Water Resources Control Board. Resolution 2012-0031. <http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0031.pdf>. [as of February 4, 2014].
[9] A specialized self-guided State Water Board-sponsored registration and training program will be available as an option for CPBELSG licensed professional civil, mechanical, industrial, and chemical engineers and professional geologists by the effective date of this General Permit.

X. Storm Water Pollution Prevention Plan (SWPPP)

A. SWPPP Elements

Dischargers shall develop and implement a site-specific SWPPP for each industrial facility covered by this General Permit that shall contain the following elements, as described further in this Section[10]:

1. Facility Name and Contact Information;
2. Site Map;
3. List of Industrial Materials;
4. Description of Potential Pollution Sources;
5. Assessment of Potential Pollutant Sources;
6. Minimum BMPs;
7. Advanced BMPs, if applicable;
8. Monitoring Implementation Plan;
9. Annual Comprehensive Facility Compliance Evaluation (Annual Evaluation); and,
10. Date that SWPPP was Initially Prepared and the Date of Each SWPPP Amendment, if Applicable.

B. SWPPP Implementation and Revisions

All Dischargers are required to implement their SWPPP by July 1, 2015 or upon commencement of industrial activity. The Discharger shall:

1. Revise their on-site SWPPP whenever necessary;
2. Certify and submit via SMARTS their SWPPP within 30 days whenever the SWPPP contains significant revision(s); and,
3. With the exception of significant revisions, the Discharger is not required to certify and submit via SMARTS their SWPPP revisions more than once every three (3) months in the reporting year.

[10] Appendix 1 (SWPPP Checklist) of this General Permit is provided to assist the Discharger in including information required in the SWPPP. This checklist is not required to be used.

C. SWPPP Performance Standards

1. The Discharger shall ensure a SWPPP is prepared to:

   a. Identify and evaluate all sources of pollutants that may affect the quality of industrial storm water discharges and authorized NSWDs;

   b. Identify and describe the minimum BMPs (Section X.H.1) and any advanced BMPs (Section X.H.2) implemented to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs. BMPs shall be selected to achieve compliance with this General Permit; and,

   c. Identify and describe conditions or circumstances which may require future revisions to be made to the SWPPP.

2. The Discharger shall prepare a SWPPP in accordance with all applicable SWPPP requirements of this Section. A copy of the SWPPP shall be maintained at the facility.

D. Planning and Organization

1. Pollution Prevention Team

   Each facility must have a Pollution Prevention Team established and responsible for assisting with the implementation of the requirements in this General Permit. The Discharger shall include in the SWPPP detailed information about its Pollution Prevention Team including:

   a. The positions within the facility organization (collectively, team members) who assist in implementing the SWPPP and conducting all monitoring requirements in this General Permit;

   b. The responsibilities, duties, and activities of each of the team members; and,

   c. The procedures to identify alternate team members to implement the SWPPP and conduct required monitoring when the regularly assigned team members are temporarily unavailable (due to vacation, illness, out of town business, or other absences).

2. Other Requirements and Existing Facility Plans

   a. The Discharger shall ensure its SWPPP is developed, implemented, and revised as necessary to be consistent with any applicable municipal, state, and federal requirements that pertain to the requirements in this General Permit.

   b. The Discharger may include in their SWPPP the specific elements of existing plans, procedures, or regulatory compliance documents that

contain storm water-related BMPs or otherwise relate to the requirements of this General Permit.

c. The Discharger shall properly reference the original sources for any elements of existing plans, procedures, or regulatory compliance documents included as part of their SWPPP and shall maintain a copy of the documents at the facility as part of the SWPPP.

d. The Discharger shall document in their SWPPP the facility's scheduled operating hours as defined in Attachment C. Scheduled facility operating hours that would be considered irregular (temporary, intermittent, seasonal, weather dependent, etc.) shall also be documented in the SWPPP.

E. Site Map

1. The Discharger shall prepare a site map that includes notes, legends, a north arrow, and other data as appropriate to ensure the map is clear, legible and understandable.

2. The Discharger may provide the required information on multiple site maps.

3. The Discharger shall include the following information on the site map:

   a. The facility boundary, storm water drainage areas within the facility boundary, and portions of any drainage area impacted by discharges from surrounding areas. Include the flow direction of each drainage area, on-facility surface water bodies, areas of soil erosion, and location(s) of nearby water bodies (such as rivers, lakes, wetlands, etc.) or municipal storm drain inlets that may receive the facility's industrial storm water discharges and authorized NSWDs;

   b. Locations of storm water collection and conveyance systems, associated discharge locations, and direction of flow. Include any sample locations if different than the identified discharge locations;

   c. Locations and descriptions of structural control measures[11] that affect industrial storm water discharges, authorized NSWDs, and/or run-on;

   d. Identification of all impervious areas of the facility, including paved areas, buildings, covered storage areas, or other roofed structures;

[11] Examples of structural control measures are catch basins, berms, detention ponds, secondary containment, oil/water separators, diversion barriers, etc.

e. Locations where materials are directly exposed to precipitation and the locations where identified significant spills or leaks (Section X.G.1.d) have occurred; and

f. Areas of industrial activity subject to this General Permit. Identify all industrial storage areas and storage tanks, shipping and receiving areas, fueling areas, vehicle and equipment storage/maintenance areas, material handling and processing areas, waste treatment and disposal areas, dust or particulate generating areas, cleaning and material reuse areas, and other areas of industrial activity that may have potential pollutant sources.

F. List of Industrial Materials

The Discharger shall ensure the SWPPP includes a list of industrial materials handled at the facility, and the locations where each material is stored, received, shipped, and handled, as well as the typical quantities and handling frequency.

G. Potential Pollutant Sources

1. Description of Potential Pollutant Sources

   a. Industrial Processes

      The Discharger shall ensure the SWPPP describes each industrial process including: manufacturing, cleaning, maintenance, recycling, disposal, and any other activities related to the process. The type, characteristics, and approximate quantity of industrial materials used in or resulting from the process shall be included. Areas protected by containment structures and the corresponding containment capacity shall be identified and described.

   b. Material Handling and Storage Areas

      The Discharger shall ensure the SWPPP describes each material handling and storage area, including: the type, characteristics, and quantity of industrial materials handled or stored; the shipping, receiving, and loading procedures; the spill or leak prevention and response procedures; and the areas protected by containment structures and the corresponding containment capacity.

   c. Dust and Particulate Generating Activities

      The Discharger shall ensure the SWPPP describes all industrial activities that generate a significant amount of dust or particulate that may be deposited within the facility boundaries. The SWPPP shall describe such industrial activities, including the discharge locations, the source type, and the characteristics of the dust or particulate pollutant.

d. Significant Spills and Leaks

The Discharger shall:

i. Evaluate the facility for areas where spills and leaks can likely occur;

ii. Ensure the SWPPP includes:

a) A list of any industrial materials that have spilled or leaked in significant quantities and have discharged from the facility's storm water conveyance system within the previous five-year period;

b) A list of any toxic chemicals identified in 40 Code of Federal Regulations section 302 that have been discharged from the facilities' storm water conveyance system as reported on U.S. EPA Form R, as well as oil and hazardous substances in excess of reportable quantities (40 C.F.R. §§ 110, 117, and 302) that have discharged from the facility's storm water conveyance system within the previous five-year period;

c) A list of any industrial materials that have spilled or leaked in significant quantities and had the potential to be discharged from the facility's storm water conveyance system within the previous five-year period; and,

iii. Ensure that for each discharge or potential discharge listed above the SWPPP includes the location, characteristics, and approximate quantity of the materials spilled or leaked; approximate quantity of the materials discharged from the facility's storm water conveyance system; the cleanup or remedial actions that have occurred or are planned; the approximate remaining quantity of materials that have the potential to be discharged; and the preventive measures taken to ensure spills or leaks of the material do not reoccur.

e. NSWDs

The Discharger shall:

i. Ensure the SWPPP includes an evaluation of the facility that identifies all NSWDs, sources, and drainage areas;

ii. Ensure the SWPPP includes an evaluation of all drains (inlets and outlets) that identifies connections to the storm water conveyance system;

iii. Ensure the SWPPP includes a description of how all unauthorized NSWDs have been eliminated; and,

iv. Ensure all NSWDs are described in the SWPPP. This description shall include the source, quantity, frequency, and characteristics of the NSWDs, associated drainage area, and whether it is an authorized or unauthorized NSWD in accordance with Section IV.

f. Erodible Surfaces

The Discharger shall ensure the SWPPP includes a description of the facility locations where soil erosion may be caused by industrial activity, contact with storm water, authorized and unauthorized NSWDs, or run-on from areas surrounding the facility.

2. Assessment of Potential Pollutant Sources

a. The Discharger shall ensure that the SWPPP includes a narrative assessment of all areas of industrial activity with potential industrial pollutant sources. At a minimum, the assessment shall include:

i. The areas of the facility with likely sources of pollutants in industrial storm water discharges and authorized NSWDs;

ii. The pollutants likely to be present in industrial storm water discharges and authorized NSWDs;

iii. The approximate quantity, physical characteristics (e.g., liquid, powder, solid, etc.), and locations of each industrial material handled, produced, stored, recycled, or disposed;

iv. The degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water;

v. The direct and indirect pathways by which pollutants may be exposed to storm water or authorized NSWDs;

vi. All sampling, visual observation, and inspection records;

vii. The effectiveness of existing BMPs to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs;

viii. The estimated effectiveness of implementing, to the extent feasible, minimum BMPs to reduce or prevent pollutants in industrial storm water discharges and authorized NSWDs; and,

ix. The identification of the industrial pollutants related to the receiving waters with 303(d) listed impairments identified in Appendix 3 or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters.

b. Based upon the assessment above, Dischargers shall identify in the SWPPP any areas of the facility where the minimum BMPs described in

subsection H.1 below will not adequately reduce or prevent pollutants in storm water discharges in compliance with Section V.A. Dischargers shall identify any advanced BMPs, as described in subsection H.2 below, for those areas.

c. Based upon the assessment above, Dischargers shall identify any drainage areas with no exposure to industrial activities and materials in accordance with the definitions in Section XVII.

d. Based upon the assessment above, Dischargers shall identify any additional parameters, beyond the required parameters in Section XI.B.6 that indicate the presence of pollutants in industrial storm water discharges.

