1. TEST CLAIM TITLE

San Diego Region Stormwater Permit - Test Claim of Riverside County Local Agencies

2. CLAIMANT INFORMATION

Riverside Co. Flood Control and Water Conservation Dist.
Name of Local Agency or School District

Jason Uhley, P.E.
Claimant Contact

General Manager - Chief Engineer
Title

1995 Market Street
Street Address

Riverside, CA 92501
City, State, Zip

951-955-1201
Telephone Number

951-788-9965
Fax Number

juhley@rivco.org
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.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
June 30, 2017
Commission on State Mandates

Test Claim #: 16-TC-05

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 .

Order No. R9-2015-0100, an Order Amending Order No. R9-2013-0001, NPDES No. CAS0109266, as Amended by Order No. R9-2015-0001, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region, Provisions A.4, B.2, B.3 (except B.3.c), B.3.b.(4), B.4, B.5, B.6, D.1.c.(6), D.2.a.(2), D.3, D.4, E.3.c.(2), E.3.c.(3), E.3.d, E.5.a., E.5.c.(1)a, E.5.c.(2)a, E.5.c.(3), E.5.e., E.6, F.1.a., F.1.b., F.2.a., F.2.b., F.2.c., F.3.b.(3) and F.3.c., effective January 7, 2016.

☐ *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 _____.

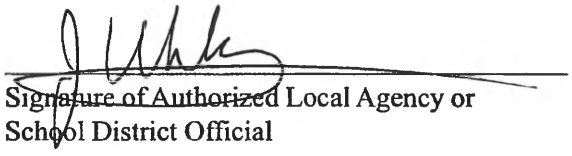
8. CLAIM CERTIFICATION

*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.

Jason Uhley, P.E.
Print or Type Name of Authorized Local Agency or School District Official

General Manager-Chief Engineer
Print or Type Title


Signature of Authorized Local Agency or School District Official

January 3, 2018
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.*

1. TEST CLAIM TITLE

San Diego Region Stormwater Permit - Test Claim of Riverside County Local Agencies

2. CLAIMANT INFORMATION

County of Riverside
Name of Local Agency or School District

Paul Angulo, CPA
Claimant Contact

Auditor-Controller
Title

4080 Lemon Street, 11th Floor
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City, State, Zip

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Telephone Number

951-955-3802
Fax Number

pangulo@rivco.org or jmarcy@rivco.org
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.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
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Los Angeles, CA 90017
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Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

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Filing Date:

RECEIVED
June 30, 2017
Commission on State Mandates

Test Claim #: 16-TC-05

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.

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8. CLAIM CERTIFICATION

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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.

Paul Angulo, CPA
Print or Type Name of Authorized Local Agency or School District Official

Auditor-Controller
Print or Type Title

Signature of Authorized Local Agency or School District Official

January 4, 2018
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.*

1. TEST CLAIM TITLE

San Diego Region Stormwater Permit - Test Claim of Riverside County Local Agencies

2. CLAIMANT INFORMATION

City of Murrieta
Name of Local Agency or School District

Kim Summers
Claimant Contact

City Manager
Title

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City, State, Zip

951-461-6010
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951-698-9885
Fax Number

KSummers@murrietaCA.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.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
Street Address

Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
June 30, 2017
Commission on State Mandates

Test Claim #: 16-TC-05

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

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☐ *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 ____

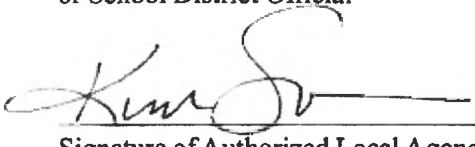
8. CLAIM CERTIFICATION

*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.

Kim Summers
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title



Signature of Authorized Local Agency or School District Official

January 7, 2018
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.*

1. TEST CLAIM TITLE

San Diego Region Stormwater Permit - Test Claim of Riverside County Local Agencies

2. CLAIMANT INFORMATION

City of Temecula
Name of Local Agency or School District

Aaron Adams
Claimant Contact

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Fax Number

aaron.adams@temecula.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.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

624 S. Grand Ave., Suite 2200
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Los Angeles, CA 90017
City, State, Zip

213-629-8788
Telephone Number

213-624-1376
Fax Number

dburhenn@burhenngest.com
E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
June 30, 2017
Commission on State Mandates

Test Claim #: 16-TC-05

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 .

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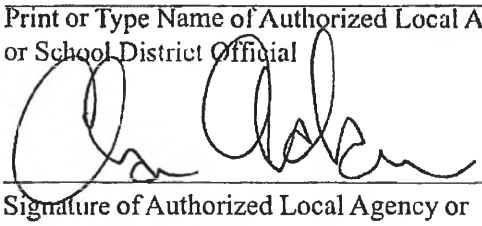
*Read, sign, and date this section and insert at the end of the test claim submission.**

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.

Aaron Adams
Print or Type Name of Authorized Local Agency or School District Official



Signature of Authorized Local Agency or School District Official

City Manager
Print or Type Title

January 3, 2018
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.*

1. TEST CLAIM TITLE

San Diego Region Stormwater Permit - Test Claim of Riverside County Local Agencies

2. CLAIMANT INFORMATION

City of Wildomar
Name of Local Agency or School District

Gary Nordquist
Claimant Contact

City Manager
Title

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City, State, Zip

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951-698-1463
Fax Number

gnordquist@cityofwildomar.org
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.