H. Best Management Practices (BMPs)

1. Minimum BMPs

The Discharger shall, to the extent feasible, implement and maintain all of the following minimum BMPs to reduce or prevent pollutants in industrial storm water discharges.[12]

a. Good Housekeeping

The Discharger shall:

i. Observe all outdoor areas associated with industrial activity; including storm water discharge locations, drainage areas, conveyance systems, waste handling/disposal areas, and perimeter areas impacted by off-facility materials or storm water run-on to determine housekeeping needs. Any identified debris, waste, spills, tracked materials, or leaked materials shall be cleaned and disposed of properly;

ii. Minimize or prevent material tracking;

iii. Minimize dust generated from industrial materials or activities;

iv. Ensure that all facility areas impacted by rinse/wash waters are cleaned as soon as possible;

v. Cover all stored industrial materials that can be readily mobilized by contact with storm water;

[12] For the purposes of this General Permit, the requirement to implement BMPs "to the extent feasible" requires Dischargers to select, design, install and implement BMPs that reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

vi. Contain all stored non-solid industrial materials or wastes (e.g., particulates, powders, shredded paper, etc.) that can be transported or dispersed by the wind or contact with storm water;

vii. Prevent disposal of any rinse/wash waters or industrial materials into the storm water conveyance system;

viii. Minimize storm water discharges from non-industrial areas (e.g., storm water flows from employee parking area) that contact industrial areas of the facility; and,

ix. Minimize authorized NSWDs from non-industrial areas (e.g., potable water, fire hydrant testing, etc.) that contact industrial areas of the facility.

b. Preventive Maintenance

The Discharger shall:

i. Identify all equipment and systems used outdoors that may spill or leak pollutants;

ii. Observe the identified equipment and systems to detect leaks, or identify conditions that may result in the development of leaks;

iii. Establish an appropriate schedule for maintenance of identified equipment and systems; and,

iv. Establish procedures for prompt maintenance and repair of equipment, and maintenance of systems when conditions exist that may result in the development of spills or leaks.

c. Spill and Leak Prevention and Response

The Discharger shall:

i. Establish procedures and/or controls to minimize spills and leaks;

ii. Develop and implement spill and leak response procedures to prevent industrial materials from discharging through the storm water conveyance system. Spilled or leaked industrial materials shall be cleaned promptly and disposed of properly;

iii. Identify and describe all necessary and appropriate spill and leak response equipment, location(s) of spill and leak response equipment, and spill or leak response equipment maintenance procedures; and,

iv. Identify and train appropriate spill and leak response personnel.

d. Material Handling and Waste Management

The Discharger shall:

i. Prevent or minimize handling of industrial materials or wastes that can be readily mobilized by contact with storm water during a storm event;

ii. Contain all stored non-solid industrial materials or wastes (e.g., particulates, powders, shredded paper, etc.) that can be transported or dispersed by the wind or contact with storm water;

iii. Cover industrial waste disposal containers and industrial material storage containers that contain industrial materials when not in use;

iv. Divert run-on and storm water generated from within the facility away from all stockpiled materials;

v. Clean all spills of industrial materials or wastes that occur during handling in accordance with the spill response procedures (Section X.H.1.c); and,

vi. Observe and clean as appropriate, any outdoor material or waste handling equipment or containers that can be contaminated by contact with industrial materials or wastes.

e. Erosion and Sediment Controls

For each erodible surface facility location identified in the SWPPP (Section X.G.1.f), the Discharger shall:

i. Implement effective wind erosion controls;

ii. Provide effective stabilization for inactive areas, finished slopes, and other erodible areas prior to a forecasted storm event;

iii. Maintain effective perimeter controls and stabilize all site entrances and exits to sufficiently control discharges of erodible materials from discharging or being tracked off the site;

iv. Divert run-on and storm water generated from within the facility away from all erodible materials; and,

v. If sediment basins are implemented, ensure compliance with the design storm standards in Section X.H.6.

f. Employee Training Program

The Discharger shall:

i. Ensure that all team members implementing the various compliance activities of this General Permit are properly trained to implement the requirements of this General Permit, including but not limited to: BMP implementation, BMP effectiveness evaluations, visual observations,

and monitoring activities. If a Discharger enters Level 1 status, appropriate team members shall be trained by a QISP;

ii. Prepare or acquire appropriate training manuals or training materials;

iii. Identify which personnel need to be trained, their responsibilities, and the type of training they shall receive;

iv. Provide a training schedule; and,

v. Maintain documentation of all completed training classes and the personnel that received training in the SWPPP.

g. Quality Assurance and Record Keeping

The Discharger shall:

i. Develop and implement management procedures to ensure that appropriate staff implements all elements of the SWPPP, including the Monitoring Implementation Plan;

ii. Develop a method of tracking and recording the implementation of BMPs identified in the SWPPP; and

iii. Maintain the BMP implementation records, training records, and records related to any spills and clean-up related response activities for a minimum of five (5) years (Section XXI.J.4).

2. Advanced BMPs

a. In addition to the minimum BMPs described in Section X.H.1, the Discharger shall, to the extent feasible, implement and maintain any advanced BMPs identified in Section X.G.2.b, necessary to reduce or prevent discharges of pollutants in its storm water discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

b. Advanced BMPs may include one or more of the following BMPs:

i. Exposure Minimization BMPs

These include storm resistant shelters (either permanent or temporary) that prevent the contact of storm water with the identified industrial materials or area(s) of industrial activity.

ii. Storm Water Containment and Discharge Reduction BMPs

These include BMPs that divert, infiltrate, reuse, contain, retain, or reduce the volume of storm water runoff. Dischargers are

encouraged to utilize BMPs that infiltrate or reuse storm water where feasible.

iii. Treatment Control BMPs

This is the implementation of one or more mechanical, chemical, biologic, or any other treatment technology that will meet the treatment design standard.

iv. Other Advanced BMPs

Any additional BMPs not described in subsections b.i through iii above that are necessary to meet the effluent limitations of this General Permit.

3. Temporary Suspension of Industrial Activities

For facilities that plan to temporarily suspend industrial activities for ten (10) or more consecutive calendar days during a reporting year, the Discharger may also suspend monitoring if it is infeasible to conduct monitoring while industrial activities are suspended (e.g., the facility is not staffed, or the facility is remote or inaccessible) and the facility has been stabilized. The Discharger shall include in the SWPPP the BMPs necessary to achieve compliance with this General Permit during the temporary suspension of the industrial activity. Once all necessary BMPs have been implemented to stabilize the facility, the Discharger is not required to:

a. Perform monthly visual observations (Section XI.A.1.a.); or,

b. Perform sampling and analysis (Section XI.B.) if it is infeasible to do so (e.g. facility is remotely located).

The Discharger shall upload via SMARTS (7) seven calendar days prior to the planned temporary suspension of industrial activities:

a. SWPPP revisions specifically addressing the facility stabilization BMPs;

b. The justification for why monitoring is infeasible at the facility during the period of temporary suspension of industrial activities;

c. The date the facility is fully stabilized for temporary suspension of industrial activities; and,

d. The projected date that industrial activities will resume at the facility.

Upon resumption of industrial activities at the facility, the Discharger shall, via SMARTS, confirm and/or update the date the facility's industrial activities have resumed. At this time, the Discharger is required to resume all compliance activities under this General Permit.

The Regional Water Boards may review the submitted information pertaining to the temporary suspension of industrial activities. Upon review, the Regional Water Board may request revisions or reject the Discharger's request to temporarily suspend monitoring.

4. BMP Descriptions

   a. The Discharger shall ensure that the SWPPP identifies each BMP being implemented at the facility, including:

      i. The pollutant(s) that the BMP is designed to reduce or prevent in industrial storm water discharges;

      ii. The frequency, time(s) of day, or conditions when the BMP is scheduled for implementation;

      iii. The locations within each area of industrial activity or industrial pollutant source where the BMP shall be implemented;

      iv. The individual and/or position responsible for implementing the BMP;

      v. The procedures, including maintenance procedures, and/or instructions to implement the BMP effectively;

      vi. The equipment and tools necessary to implement the BMP effectively; and,

      vii. The BMPs that may require more frequent visual observations beyond the monthly visual observations as described in Section XI.A.1.

   b. The Discharger shall ensure that the SWPPP identifies and justifies each minimum BMP or applicable advanced BMP not being implemented at the facility because they do not reflect best industry practice considering technological availability and economic practicability and achievability.

   c. The Discharger shall identify any BMPs described in subsection a above that are implemented in lieu of any of the minimum or applicable advanced BMPs.

5. BMP Summary Table

   The Discharger shall prepare a table summarizing each identified area of industrial activity, the associated industrial pollutant sources, the industrial pollutants, and the BMPs being implemented.

6. Design Storm Standards for Treatment Control BMPs

All new treatment control BMPs employed by the Discharger to comply with Section X.H.2 Advanced BMPs and new sediment basins installed after the effective date of this order shall be designed to comply with design storm standards in this Section, except as provided in an Industrial Activity BMP Demonstration (Section XII.D.2.a). A Factor of Safety shall be incorporated into the design of all treatment control BMPs to ensure that storm water is sufficiently treated throughout the life of the treatment control BMPs. The design storm standards for treatment control BMPs are as follows:

a. Volume-based BMPs: The Discharger, at a minimum, shall calculate[13] the volume to be treated using one of the following methods:

   i. The volume of runoff produced from an 85th percentile 24-hour storm event, as determined from local, historical rainfall records;

   ii. The volume of runoff produced by the 85th percentile 24-hour storm event, determined as the maximized capture runoff volume for the facility, from the formula recommended in the Water Environment Federation's Manual of Practice;[14] or,

   iii. The volume of annual runoff required to achieve 80% or more treatment, determined in accordance with the methodology set forth in the latest edition of California Stormwater Best Management Practices Handbook[15], using local, historical rainfall records.

b. Flow-based BMPs: The Discharger shall calculate the flow needed to be treated using one of the following methods:

   i. The maximum flow rate of runoff produced from a rainfall intensity of at least 0.2 inches per hour for each hour of a storm event;

   ii. The maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from local historical rainfall records, multiplied by a factor of two; or,

   iii. The maximum flow rate of runoff, as determined using local historical rainfall records, that achieves approximately the same reduction in total pollutant loads as would be achieved by treatment of the 85th percentile hourly rainfall intensity multiplied by a factor of two.

[13] All hydrologic calculations shall be certified by a California licensed professional engineer in accordance with the Professional Engineers Act (Bus. & Prof. Code § 6700, et seq).

[14] Water Environment Federation (WEF). Manual of Practice No. 23/ ASCE Manual of Practice No. 87, cited in chapter 5 (1998 Edition) and Cited in Chapter 3 (2012 Edition) .

[15] California Stormwater Quality Association. Stormwater Best Management Practice New Development and Redevelopment Handbook. < http://www.casqa.org/ >. [as of July 3, 2013].

I. MONITORING IMPLEMENTATION PLAN

The Discharger shall prepare a Monitoring Implementation Plan in accordance with the requirements of this General Permit. The Monitoring Implementation Plan shall be included in the SWPPP and shall include the following items:

1. An identification of team members assigned to conduct the monitoring requirements;

2. A description of the following in accordance with Attachment H:

   a. Discharge locations;

   b. Visual observation procedures; and,

   c. Visual observation response procedures related to monthly visual observations and sampling event visual observations.

3. Justifications for any of the following that are applicable to the facility:

   a. Alternative discharge locations in accordance with Section XI.C.3;

   b. Representative Sampling Reduction in accordance with Section XI.C.4; or,

   c. Qualified Combined Samples in accordance with Section XI.C.5.

4. Procedures for field instrument calibration instructions, including calibration intervals specified by the manufacturer; and,

5. An example Chain of Custody form used when handling and shipping water quality samples to the lab.

XI. MONITORING

A. Visual Observations

1. Monthly Visual Observations

   a. At least once per calendar month, the Discharger shall visually observe each drainage area for the following:

      i. The presence or indications of prior, current, or potential unauthorized NSWDs and their sources;

      ii. Authorized NSWDs, sources, and associated BMPs to ensure compliance with Section IV.B.3; and,

iii. Outdoor industrial equipment and storage areas, outdoor industrial activities areas, BMPs, and all other potential source of industrial pollutants.

b. The monthly visual observations shall be conducted during daylight hours of scheduled facility operating hours and on days without precipitation.

c. The Discharger shall provide an explanation in the Annual Report for uncompleted monthly visual observations.

2. Sampling Event Visual Observations

Sampling event visual observations shall be conducted at the same time sampling occurs at a discharge location. At each discharge location where a sample is obtained, the Discharger shall observe the discharge of storm water associated with industrial activity.

a. The Discharger shall ensure that visual observations of storm water discharged from containment sources (e.g. secondary containment or storage ponds) are conducted at the time that the discharge is sampled.

b. Any Discharger employing volume-based or flow-based treatment BMPs shall sample any bypass that occurs while the visual observations and sampling of storm water discharges are conducted.

c. The Discharger shall visually observe and record the presence or absence of floating and suspended materials, oil and grease, discolorations, turbidity, odors, trash/debris, and source(s) of any discharged pollutants.

d. In the event that a discharge location is not visually observed during the sampling event, the Discharger shall record which discharge locations were not observed during sampling or that there was no discharge from the discharge location.

e. The Discharger shall provide an explanation in the Annual Report for uncompleted sampling event visual observations.

3. Visual Observation Records

The Discharger shall maintain records of all visual observations. Records shall include the date, approximate time, locations observed, presence and probable source of any observed pollutants, name of person(s) that conducted the observations, and any response actions and/or additional SWPPP revisions necessary in response to the visual observations.

4. The Discharger shall revise BMPs as necessary when the visual observations indicate pollutant sources have not been adequately addressed in the SWPPP.

B. Sampling and Analysis

1. A Qualifying Storm Event (QSE) is a precipitation event that:

   a. Produces a discharge for at least one drainage area; and,

   b. Is preceded by 48 hours with no discharge from any drainage area.

2. The Discharger shall collect and analyze storm water samples from two (2) QSEs within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30).

3. Compliance Group Participants are only required to collect and analyze storm water samples from one (1) QSE within the first half of each reporting year (July 1 to December 31) and one (1) QSE within the second half of the reporting year (January 1 to June 30).

4. Except as provided in Section XI.C.4 (Representative Sampling Reduction), samples shall be collected from each drainage area at all discharge locations. The samples must be:

   a. Representative of storm water associated with industrial activities and any commingled authorized NSWDs; or,

   b. Associated with the discharge of contained storm water.

5. Samples from each discharge location shall be collected within four (4) hours of:

   a. The start of the discharge; or,

   b. The start of facility operations if the QSE occurs within the previous 12-hour period (e.g., for storms with discharges that begin during the night for facilities with day-time operating hours). Sample collection is required during scheduled facility operating hours and when sampling conditions are safe in accordance with Section XI.C.6.a.ii.

6. The Discharger shall analyze all collected samples for the following parameters:

   a. Total suspended solids (TSS) and oil and grease (O&G);

   b. pH (see Section XI.C.2);

c. Additional parameters identified by the Discharger on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment (Section X.G.2). These additional parameters may be modified (added or removed) in accordance with any updated SWPPP pollutant source assessment;

d. Additional applicable parameters listed in Table 1 below. These parameters are dependent on the facility Standard Industrial Classification (SIC) code(s);

e. Additional applicable industrial parameters related to receiving waters with 303(d) listed impairments or approved TMDLs based on the assessment in Section X.G.2.a.ix. Test methods with lower detection limits may be necessary when discharging to receiving waters with 303(d) listed impairments or TMDLs;

f. Additional parameters required by the Regional Water Board. The Discharger shall contact its Regional Water Board to determine appropriate analytical test methods for parameters not listed in Table 2 below. These analytical test methods will be added to SMARTS; and

g. For discharges subject to Subchapter N, additional parameters specifically required by Subchapter N. If the discharge is subject to ELGs, the Dischargers shall contact the Regional Water Board to determine appropriate analytical methods for parameters not listed in Table 2 below.

7. The Discharger shall select corresponding NALs, analytical test methods,, and reporting units from the list provided in Table 2 below. SMARTS will be updated over time to add additional acceptable analytical test methods. Dischargers may propose an analytical test method for any parameter or pollutant that does not have an analytical test method specified in Table 2 or in SMARTS. Dischargers may also propose analytical test methods with substantially similar or more stringent method detection limits than existing approved analytical test methods. Upon approval, the analytical test method will be added to SMARTS.

8. The Discharger shall ensure that the collection, preservation and handling of all storm water samples are in accordance with Attachment H, Storm Water Sample Collection and Handling Instructions.

9. Samples from different discharge locations shall not be combined or composited except as allowed in Section XI.C.5 (Qualified Combined Samples).

10. The Discharger shall ensure that all laboratory analyses are conducted according to test procedures under 40 Code of Federal Regulations part 136, including the observation of holding times, unless other test procedures have been specified in this General Permit or by the Regional Water Board.

11. Sampling Analysis Reporting

a. The Discharger shall submit all sampling and analytical results for all individual or Qualified Combined Samples via SMARTS within 30 days of obtaining all results for each sampling event.

b. The Discharger shall provide the method detection limit when an analytical result from samples taken is reported by the laboratory as a "non-detect" or less than the method detection limit. A value of zero shall not be reported.

c. The Discharger shall provide the analytical result from samples taken that is reported by the laboratory as below the minimum level (often referred to as the reporting limit) but above the method detection limit.

Reported analytical results will be averaged automatically by SMARTS. For any calculations required by this General Permit, SMARTS will assign a value of zero (0) for all results less than the minimum level as reported by the laboratory.

TABLE 1: Additional Analytical Parameters

SIC code	SIC code Description	Parameters*
102X	Copper Ores	COD; N+N
12XX	Coal Mines	Al; Fe
144X	Sand and Gravel	N+N
207X	Fats and Oils	BOD; COD; N+N
2421	Sawmills & Planning Mills	COD; Zn
2426	Hardwood Dimension	COD
2429	Special Product Sawmills	COD
243X	Millwork, Veneer, Plywood	COD
244X	Wood Containers	COD
245X	Wood Buildings & Mobile Homes	COD
2491	Wood Preserving	As; Cu
2493	Reconstituted Wood Products	COD
263X	Paperboard Mills	COD
281X	Industrial Inorganic Chemicals	Al; Fe; N+N
282X	Plastic Materials, Synthetics	Zn
284X	Soaps, Detergents, Cosmetics	N+N; Zn
287X	Fertilizers, Pesticides, etc.	Fe; N+N; Pb; Zn; P
301X	Tires, Inner Tubes	Zn
302X	Rubber and Plastic Footwear	Zn
305X	Rubber & Plastic Sealers & Hoses	Zn
306X	Misc. Fabricated Rubber Products	Zn
325X	Structural Clay Products	Al
326X	Pottery & Related Products	Al
3297	Non-Clay Refractories	Al
327X	Concrete, Gypsum, Plaster Products (Except 3274)	Fe
3295	Minerals & Earths	Fe
331X	Steel Works, Blast Furnaces, Rolling and Finishing Mills	Al; Zn
332X	Iron and Steel Foundries	Al; Cu; Fe; Zn
335X	Metal Rolling, Drawing, Extruding	Cu; Zn

336X	Nonferrous Foundries (Castings)	Cu; Zn
34XX	Fabricated Metal Products (Except 3479)	Zn; N+N; Fe; Al
3479	Coating and Engraving	Zn; N+N
4953	Hazardous Waste Facilities	NH3; Mg; COD; As; Cn; Pb; HG; Se; Ag
44XX	Water Transportation	Al; Fe; Pb; Zn
45XX	Air Transportation Facilities[16]	BOD; COD; NH3
4911	Steam Electric Power Generating Facilities	Fe
4953	Landfills and Land Application Facilities	Fe
5015	Dismantling or Wrecking Yards	Fe; Pb; Al
5093	Scrap and Waste Materials (not including source-separated recycling)	Fe; Pb; Al; Zn; COD

***Table 1 Parameter Reference**	
Ag – Silver	**Mg** – Magnesium
Al – Aluminum	**N+N** - Nitrate & Nitrite Nitrogen
As – Arsenic	**NH** – Ammonia
BOD – Biochemical Oxygen Demand	**Ni** – Nickel
Cd - Cadmium	**P** – Phosphorus
Cn – Cyanide	**Se** – Selenium
COD – Chemical Oxygen Demand	**TSS** – Total Suspended Solids
Cu – Copper	**Zn** – Zinc
Fe – Iron	**Pb** – Lead
Hg – Mercury	

[16] Only airports (SIC 4512-4581) where a single Discharger, or a combination of permitted facilities use more than 100,000 gallons of glycol-based deicing chemicals and/or 100 tons or more of urea on an average annual basis, are required to monitor these parameters for those outfalls that collect runoff from areas where deicing activities occur.