David W. Burhenn
Claimant Representative Name

Attorney
Title

Burhenn & Gest LLP
Organization

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Los Angeles, CA 90017
City, State, Zip

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dburhenn@burhenngest.com
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For CSM Use Only

Filing Date

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June 30, 2017
Commission on State Mandates

Test Claim #. 16-TC-05

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Gary Nordquist
Print or Type Name of Authorized Local Agency or School District Official

City Manager
Print or Type Title

Signature of Authorized Local Agency or School District Official

January 3, 2018
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.*

SECTION 5
NARRATIVE STATEMENT

IN SUPPORT OF JOINT TEST CLAIM OF RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ET AL. TO SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R9-2015-0100, AN ORDER AMENDING ORDER NO. R9-2013-0001, NPDES NO. CAS0109266, AS AMENDED BY ORDER NO. R9-2015-0001, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION, PROVISIONS A.4, B.2, B.3 (EXCEPT B.3.c), B.3.b.(4), B.4, B.5, B.56, D.1.c.(6), D.2.a.(2), D.3, D.4, E.3.c.(2), E.3.c.(3), E.3.d, E.5.c.(1)a, E.5.c.(2)(a), E.5.c.(3), E.5.e., E.6, F.1.a., F.1.b., F.2.a., F.2.b., F.2.c., F.3.b.(3) AND F.3.c., EFFECTIVE JANUARY 7, 2016

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I. INTRODUCTION

The Riverside County Flood Control and Water Conservation District ("District"), the County of Riverside ("County") and the Cities of Murrieta, Temecula and Wildomar (collectively, "Claimants") bring this Joint Test Claim with respect to various requirements in a regional stormwater permit adopted by the California Regional Water Quality Control Board, San Diego Region ("RWQCB"). Such requirements are unfunded state mandates for which a subvention of funds is required.

A. Adoption of Executive Order

On May 8, 2013, the RWQCB adopted Order No. R9-2013-0001 (hereinafter the "2013 Permit"), which became effective on June 27, 2013. The 2013 Permit (and as amended) acted as both a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Water Pollution Control Act ("CWA")[1] and Waste Discharge Requirements under California's Porter-Cologne Water Quality Control Act ("Porter-Cologne Act").[2] The 2013 Permit was intended to regulate stormwater discharges from municipal separate storm sewer systems ("MS4s") on a regional basis, covering MS4 operators in southwestern Riverside County, San Diego County and southern Orange County.[3] The 2013 Permit did not, however, apply to Claimants.

On February 11, 2015, the RWQCB adopted Order No. R9-2015-0001 ("First Amended Permit"), which amended the 2013 Permit primarily to include the regulation of MS4 discharges by municipalities in south Orange County. The First Amended Permit did not apply to Claimants.

On November 18, 2015, the RWQCB issued Order No. R9-2015-0100 ("Second Amended Permit"), which amended the 2013 Permit to include the regulation of discharges from Claimants' MS4s and to make other minor changes in the 2013 Permit.[4] The Second Amended Permit took effect on January 7, 2016. Claimants are subject to the Second Amended Permit. Because the 2013 Permit, the First Amended Permit and the Second Amended Permit are considered a single permit by the RWQCB, they are referred to herein, collectively, as the "Permit."

Prior to adoption of the Second Amended Permit, the RWQCB regulated MS4 discharges by Claimants through NPDES Permit No. CAS0108766, Order No. R9-2010-0016, adopted November 10, 2010 (the "2010 Permit"). Claimants, therefore, have a distinct prior MS4 permitting history from that of the County of San Diego, whose pending Test Claim, 14-TC-03, also seeks reimbursement for mandates imposed by the Permit and municipalities in south Orange

[1] 33 U.S.C. § 1251 *et seq.*

[2] Water Code § 13000 *et seq.*

[3] The San Diego Region, as described herein, consists of all lands and waters subject to the jurisdiction of the San Diego Regional Water Quality Control Board, including all of San Diego County, the southern portion of Orange County and the southwestern portion of Riverside County.

[4] The Second Amended Permit also covered the City of Menifee with respect to that portion of the city located within the San Diego Region and as to the requirements relating to the development of a Water Quality Improvement Plan ("WQIP"). Permit, Finding 29. Menifee's participation in the WQIP process is discussed in Section V.A below.

County, whose pending Test Claim, 15-TC-02, also seeks such reimbursement. Claimants had previously filed a test claim with the Commission on the 2010 Permit, *California Regional Water Quality Control Board, San Diego Region, R9-2010-0016, 11-TC-03.* Claimants seek reimbursement in this Joint Test Claim for costs mandated by the Permit that are additional to those costs mandated by the 2010 Permit.