TABLE 2: Parameter NAL Values, Test Methods, and Reporting Units

PARAMETER	TEST METHOD	REPORTING UNITS	ANNUAL NAL	INSTANTANEOUS MAXIMUM NAL
pH*	See Section XI.C.2	pH units	N/A	Less than 6.0 Greater than 9.0
Suspended Solids (TSS)*, Total	SM 2540-D	mg/L	100	400
Oil & Grease (O&G)*, Total	EPA 1664A	mg/L	15	25
Zinc, Total (H)	EPA 200.8	mg/L	0.26**	
Copper, Total (H)	EPA 200.8	mg/L	0.0332**	
Cyanide, Total	SM 4500–CN C, D, or E	mg/L	0.022	
Lead, Total (H)	EPA 200.8	mg/L	0.262**	
Chemical Oxygen Demand (COD)	SM 5220C	mg/L	120	
Aluminum, Total	EPA 200.8	mg/L	0.75	
Iron, Total	EPA 200.7	mg/L	1.0	
Nitrate + Nitrite Nitrogen	SM 4500-NO3- E	mg/L as N	0.68	
Total Phosphorus	SM 4500-P B+E	mg/L as P	2.0	
Ammonia (as N)	SM 4500-NH3 B+ C or E	mg/L	2.14	
Magnesium, total	EPA 200.7	mg/L	0.064	
Arsenic, Total (c)	EPA 200.8	mg/L	0.15	
Cadmium, Total (H)	EPA 200.8	mg/L	0.0053**	
Nickel, Total (H)	EPA 200.8	mg/l	1.02**	
Mercury, Total	EPA 245.1	mg/L	0.0014	
Selenium, Total	EPA 200.8	mg/L	0.005	
Silver, Total (H)	EPA 200.8	mg/L	0.0183**	
Biochemical Oxygen Demand (BOD)	SM 5210B	mg/L	30	

SM – Standard Methods for the Examination of Water and Wastewater, 18th edition
EPA – U.S. EPA test methods
(H) – Hardness dependent
* Minimum parameters required by this General Permit
**The NAL is the highest value used by U.S. EPA based on their hardness table in the 2008 MSGP.

C. Methods and Exceptions

1. The Discharger shall comply with the monitoring methods in this General Permit and Attachment H.

2. pH Methods

   a. Dischargers that are not subject to Subchapter N ELGs mandating pH analysis related to acidic or alkaline sources and have never entered Level 1 status for pH, are eligible to screen for pH using wide range litmus pH paper or other equivalent pH test kits. The pH screen shall be performed as soon as practicable, but no later than 15 minutes after the sample is collected.

   b. Dischargers subject to Subchapter N ELGs shall either analyze samples for pH using methods in accordance with 40 Code of Federal Regulations 136 for testing storm water or use a calibrated portable instrument for pH.

   c. Dischargers that enter Level 1 status (see Section XII.C) for pH shall, in the subsequent reporting years, analyze for pH using methods in accordance with 40 Code of Federal Regulations 136 or use a calibrated portable instrument for pH.

   d. Dischargers using a calibrated portable instrument for pH shall ensure that all field measurements are conducted in accordance with the accompanying manufacturer's instructions.

3. Alternative Discharge Locations

   a. The Discharger is required to identify, when practicable, alternative discharge locations for any discharge locations identified in accordance with Section XI.B.4 if the facility's discharge locations are:

      i. Affected by storm water run-on from surrounding areas that cannot be controlled; and/or,

      ii. Difficult to observe or sample (e.g. submerged discharge outlets, dangerous discharge location accessibility).

   b. The Discharger shall submit and certify via SMARTS any alternative discharge location or revisions to the alternative discharge locations in the Monitoring Implementation Plan.

4. Representative Sampling Reduction

   a. The Discharger may reduce the number of locations to be sampled in each drainage area (e.g., roofs with multiple downspouts, loading/unloading areas with multiple storm drains) if the industrial

activities, BMPs, and physical characteristics (grade, surface materials, etc.) of the drainage area for each location to be sampled are substantially similar to one another. To qualify for the Representative Sampling Reduction, the Discharger shall provide a Representative Sampling Reduction justification in the Monitoring Implementation Plan section of the SWPPP.

b. The Representative Sampling Reduction justification shall include:

   i. Identification and description of each drainage area and corresponding discharge location(s);

   ii. A description of the industrial activities that occur throughout the drainage area;

   iii. A description of the BMPs implemented in the drainage area;

   iv. A description of the physical characteristics of the drainage area;

   v. A rationale that demonstrates that the industrial activities and physical characteristics of the drainage area(s) are substantially similar; and,

   vi. An identification of the discharge location(s) selected for representative sampling, and rationale demonstrating that the selected location(s) to be sampled are representative of the discharge from the entire drainage area.

c. A Discharger that satisfies the conditions of subsection 4.b.i through v above shall submit and certify via SMARTS the revisions to the Monitoring Implementation Plan that includes the Representative Sampling Reduction justification.

d. Upon submittal of the Representative Sampling Reduction justification, the Discharger may reduce the number of locations to be sampled in accordance with the Representative Sampling Reduction justification. The Regional Water Board may reject the Representative Sampling Reduction justification and/or request additional supporting documentation. In such instances, the Discharger is ineligible for the Representative Sampling Reduction until the Regional Water Board approves the Representative Sampling Reduction justification.

5. Qualified Combined Samples

   a. The Discharger may authorize an analytical laboratory to combine samples of equal volume from as many as four (4) discharge locations if the industrial activities, BMPs, and physical characteristics (grade, surface materials, etc.) within each of the drainage areas are substantially similar to one another.

b. The Qualified Combined Samples justification shall include:

i. Identification and description of each drainage area and corresponding discharge locations;

ii. A description of the BMPs implemented in the drainage area;

iii. A description of the industrial activities that occur throughout the drainage area;

iv. A description of the physical characteristics of the drainage area; and,

v. A rationale that demonstrates that the industrial activities and physical characteristics of the drainage area(s) are substantially similar.

c. A Discharger that satisfies the conditions of subsection 5.b.i through iv above shall submit and certify via SMARTS the revisions to the Monitoring Implementation Plan that includes the Qualified Combined Samples justification.

d. Upon submittal of the Qualified Combined Samples justification revisions in the Monitoring Implementation Plan, the Discharger may authorize the lab to combine samples of equal volume from as many as four (4) drainage areas. The Regional Water Board may reject the Qualified Combined Samples justification and/or request additional supporting documentation. In such instances, the Discharger is ineligible for the Qualified Combined Samples justification until the Regional Water Board approves the Qualified Combined Samples justification.

e. Regional Water Board approval is necessary to combine samples from more than four (4) discharge locations.

6. Sample Collection and Visual Observation Exceptions

a. Sample collection and visual observations are not required under the following conditions:

i. During dangerous weather conditions such as flooding or electrical storms; or,

ii. Outside of scheduled facility operating hours. The Discharger is not precluded from collecting samples or conducting visual observations outside of scheduled facility operating hours.

b. In the event that samples are not collected, or visual observations are not conducted in accordance with Section XI.B.5 due to these exceptions, an explanation shall be included in the Annual Report.

c. Sample collection is not required for drainage areas with no exposure to industrial activities and materials in accordance with the definitions in Section XVII.

7. Sampling Frequency Reduction Certification
   a. Dischargers are eligible to reduce the number of QSEs sampled each reporting year in accordance with the following requirements:

      i. Results from four (4) consecutive QSEs that were sampled (QSEs may be from different reporting years) did not exceed any NALs as defined in Section XII.A; and

      ii. The Discharger is in full compliance with the requirements of this General Permit and has updated, certified and submitted via SMARTS all documents, data, and reports required by this General Permit during the time period in which samples were collected.

   b. The Regional Water Board may notify a Discharger that it may not reduce the number of QSEs sampled each reporting year if the Discharger is subject to an enforcement action.

   c. An eligible Discharger shall certify via SMARTS that it meets the conditions in subsection 7.a above.

   d. Upon Sampling Frequency Reduction certification, the Discharger shall collect and analyze samples from one (1) QSE within the first half of each reporting year (July 1 to December 31), and one (1) QSE within the second half of each reporting year (January 1 to June 30). All other monitoring, sampling, and reporting requirements remain in effect.

   e. Dischargers who participate in a Compliance Group and certify a Sampling Frequency Reduction are only required to collect and analyze storm water samples from one (1) QSE within each reporting year.

   f. A Discharger may reduce sampling per the Sampling Frequency Reduction certification unless notified by the Regional Water Board that: (1) the Sampling Frequency Reduction certification has been rejected or (2) additional supporting documentation must be submitted. In such instances, a Discharger is ineligible for the Sampling Frequency Reduction until the Regional Water Board provides Sampling Frequency Reduction certification approval. Revised Sampling Frequency Reduction certifications shall be certified and submitted via SMARTS by the Discharger.

   g. A Discharger loses its Sampling Frequency Reduction certification if an NAL exceedance occurs (Section XII.A).

D. Facilities Subject to Federal Storm Water Effluent Limitation Guidelines (ELGs)

1. In addition to the other requirements in this General Permit, Dischargers with facilities subject to storm water ELGs in Subchapter N shall:

   a. Collect and analyze samples from QSEs for each regulated pollutant specified in the appropriate category in Subchapter N as specified in Section XI.B;

   b. For Dischargers with facilities subject to 40 Code of Federal Regulations parts 419[17] and 443[18], estimate or calculate the volume of industrial storm water discharges from each drainage area subject to the ELGs and the mass of each regulated pollutant as defined in parts 419 and 443; and,

   c. Ensure that the volume/mass estimates or calculations required in subsection b are completed by a California licensed professional engineer.

2. Dischargers subject to Subchapter N shall submit the information in Section XI.D.1.a through c in their Annual Report.

3. Dischargers with facilities subject to storm water ELGs in Subchapter N are ineligible for the Representative Sampling Reduction in Section XI.C.4.

XII. EXCEEDANCE RESPONSE ACTIONS (ERAs)

A. NALs and NAL Exceedances

The Discharger shall perform sampling, analysis and reporting in accordance with the requirements of this General Permit and shall compare the results to the two types of NAL values in Table 2 to determine whether either type of NAL has been exceeded for each applicable parameter. The two types of potential NAL exceedances are as follows:

1. Annual NAL exceedance: The Discharger shall determine the average concentration for each parameter using the results of all the sampling and analytical results for the entire facility for the reporting year (i.e., all "effluent" data). The Discharger shall compare the average concentration for each parameter to the corresponding annual NAL values in Table 2. For Dischargers using composite sampling or flow-weighted measurements in accordance with standard practices, the average concentrations shall be calculated in accordance with the U.S. EPA's NPDES Storm Water

[17] Part 419 - Petroleum refining point source category
[18] Part 443 - Effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources for the paving and roofing materials (tars and asphalt) point source category

Sampling Guidance Document.[19] An annual NAL exceedance occurs when the average of all the analytical results for a parameter from samples taken within a reporting year exceeds the annual NAL value for that parameter listed in Table 2; and,

2. Instantaneous maximum NAL exceedance: The Discharger shall compare all sampling and analytical results from each distinct sample (individual or combined as authorized by XI.C.5) to the corresponding instantaneous maximum NAL values in Table 2. An instantaneous maximum NAL exceedance occurs when two (2) or more analytical results from samples taken for any single parameter within a reporting year exceed the instantaneous maximum NAL value (for TSS and O&G) or are outside of the instantaneous maximum NAL range for pH.

B. Baseline Status

At the beginning of a Discharger's NOI Coverage, all Dischargers have Baseline status for all parameters.

C. Level 1 Status

A Discharger's Baseline status for any given parameter shall change to Level 1 status if sampling results indicate an NAL exceedance for that same parameter. Level 1 status will commence on July 1 following the reporting year during which the exceedance(s) occurred.[20]

1. Level 1 ERA Evaluation

    a. By October 1 following commencement of Level 1 status for any parameter with sampling results indicating an NAL exceedance, the Discharger shall:

    b. Complete an evaluation, with the assistance of a QISP, of the industrial pollutant sources at the facility that are or may be related to the NAL exceedance(s); and,

    c. Identify in the evaluation the corresponding BMPs in the SWPPP and any additional BMPs and SWPPP revisions necessary to prevent future NAL exceedances and to comply with the requirements of this General Permit. Although the evaluation may focus on the drainage areas where the NAL exceedance(s) occurred, all drainage areas shall be evaluated.

2. Level 1 ERA Report

[19] U.S. EPA. NPDES Storm Water Sampling Guidance Document. <http://www.epa.gov/npdes/pubs/owm0093.pdf >. [as of February 4, 2014]

[20] For all sampling results reported before June 30th of the preceding reporting year. If sample results indicating an NAL exceedance are submitted after June 30th, the Discharger will change status once those results have been reported.

a. Based upon the above evaluation, the Discharger shall, as soon as practicable but no later than January 1 following commencement of Level 1 status :

i. Revise the SWPPP as necessary and implement any additional BMPs identified in the evaluation;

ii. Certify and submit via SMARTS a Level 1 ERA Report prepared by a QISP that includes the following:

1) A summary of the Level 1 ERA Evaluation required in subsection C.1 above; and,

2) A detailed description of the SWPPP revisions and any additional BMPs for each parameter that exceeded an NAL.

iii. Certify and submit via SMARTS the QISP's identification number, name, and contact information (telephone number, e-mail address).

b. A Discharger's Level 1 status for a parameter will return to Baseline status once a Level 1 ERA report has been completed, all identified additional BMPs have been implemented, and results from four (4) consecutive QSEs that were sampled subsequent to BMP implementation indicate no additional NAL exceedances for that parameter.

3. NAL Exceedances Prior to Implementation of Level 1 Status BMPs.

Prior to the implementation of an additional BMP identified in the Level 1 ERA Evaluation or October 1, whichever comes first, sampling results for any parameter(s) being addressed by that additional BMP will not be included in the calculations of annual average or instantaneous NAL exceedances in SMARTS.

D. Level 2 Status

A Discharger's Level 1 status for any given parameter shall change to Level 2 status if sampling results indicate an NAL exceedance for that same parameter while the Discharger is in Level 1. Level 2 status will commence on July 1 following the reporting year during which the NAL exceedance(s) occurred.[21]

1. Level 2 ERA Action Plan

[21] For all sampling results reported before June 30th of the preceding reporting year. If sample results indicating an NAL exceedance are submitted after June 30th, the Discharger will change status upon the date those results have been reported into SMARTS.

a. Dischargers with Level 2 status shall certify and submit via SMARTS a Level 2 ERA Action Plan prepared by a QISP that addresses each new Level 2 NAL exceedance by January 1 following the reporting year during which the NAL exceedance(s) occurred. For each new Level 2 NAL exceedance, the Level 2 Action Plan will identify which of the demonstrations in subsection D.2.a through c the Discharger has selected to perform. A new Level 2 NAL exceedance is any Level 2 NAL exceedance for 1) a new parameter in any drainage area, or 2) the same parameter that is being addressed in an existing Level 2 ERA Action Plan in a different drainage area.

b. The Discharger shall certify and submit via SMARTS the QISP's identification number, name, and contact information (telephone number, e-mail address) if this information has changed since previous certifications.

c. The Level 2 ERA Action Plan shall at a minimum address the drainage areas with corresponding Level 2 NAL exceedances.

d. All elements of the Level 2 ERA Action Plan shall be implemented as soon as practicable and completed no later than 1 year after submitting the Level 2 ERA Action Plan.

e. The Level 2 ERA Action Plan shall include a schedule and a detailed description of the tasks required to complete the Discharger's selected demonstration(s) as described below in Section D.2.a through c.

2. Level 2 ERA Technical Report

On January 1 of the reporting year following the submittal of the Level 2 ERA Action Plan, a Discharger with Level 2 status shall certify and submit a Level 2 ERA Technical Report prepared by a QISP that includes one or more of the following demonstrations:

a. Industrial Activity BMPs Demonstration

This shall include the following requirements, as applicable:

i. Shall include a description of the industrial pollutant sources and corresponding industrial pollutants that are or may be related to the NAL exceedance(s);

ii. Shall include an evaluation of all pollutant sources associated with industrial activity that are or may be related to the NAL exceedance(s);

iii. Where all of the Discharger's implemented BMPs, including additional BMPs identified in the Level 2 ERA Action Plan, achieve

compliance with the effluent limitations of this General Permit and are expected to eliminate future NAL exceedance(s), the Discharger shall provide a description and analysis of all implemented BMPs;

iv. In cases where all of the Discharger's implemented BMPs, including additional BMPs identified in the Level 2 ERA Action Plan, achieve compliance with the effluent limitations of this General Permit but are not expected to eliminate future NAL exceedance(s), the Discharger shall provide, in addition to a description and analysis of all implemented BMPs:

1) An evaluation of any additional BMPs that would reduce or prevent NAL exceedances;

2) Estimated costs of the additional BMPs evaluated; and,

3) An analysis describing the basis for the selection of BMPs implemented in lieu of the additional BMPs evaluated but not implemented.

v. The description and analysis of BMPs required in subsection a.iii above shall specifically address the drainage areas where the NAL exceedance(s) responsible for the Discharger's Level 2 status occurred, although any additional Level 2 ERA Action Plan BMPs may be implemented for all drainage areas; and,

vi. If an alternative design storm standard for treatment control BMPs (in lieu of the design storm standard for treatment control BMPs in Section X.H.6 in this General Permit) will achieve compliance with the effluent limitations of this General Permit, the Discharger shall provide an analysis describing the basis for the selection of the alternative design storm standard.

b. Non-Industrial Pollutant Source Demonstration

This shall include:

i. A statement that the Discharger has determined that the exceedance of the NAL is attributable solely to the presence of non-industrial pollutant sources. (The pollutant may also be present due to industrial activities, in which case the Discharger must demonstrate that the pollutant contribution from the industrial activities by itself does not result in an NAL exceedance.) The sources shall be identified as either run-on from adjacent properties, aerial deposition from man-made sources, or as generated by on-site non-industrial sources;

ii. A statement that the Discharger has identified and evaluated all potential pollutant sources that may have commingled with storm water associated with the Discharger's industrial activity and may be contributing to the NAL exceedance;

iii. A description of any on-site industrial pollutant sources and corresponding industrial pollutants that are contributing to the NAL exceedance;

iv. An assessment of the relative contributions of the pollutant from (1) storm water run-on to the facility from adjacent properties or non-industrial portions of the Discharger's property or from aerial deposition and (2) the storm water associated with the Discharger's industrial activity;

v. A summary of all existing BMPs for that parameter; and,

vi. An evaluation of all on-site/off-site analytical monitoring data demonstrating that the NAL exceedances are caused by pollutants in storm water run-on to the facility from adjacent properties or non-industrial portions of the Discharger's property or from aerial deposition.

c. Natural Background Pollutant Source Demonstration

This shall include:

i. A statement that the Discharger has determined that the NAL exceedance is attributable solely to the presence of the pollutant in the natural background that has not been disturbed by industrial activities. (The pollutant may also be present due to industrial activities, in which case the Discharger must demonstrate that the pollutant contribution from the industrial activities by itself does not result in an NAL exceedance);

ii. A summary of all data previously collected by the Discharger, or other identified data collectors, that describes the levels of natural background pollutants in the storm water discharge;

iii. A summary of any research and published literature that relates the pollutants evaluated at the facility as part of the Natural Background Source Demonstration;

iv. Map showing the reference site location in relation to facility along with available land cover information;

v. Reference site and test site elevation;

vi. Available geology and soil information for reference and test sites;

vii. Photographs showing site vegetation;

viii. Site reconnaissance survey data regarding presence of roads, outfalls, or other human-made structures; and,

ix. Records from relevant state or federal agencies indicating no known mining, forestry, or other human activities upstream of the proposed reference site.

3. Level 2 ERA Technical Report Submittal

a. The Discharger shall certify and submit via SMARTS the Level 2 ERA Technical Report described in Section D.2 above.

b. The State Water Board and Regional Boards (Water Boards) may review the submitted Level 2 ERA Technical Reports. Upon review of a Level 2 ERA Technical Report, the Water Boards may reject the Level 2 ERA Technical Report and direct the Discharger to take further action(s) to comply with this General Permit.

c. Dischargers with Level 2 status who have submitted the Level 2 ERA Technical Report are only required to annually update the Level 2 ERA Technical Report based upon additional NAL exceedances of the same parameter and same drainage area (if the original Level 2 ERA Technical Report contained an Industrial Activity BMP Demonstration and the implemented BMPs were expected to eliminate future NAL exceedances in accordance with Section XII.D.2.a.ii), facility operational changes, pollutant source(s) changes, and/or information that becomes available via compliance activities (monthly visual observations, sampling results, annual evaluation, etc.). The Level 2 ERA Technical Report shall be prepared by a QISP and be certified and submitted via SMARTS by the Discharger with each Annual Report. If there are no changes prompting an update of the Level 2 ERA Technical Report, as specified above, the Discharger will provide this certification in the Annual Report that there have been no changes warranting re-submittal of the Level 2 ERA Technical Report.

d. Dischargers are not precluded from submitting a Level 2 ERA Action Plan or ERA Technical Report prior to entering Level 2 status if information is available to adequately prepare the report and perform the demonstrations described above. A Discharger who chooses to submit a Level 2 ERA Action Plan or ERA Technical Report prior to entering Level 2 status will automatically be placed in Level 2 in accordance to the Level 2 ERA schedule.

4. Eligibility for Returning to Baseline Status

a. Dischargers with Level 2 status who submit an Industrial Activity BMPs Demonstration in accordance with subsection 2.a.i through iii above and have implemented BMPs to prevent future NAL exceedance(s) for the Level 2 parameter(s) shall return to baseline status for that parameter, if results from four (4) subsequent consecutive QSEs sampled indicate no additional NAL exceedance(s) for that parameter(s). If future NAL exceedances occur for the same parameter(s), the Discharger's Baseline status will return to Level 2 status on July 1 in the subsequent reporting year during which the NAL exceedance(s) occurred. These Dischargers shall update the Level 2 ERA Technical Report as required above in Section D.3.c.

b. Dischargers are ineligible to return to baseline status if they submit any of the following:

   i. A industrial activity BMP demonstration in accordance with subsection 2.a.iv above;

   ii. An non-industrial pollutant source demonstration; or,

   iii. A natural background pollutant source demonstration.

5. Level 2 ERA Implementation Extension

   a. Dischargers that need additional time to submit the Level 2 ERA Technical Report shall be automatically granted a single time extension for up to six (6) months upon submitting the following items into SMARTS, as applicable:

      i. Reasons for the time extension;

      ii. A revised Level 2 ERA Action Plan including a schedule and a detailed description of the necessary tasks still to be performed to complete the Level 2 ERA Technical Report; and

      iii. A description of any additional temporary BMPs that will be implemented while permanent BMPs are being constructed.

   b. The Regional Water Boards will review Level 2 ERA Implementation Extensions for completeness and adequacy. Requests for extensions that total more than six (6) months are not granted unless approved in writing by the Water Boards. The Water Boards may (1) reject or revise the time allowed to complete Level 2 ERA Implementation Extensions, (2) identify additional tasks necessary to complete the Level 2 ERA Technical Report, and/or (3) require the Discharger to implement additional temporary BMPs.

XIII. INACTIVE MINING OPERATION CERTIFICATION

A. Inactive mining operations are defined in Part 3 of Attachment A of this General Permit. The Discharger may, in lieu of complying with the General Permit requirements described in subsection B below, certify and submit via SMARTS that their inactive mining operation meets the following conditions:

1. The Discharger has determined and justified in the SWPPP that it is impracticable to implement the monitoring requirements in this General Permit for the inactive mining operation;

2. A SWPPP has been signed (wet signature and license number) by a California licensed professional engineer and is being implemented in accordance with the requirements of this General Permit; and,

3. The facility is in compliance with this General Permit, except as provided in subsection B below.

B. The Discharger who has certified and submitted that they meet the conditions in subsection A above, are not subject to the following General Permit requirements:

1. Monitoring Implementation Plan in Section X.I;

2. Monitoring Requirements in Section XI;

3. Exceedance Response Actions (ERAs) in Section XII; and,

4. Annual Report Requirements in Section XVI.

C. Inactive Mining Operation Certification Submittal Schedule

1. The Discharger shall certify and submit via SMARTS NOI coverage PRDs listed in Section II.B.1 and meet the conditions in subsection A above.

2. The Discharger shall annually inspect the inactive mining site and certify via SMARTS no later than July 15th of each reporting year, that their inactive mining operation continues to meet the conditions in subsection A above.

3. The Discharger shall have a California licensed professional engineer review and update the SWPPP if there are changes to their inactive mining operation or additional BMPs are needed to comply with this General Permit. Any significant updates to the SWPPP shall be signed (wet signature and license number) by a California license professional engineer.

4. The Discharger shall certify and submit via SMARTS any significantly revised SWPPP within 30 days of the revision(s).

XIV. COMPLIANCE GROUPS AND COMPLIANCE GROUP LEADERS

A. Compliance Group Qualification Requirements

1. Any group of Dischargers of the same industry type or any QISP representing Dischargers of the same industry type may form a Compliance Group. A Compliance Group shall consist of Dischargers that operate facilities with similar types of industrial activities, pollutant sources, and pollutant characteristics (e.g., scrap metals recyclers would join a different group than paper recyclers, truck vehicle maintenance facilities would join a different group than airplane vehicle maintenance facilities, etc.). A Discharger participating in a Compliance Group is termed a Compliance Group Participant. Participation in a Compliance Group is not required. Compliance Groups may be formed at any time.

2. Each Compliance Group shall have a Compliance Group Leader.

3. To establish a Compliance Group, the Compliance Group Leader shall register as a Compliance Group Leader via SMARTS. The registration shall include documentation demonstrating compliance with the Compliance Group qualification requirements above and a list of the Compliance Group Participants.

4. Each Compliance Group Participant shall register as a member of an established Compliance Group via SMARTS.

5. The Executive Director of the State Water Board may review Compliance Group registrations and/or activities for compliance with the requirements of this General Permit. The Executive Director may reject the Compliance Group, the Compliance Group Leader, or individual Compliance Group Participants within the Compliance Group.

B. Compliance Group Leader Responsibilities

1. A Compliance Group Leader must complete a State Water Board sponsored or approved training program for Compliance Group Leaders.

2. The Compliance Group Leader shall assist Compliance Group Participants with all compliance activities required by this General Permit.

3. A Compliance Group Leader shall prepare a Consolidated Level 1 ERA Report for all Compliance Group Participants with Level 1 status for the same parameter. Compliance Group Participants who certify and submit these Consolidated Level 1 ERA Reports are subject to the same provisions as individual Dischargers with Level 1 status, as described in Section XII.C. A Consolidated Level 1 ERA Report is equivalent to a Level 1 ERA Report.

4. The Compliance Group Leader shall update the Consolidated Level 1 ERA Report as needed to address additional Compliance Group Participants with ERA Level 1 status.

5. A Compliance Group Leader shall prepare a Level 2 ERA Action Plan specific to each Compliance Group Participant with Level 2 status. Compliance Group Participants who certify and submit these Level 2 ERA Action Plans are subject to the same provisions as individual Dischargers with Level 2 status, as described in Section XII.D.

6. A Compliance Group Leader shall prepare a Level 2 ERA Technical Report specific to each Compliance Group Participant with Level 2 status. Compliance Group Participants who certify and submit these Level 2 ERA Technical Reports are subject to the same provisions as individual Dischargers with Level 2 status, as described in Section XII.D.

7. The Compliance Group Leader shall inspect all the facilities of the Compliance Group Participants that have entered Level 2 status prior to preparing the individual Level 2 ERA Technical Report.

8. The Compliance Group Leader shall revise the Consolidated Level 1 ERA Report, individual Level 2 ERA Action Plans, or individual Level 2 Technical Reports in accordance with any comments received from the Water Boards.

9. The Compliance Group Leader shall inspect all the facilities of the Compliance Group Participants at a minimum of once per reporting year (July 1 to June 30).

C. Compliance Group Participant Responsibilities

1. Each Compliance Group Participant is responsible for permit compliance for the Compliance Group Participant's facility and for ensuring that the Compliance Group Leader's activities related to the Compliance Group Participant's facility comply with this General Permit.

2. Compliance Group Participants with Level 1 status shall certify and submit via SMARTS the Consolidated Level 1 ERA Report. The Compliance Group Participants shall certify that they have reviewed the Consolidated Level 1 ERA Report and have implemented any required additional BMPs. Alternatively, the Compliance Group Participant may submit an individual Level 1 ERA Report in accordance with the provisions in Section XII.C.2.

3. Compliance Group Participants with Level 2 status shall certify and submit via SMARTS their individual Level 2 ERA Action Plan and Technical Report prepared by their Compliance Group Leader. Each Compliance Group Participant shall certify that they have reviewed the Level 2 ERA Action Plan and Technical Report and will implement any required additional BMPs.

4. Compliance Group Participants can at any time discontinue their participation in their associated Compliance Group via SMARTS. Upon discontinuation, the former Compliance Group Participant is immediately subject to the sampling and analysis requirements described in Section XI.B.2.

XV. ANNUAL COMPREHENSIVE FACILITY COMPLIANCE EVALUATION (ANNUAL EVALUATION)

The Discharger shall conduct one Annual Evaluation for each reporting year (July 1 to June 30). If the Discharger conducts an Annual Evaluation fewer than eight (8) months, or more than sixteen (16) months, after it conducts the previous Annual Evaluation, it shall document the justification for doing so. The Discharger shall revise the SWPPP, as appropriate, and implement the revisions within 90 days of the Annual Evaluation. At a minimum, Annual Evaluations shall consist of:

A. A review of all sampling, visual observation, and inspection records conducted during the previous reporting year;

B. An inspection of all areas of industrial activity and associated potential pollutant sources for evidence of, or the potential for, pollutants entering the storm water conveyance system;

C. An inspection of all drainage areas previously identified as having no exposure to industrial activities and materials in accordance with the definitions in Section XVII;

D. An inspection of equipment needed to implement the BMPs;

E. An inspection of any BMPs;

F. A review and effectiveness assessment of all BMPs for each area of industrial activity and associated potential pollutant sources to determine if the BMPs are properly designed, implemented, and are effective in reducing and preventing pollutants in industrial storm water discharges and authorized NSWDs; and,

G. An assessment of any other factors needed to comply with the requirements in Section XVI.B.

XVI. ANNUAL REPORT

A. The Discharger shall certify and submit via SMARTS an Annual Report no later than July 15th following each reporting year using the standardized format and checklists in SMARTS.

B. The Discharger shall include in the Annual Report:

1. A Compliance Checklist that indicates whether a Discharger complies with, and has addressed all applicable requirements of this General Permit;

2. An explanation for any non-compliance of requirements within the reporting year, as indicated in the Compliance Checklist;

3. An identification, including page numbers and/or sections, of all revisions made to the SWPPP within the reporting year; and,

4. The date(s) of the Annual Evaluation.

XVII. CONDITIONAL EXCLUSION - NO EXPOSURE CERTIFICATION (NEC)

A. Discharges composed entirely of storm water that has not been exposed to industrial activity are not industrial storm water discharges. Dischargers are conditionally excluded from complying with the SWPPP and monitoring requirements of this General Permit if all of the following conditions are met:

1. There is no exposure of Industrial Materials and Activities to rain, snow, snowmelt, and/or runoff;

2. All unauthorized NSWDs have been eliminated and all authorized NSWDs meet the conditions of Section IV;

3. The Discharger has certified and submitted via SMARTS PRDs for NEC coverage pursuant to the instructions in Section II.B.2; and,

4. The Discharger has satisfied all other requirements of this Section.

B. NEC Specific Definitions

1. No Exposure - all Industrial Materials and Activities are protected by a Storm-Resistant Shelter to prevent all exposure to rain, snow, snowmelt, and/or runoff.

2. Industrial Materials and Activities - includes, but is not limited to, industrial material handling activities or equipment, machinery, raw materials, intermediate products, by-products, final products, and waste products.

3. Material Handling Activities - includes the storage, loading and unloading, transportation, or conveyance of any industrial raw material, intermediate product, final product, or waste product.

4. Sealed - banded or otherwise secured, and without operational taps or valves.

5. Storm-Resistant Shelters - includes completely roofed and walled buildings or structures. Also includes structures with only a top cover supported by permanent supports but with no side coverings, provided material within the structure is not subject to wind dispersion (sawdust, powders, etc.), or track-out, and there is no storm water discharged from within the structure that comes into contact with any materials.

C. NEC Qualifications

To qualify for an NEC, a Discharger shall:

1. Except as provided in subsection D below, provide a Storm-Resistant Shelter to protect Industrial Materials and Activities from exposure to rain, snow, snowmelt, run-on, and runoff;

2. Inspect and evaluate the facility annually to determine that storm water exposed to industrial materials or equipment has not and will not be discharged to waters of the United States. Evaluation records shall be maintained for five (5) years in accordance with Section XXI.J.4;

3. Register for NEC coverage by certifying that there are no discharges of storm water contaminated by exposure to Industrial Materials and Activities from areas of the facility subject to this General Permit, and certify that all unauthorized NSWDs have been eliminated and all authorized NSWDs meet the conditions of Section IV (Authorized NSWDs). NEC coverage and annual renewal requires payment of an annual fee in accordance with California Code of Regulations, title 23, section 2200 et seq.; and,

4. Submit PRDs for NEC coverage shall be prepared and submitted in accordance with the:

   a. Certification requirements in Section XXI.K; and,

   b. Submittal schedule in accordance with Section II.B.2.

D. NEC Industrial Materials and Activities - Storm-Resistant Shelter Not Required

To qualify for NEC coverage, a Storm-Resistant Shelter is not required for the following:

1. Drums, barrels, tanks, and similar containers that are tightly Sealed, provided those containers are not deteriorated, do not contain residual industrial materials on the outside surfaces, and do not leak;

2. Adequately maintained vehicles used in material handling;

3. Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt);

4. Any Industrial Materials and Activities that are protected by a temporary shelter for a period of no more than ninety (90) days due to facility construction or remodeling; and,

5. Any Industrial Materials and Activities that are protected within a secondary containment structure that will not discharge storm water to waters of the United States.

E. NEC Limitations

1. NEC coverage is available on a facility-wide basis only, not for individual outfalls. If a facility has industrial storm water discharges from one or more drainage areas that require NOI coverage, Dischargers shall register for NOI coverage for the entire facility through SMARTS in accordance with Section II.B.2. Any drainage areas on that facility that would otherwise qualify for NEC coverage may be specially addressed in the facility SWPPP by including an NEC Checklist and a certification statement demonstrating that those drainage areas of the facility have been evaluated; and that none of the Industrial Materials or Activities listed in subsection C above are, or will be in the foreseeable future, exposed to precipitation.

2. If circumstances change and Industrial Materials and Activities become exposed to rain, snow, snowmelt, and/or runoff, the conditions for this exclusion shall no longer apply. In such cases, the Discharger may be subject to enforcement for discharging without a permit. A Discharger with NEC coverage that anticipates changes in circumstances should register for NOI coverage at least seven (7) days before anticipated exposure.

3. The Regional Water Board may deny NEC coverage and require NOI coverage upon determining that:

   a. Storm water is exposed to Industrial Materials and Activities; and/or

   b. The discharge has a reasonable potential to cause or contribute to an exceedance of an applicable water quality standards.

F. NEC Permit Registration Documents Required for Initial NEC Coverage

A Discharger shall submit via SMARTS the following PRDs for NEC coverage to document the applicability of the conditional exclusion:

1. The NEC form, which includes:

   a. The legal name, postal address, telephone number, and e-mail address of the Discharger;

   b. The facility business name and physical mailing address, the county name, and a description of the facility location if the facility does not have a physical mailing address; and,

   c. Certification by the Discharger that all PRDs submitted are correct and true and the conditions of no exposure have been met.

2. An NEC Checklist prepared by the Discharger demonstrating that the facility has been evaluated; and that none of the following industrial materials or activities are, or will be in the foreseeable future, exposed to precipitation:

a. Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed;

b. Materials or residuals on the ground or in storm water inlets from spills/leaks;

c. Materials or products from past industrial activity;

d. Material handling equipment (except adequately maintained vehicles);

e. Materials or products during loading/unloading or transporting activities;

f. Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

g. Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

h. Materials or products handled/stored on roads or railways owned or maintained by the Discharger;

i. Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

j. Application or disposal of processed wastewater (unless already covered by an NPDES permit); and,

k. Particulate matter or visible deposits of residuals from roof stacks/vents evident in the storm water outflow.

3. Site Map (see Section X.E).

G. Requirements for Annual NEC Coverage Recertification

By October 1 of each reporting year beginning in 2015, any Discharger who has previously registered for NEC coverage shall either submit and certify an NEC demonstrating that the facility has been evaluated, and that none of the Industrial Materials or Activities listed above are, or will be in the foreseeable future, exposed to precipitation, or apply for NOI coverage.

H. NEC Certification Statement

All NEC certifications and re-certifications shall include the following certification statement:

I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of 'no exposure' and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities

or materials from the industrial facility identified in this document (except as allowed in subsection C above). I understand that I am obligated to submit a no exposure certification form annually to the State Water Board and, if requested, to the operator of the local Municipal Separate Storm Sewer System (MS4) into which this facility discharges (where applicable). I understand that I must allow the Water Board staff, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. 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 gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

XVIII. SPECIAL REQUIREMENTS - PLASTIC MATERIALS

A. Facilities covered under this General Permit that handle Plastic Materials are required to implement BMPs to eliminate discharges of plastic in storm water in addition to the other requirements of this General Permit that are applicable to all other Industrial Materials and Activities. Plastic Materials are virgin and recycled plastic resin pellets, powders, flakes, powdered additives, regrind, dust, and other similar types of preproduction plastics with the potential to discharge or migrate off-site. Any Dischargers' facility handling Plastic Materials will be referred to as Plastics Facilities in this General Permit. Any Plastics Facility covered under this General Permit that manufactures, transports, stores, or consumes these materials shall submit information to the State Water Board in their PRDs, including the type and form of plastics, and which BMPs are implemented at the facility to prevent illicit discharges. Pursuant to Water Code section 13367, Plastics Facilities are subject to mandatory, minimum BMPs.

1. At a minimum, Plastics Facilities shall implement and include in the SWPPP:

   a. Containment systems at each on-site storm drain discharge location down gradient of areas containing plastic material. The containment system shall be designed to trap all particles retained by a 1mm mesh screen, with a treatment capacity of no less than the peak flow rate from a one-year, one-hour storm.

   b. When a containment system is infeasible, or poses the potential to cause an illicit discharge, the facility may propose a technically feasible

alternative BMP or suite of BMPs. The alternative BMPs shall be designed to achieve the same or better performance standard as a 1mm mesh screen with a treatment capacity of the peak flow rate from a one-year, one-hour storm. Alternative BMPs shall be submitted to the Regional Water Board for approval.

c. Plastics Facilities shall use durable sealed containers designed not to rupture under typical loading and unloading activities at all points of plastic transfer and storage.

d. Plastics Facilities shall use capture devices as a form of secondary containment during transfers, loading, or unloading Plastic Materials. Examples of capture devices for secondary containment include, but are not limited to catch pans, tarps, berms or any other device that collects errant material.

e. Plastics Facilities shall have a vacuum or vacuum-type system for quick cleanup of fugitive plastic material available for employees.

f. Pursuant to Water Code section 13367(e)(1), Plastics Facilities that handle Plastic Materials smaller than 1mm in size shall develop a containment system designed to trap the smallest plastic material handled at the facility with a treatment capacity of at least the peak flow rate from a one-year, one-hour storm, or develop a feasible alternative BMP or suite of BMPs that are designed to achieve a similar or better performance standard that shall be submitted to the Regional Water Board for approval.

2. Plastics Facilities are exempt from the Water Code requirement to install a containment system under section 13367 of the Water Code if they meet one of the following requirements that are determined to be equal to, or exceed the performance requirements of a containment system:

   a. The Discharger has certified and submitted via SMARTS a valid No Exposure Certification (NEC) in accordance with Section XVII; or

   b. Plastics Facilities are exempt from installing a containment system, if the following suite of eight (8) BMPs is implemented. This combination of BMPs is considered to reduce or prevent the discharge of plastics at a performance level equivalent to or better than the 1mm mesh and flow standard in Water Code section 13367(e)(1).

      i. Plastics Facilities shall annually train employees handling Plastic Materials. Training shall include environmental hazards of plastic discharges, employee responsibility for corrective actions to prevent errant Plastic Materials, and standard procedures for containing, cleaning, and disposing of errant Plastic Materials.

ii. Plastics Facilities shall immediately fix any Plastic Materials containers that are punctured or leaking and shall clean up any errant material in a timely manner.

iii. Plastics Facilities shall manage outdoor waste disposal of Plastic Materials in a manner that prevents the materials from leaking from waste disposal containers or during waste hauling.

iv. Plastics Facilities that operate outdoor conveyance systems for Plastic Materials shall maintain the system in good operating condition. The system shall be sealed or filtered in such a way as to prevent the escape of materials when in operation. When not in operation, all connection points shall be sealed, capped, or filtered so as to not allow material to escape. Employees operating the conveyance system shall be trained how to operate in a manner that prevents the loss of materials such as secondary containment, immediate spill response, and checks to ensure the system is empty during connection changes.

v. Plastics Facilities that maintain outdoor storage of Plastic Materials shall do so in a durable, permanent structure that prevents exposure to weather that could cause the material to migrate or discharge in storm water.

vi. Plastics Facilities shall maintain a schedule for regular housekeeping and routine inspection for errant Plastic Materials. The Plastics Facility shall ensure that their employees follow the schedule.

vii. PRDs shall include the housekeeping and routine inspection schedule, spill response and prevention procedures, and employee training materials regarding plastic material handling.

viii. Plastics Facilities shall correct any deficiencies in the employment of the above BMPs that result in errant Plastic Materials that may discharge or migrate off-site in a timely manner. Any Plastic Materials that are discharged or that migrate off-site constitute an illicit discharge in violation of this General Permit.

XIX. REGIONAL WATER BOARD AUTHORITIES

A. The Regional Water Boards may review a Discharger's PRDs for NOI or NEC coverage and administratively reject General Permit coverage if the PRDs are deemed incomplete. The Regional Water Boards may take actions that include rescinding General Permit coverage, requiring a Discharger to revise and re-submit their PRDs (certified and submitted by the Discharger) within a specified time period, requiring the Discharger to apply for different General Permit coverage or a different individual or general permit, or taking no action.

B. The Regional Water Boards have the authority to enforce the provisions and requirements of this General Permit. This includes, but is not limited to,

reviewing SWPPPs, Monitoring Implementation Plans, ERA Reports, and Annual Reports, conducting compliance inspections, and taking enforcement actions.

C. As appropriate, the Regional Water Boards may issue NPDES storm water general or individual permits to a Discharger, categories of Dischargers, or Dischargers within a watershed or geographic area. Upon issuance of such NPDES permits, this General Permit shall no longer regulate the affected Discharger(s).

D. The Regional Water Boards may require a Discharger to revise its SWPPP, ERA Reports, or monitoring programs to achieve compliance with this General Permit. In this case, the Discharger shall implement these revisions in accordance with a schedule provided by the Regional Water Board.

E. The Regional Water Boards may approve requests from a Discharger to include co-located, but discontiguous, industrial activities within the same facility under a single NOI or NEC coverage.

F. Consistent with 40 Code of Federal Regulations section 122.26(a)(9)(i)(D), the Regional Water Boards may require any discharge that is not regulated by this General Permit, that is determined to contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, to be covered under this General Permit as appropriate. Upon designation, the Discharger responsible for the discharge shall obtain coverage under this General Permit.

G. The Regional Water Boards may review a Discharger's Inactive Mining Operation Certification and reject it at any time if the Regional Water Board determines that access to the facility for monitoring purposes is practicable or that the facility is not in compliance with the applicable requirements of this General Permit.

H. All Regional Water Board actions that modify a Discharger's obligations under this General Permit must be in writing and should also be submitted in SMARTS.

XX. SPECIAL CONDITIONS

A. Reopener Clause

This General Permit may be reopened and amended to incorporate TMDL-related provisions. This General Permit may also be modified, revoked and reissued, or terminated for cause due to promulgation of amended regulations, water quality control plans or water quality control policies, receipt of U.S. EPA guidance concerning regulated activities, judicial decision, or in accordance with 40 Code of Federal Regulations sections 122.62, 122.63, 122.64, and 124.5.

B. Water Quality Based Corrective Actions

1. Upon determination by the Discharger or written notification by the Regional Water Board that industrial storm water discharges and/or authorized NSWDs contain pollutants that are in violation of Receiving Water Limitations (Section VI), the Discharger shall:

    a. Conduct a facility evaluation to identify pollutant source(s) within the facility that are associated with industrial activity and whether the BMPs described in the SWPPP have been properly implemented;

    b. Assess the facility's SWPPP and its implementation to determine whether additional BMPs or SWPPP implementation measures are necessary to reduce or prevent pollutants in industrial storm water discharges to meet the Receiving Water Limitations (Section VI); and,

    c. Certify and submit via SMARTS documentation based upon the above facility evaluation and assessment that:

        i. Additional BMPs and/or SWPPP implementation measures have been identified and included in the SWPPP to meet the Receiving Water Limitations (Section VI); or

        ii. No additional BMPs or SWPPP implementation measures are required to reduce or prevent pollutants in industrial storm water discharges to meet the Receiving Water Limitations (Section VI).

2. The Regional Water Board may reject the Dischargers water quality based corrective actions and/or request additional supporting documentation.

C. Requirements for Dischargers Claiming "No Discharge" through the Notice of Non-Applicability (NONA)

1. For the purpose of the NONA, the Entity (Entities) is referring to the person(s) defined in section 13399.30 of the Water Code.

2. Entities who are claiming "No Discharge" through the NONA shall meet the following eligibility requirements:

    a. The facility is engineered and constructed to have contained the maximum historic precipitation event (or series of events) using the precipitation data collected from the National Oceanic and Atmospheric Agency's website (or other nearby precipitation data available from other government agencies) so that there will be no discharge of industrial storm water to waters of the United States; or,

    b. The facility is located in basins or other physical locations that are not hydrologically connected to waters of the United States.

3. When claiming the "No Discharge" option, Entities shall submit and certify via SMARTS both the NONA and a No Discharge Technical Report. The No

Discharge Technical Report shall demonstrate the facility meets the eligibility requirements described above.

4. The No Discharge Technical Report shall be signed (wet signature and license number) by a California licensed professional engineer.

XXI. STANDARD CONDITIONS

A. Duty to Comply

Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the Water Code and is grounds for enforcement action and/or removal from General Permit coverage.

Dischargers shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions.

B. Duty to Reapply

Dischargers that wish to continue an activity regulated under this General Permit after the expiration date of this General Permit shall apply for and obtain authorization from the Water Boards as required by the new general permit once it is issued.

C. General Permit Actions

1. This General Permit may be modified, revoked and reissued, or terminated for cause. Submittal of a request by the Discharger for General Permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not annul any General Permit condition.

2. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge, and that standard or prohibition is more stringent than any limitation on the pollutant in this General Permit, this General Permit shall be modified or revoked and reissued to conform to the toxic effluent standard or prohibition.

D. Need to Halt or Reduce Activity Not a Defense

In an enforcement action, it shall not be a defense for a Discharger that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this General Permit.

E. Duty to Mitigate

Dischargers shall take all responsible steps to reduce or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.

F. Proper Operation and Maintenance

Dischargers shall at all times properly operate and maintain any facilities and systems of treatment and control (and related equipment and apparatuses) which are installed or used by the Discharger to achieve compliance with the conditions of this General Permit. Proper operation and maintenance also include adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance may require the operation of backup or auxiliary facilities or similar systems installed by a Discharger when necessary to achieve compliance with the conditions of this General Permit.

G. Property Rights

This General Permit does not convey any property rights of any sort or any exclusive privileges. It also does not authorize any injury to private property or any invasion of personal rights, nor does it authorize any infringement of federal, state, or local laws and regulations.

H. Duty to Provide Information

Upon request by the relevant agency, Dischargers shall provide information to determine compliance with this General Permit to the Water Boards, U.S. EPA, or local Municipal Separate Storm Sewer System (MS4) within a reasonable time. Dischargers shall also furnish, upon request by the relevant agency, copies of records that are required to be kept by this General Permit.

I. Inspection and Entry

Dischargers shall allow the Water Boards, U.S. EPA, and local MS4 (including any authorized contractor acting as their representative), to:

1. Enter upon the premises at reasonable times where a regulated industrial activity is being conducted or where records are kept under the conditions of this General Permit;

2. Access and copy at reasonable times any records that must be kept under the conditions of this General Permit;

3. Inspect the facility at reasonable times; and,

4. Sample or monitor at reasonable times for the purpose of ensuring General Permit compliance.

J. Monitoring and Records

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. If Dischargers monitor any pollutant more frequently than required, the results of such monitoring shall be included in the calculation and reporting of the data submitted.

3. Records of monitoring information shall include:

   a. The date, exact location, and time of sampling or measurement;

   b. The date(s) analyses were performed;

   c. The individual(s) that performed the analyses;

   d. The analytical techniques or methods used; and,

   e. The results of such analyses.

4. Dischargers shall retain, for a period of at least five (5) years, either a paper or electronic copy of all storm water monitoring information, records, data, and reports required by this General Permit. Copies shall be available for review by the Water Board's staff at the facility during scheduled facility operating hours.

5. Upon written request by U.S. EPA or the local MS4, Dischargers shall provide paper or electronic copies of Annual Reports or other requested records to the Water Boards, U.S. EPA, or local MS4 within ten (10) days from receipt of the request.

K. Electronic Signature and Certification Requirements

1. All Permit Registration Documents (PRDs) for NOI and NEC coverage shall be certified and submitted via SMARTS by the Discharger's Legally Responsible Person (LRP). All other documents may be certified and submitted via SMARTS by the LRP or by their designated Duly Authorized Representative.

2. When a new LRP or Duly Authorized Representative is designated, the Discharger shall ensure that the appropriate revisions are made via SMARTS. In unexpected or emergency situations, it may be necessary for the Discharger to directly contact the State Water Board's Storm Water Section to register for SMARTS account access in order to designate a new LRP.

3. Documents certified and submitted via SMARTS by an unauthorized or ineligible LRP or Duly Authorized Representative are invalid.

4. LRP eligibility is as follows:

    a. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

        i. A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function; or

        ii. The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

    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. This includes the chief executive officer of the agency or the senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of U.S. EPA).

5. Duly Authorized Representative eligibility is as follows:

    a. The Discharger must authorize via SMARTS any person designated as a Duly Authorized Representative;

    b. The authorization shall specify that a person designated as a Duly Authorized Representative has responsibility for the overall operation of the regulated facility or activity, such as a person that is a manager, operator, superintendent, or another position of equivalent responsibility, or is an individual who has overall responsibility for environmental matters for the company; and,

    c. The authorization must be current (it has been updated to reflect a different individual or position) prior to any report submittals, certifications, or records certified by the Duly Authorized Representative.

L. Certification

Any person signing, certifying, and submitting documents under Section XXI.K above 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 that manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is, 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.

M. Anticipated Noncompliance

Dischargers shall give advance notice to the Regional Water Board and local MS4 of any planned changes in the industrial activity that may result in noncompliance with this General Permit.

N. Penalties for Falsification of Reports

Clean Water Act section 309(c)(4) provides that any person that knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this General Permit, including reports of compliance or noncompliance shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years or by both.

O. Oil and Hazardous Substance Liability

Nothing in this General Permit shall be construed to preclude the initiation of any legal action or relieve the Discharger from any responsibilities, liabilities, or penalties to which the Discharger is or may be subject to under section 311 of the Clean Water Act.

P. Severability

The provisions of this General Permit are severable; if any provision of this General Permit or the application of any provision of this General Permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this General Permit shall not be affected thereby.

Q. Penalties for Violations of Permit Conditions

1. Clean Water Act section 309 provides significant penalties for any person that violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act or any permit condition or limitation implementing any such section in a permit issued under section 402. Any

person that violates any permit condition of this General Permit is subject to a civil penalty not to exceed $37,500[22] per calendar day of such violation, as well as any other appropriate sanction provided by section 309 of the Clean Water Act.

2. The Porter-Cologne Water Quality Control Act also provides for civil and criminal penalties, which may be greater than penalties under the Clean Water Act.

R. Transfers

Coverage under this General Permit is non-transferrable. When operation of the facility has been transferred to another entity, or a facility is relocated, new PRDs for NOI and NEC coverage must be certified and submitted via SMARTS prior to the transfer, or at least seven (7) days prior to the first day of operations for a relocated facility.

S. Continuation of Expired General Permit

If this General Permit is not reissued or replaced prior to the expiration date, it will be administratively continued in accordance with 40 Code of Federal Regulations 122.6 and remain in full force and effect.

[22] May be further adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act.

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.

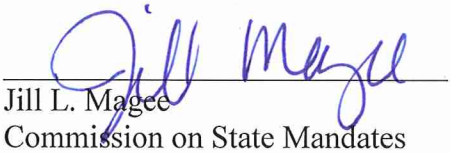
On September 22, 2017, I served the:

- **Second Notice of Incomplete Joint Test Claim issued September 22, 2017**
- **Claimant's (Los Angeles County Flood Control District) Response to the Notice of Incomplete Joint Test Claim filed September 7, 2017**
- **Claimant's (County of Los Angeles) Response to the Notice of Incomplete Joint Test Claim filed September 6, 2017**

  Los Angeles Region Water Permit – County of Los Angeles, 13-TC-02
  California Regional Water Quality Control Board, Los Angeles Region,
  Order No. R4-2012-0175
  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 September 22, 2017 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/21/17

Claim Number: 13-TC-02

Matter: Los Angeles Region Water Permit - County of Los Angeles

Claimants: County of Los Angeles
Los Angeles County Flood Control District

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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