B. Summary of State Mandates in Joint Test Claim

The RWQCB itself states that the Permit is based on both federal and California statutes and regulations, including the CWA, the Porter-Cologne Act, applicable state and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board ("State Board"), the Water Quality Control Plan for the San Diego Basin adopted by the RWQCB, the California Toxics Rule, and the California Toxics Rule Implementation Plan.[5]

The Permit contains a number of state mandates for which Claimants are entitled to reimbursement under article XIII B, section 6 of the California Constitution. This Joint Test Claim describes the activities that constitute unfunded mandates and sets forth the basis for reimbursement of the costs of such activities. These new programs and higher levels of service are described in detail below, and are summarized as follows:

A. New requirements to develop goals, strategies, schedules, panels, assessment and adaptive management strategies, and watershed coordination in the development and implementation of watershed based Water Quality Improvement Plans, requirements which also shift to Claimants the state's responsibility under the CWA to develop Total Daily Maximum Loads ("TMDLs") programs.

B. New requirements to manage critical sediment yield areas in accordance with hydromodification management standards.

C. New requirements to update the BMP Design Manual in response to increased regulation.

D. New requirements to develop and implement a residential inspection program.

E. New requirements to retrofit existing development and rehabilitate streams within areas of existing development.

F. New requirements to update the enforcement response plan in response to increased regulation.

G. New requirements to update the Jurisdictional Urban Runoff Management Plan to incorporate expanded Permit requirements.

[5] Permit Fact Sheet, F-24 to F-33.

H. New requirements concerning monitoring field screening activities.

I. New requirements related to special studies.

J. New requirements related to assessments.

K. New requirements related to alternative compliance for onsite structural BMPs.

L. New requirements related to dry weather receiving water hydromodification monitoring.

Claimants first incurred costs to implement the Permit during the fiscal year that ended on June 30, 2016.[6]

C. Statement of Interest of Claimants

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

1. Claimants allege state-mandated costs resulting from the same Executive Order, i.e., the Permit;

2. Claimants agree on all issues of the Joint Test Claim; and

3. Claimants have designated one contact person to act as a resource for information regarding the test claim in Section 3 of their Test Claim forms.

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

Claimants 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 the Claimants. This Narrative Statement sets forth specific amounts expended by Claimants as determined from the perusal 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 Claimants. Claimants respectfully reserve the right to modify such amounts when or if additional information is receive and to adduce additional evidence of costs if required in the course of the Joint Test Claim.

E. 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

[6] *See* Section 6 Declarations Submitted in Support of Joint Test Claim ("Declarations"), ¶ 7.

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."[7]

Claimants first incurred certain costs to implement the Permit during fiscal year ("FY") 2015-2016, which ended on July 1, 2016. In particular, the District first incurred costs under the Permit on January 7, 2016, the County first incurred costs on January 21, 2016 and the Cities of Murrieta, Temecula and Wildomar first incurred costs on April 20, 2016. *See* Declarations, ¶ 7. This Joint Test Claim was filed on June 30, 2017, within the next fiscal year (2016-17) after the costs were first incurred. It is thus timely.

F. Incorporation of Prior Joint Test Claim

On November 18, 2011, Claimants filed a test claim concerning the 2010 Permit, which has been entitled California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, 11-TC-03. That test claim addressed several requirements in the 2010 Permit, some of which have been carried over into the Permit. To the extent that such requirements have carried over, Claimants hereby incorporate by reference the prior test claim. To the extent the Commission in Test Claim 11-TC-03 finds those 2010 Permit requirements to be reimbursable state mandates, that ruling should continue and apply equally here.

In particular, the following 2010 Permit requirements contained in Test Claim 11-TC-03 are also found in the Permit:

- Removal of categories of non-stormwater, 2010 Permit Section B.2, found in Permit Provision E.2(a).
- Priority Development Projects and LID and Hydromodification Requirements, 2010 Permit Sections F.1.d and F.1.h, found in part in Permit Provision E.3.b.(1-2).
- Requirement to track BMP maintenance, 2010 Permit Section F.1, found in Permit Provision E.3.e.(2).
- Requirements to install Active/Passive Sediment Treatment at construction sites, 2010 Permit Section F.2.d, found in Permit Provision E.4.c.
- Unpaved road BMP requirements, 2010 Permit Section F.1.i. and F.3.a.10, found in Permit Provision E.3.a and E.5.b.(1).[8]

To the extent not identified herein, Claimants hereby incorporate all other requirements identified in Test Claim 11-TC-03 that continue to be present in the Permit.

[7] 2 Cal. Code Regs. § 1183.1(b).

[8] *See* Second Declaration of Julianna Adams ("Adams Declaration"), ¶ 7 (included in Section 6 Declarations).

II. BACKGROUND

This Joint Test Claim concerns the discretionary choices made by the RWQCB, acting under its authority granted by California law, to impose requirements under the Permit that go beyond those required by the CWA. The RWQCB has such authority because, under the CWA, a state may impose additional requirements on a permittee covered by a federal NPDES permit, such as the Permit. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613. As the California Supreme Court found in that case,

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not *"less stringent"* than the federal standard (33 U.S.C. § 1370, italics added)."

Id. at 627-28.

The source of those additional requirements is the Porter-Cologne act, which was adopted *prior* to the CWA and whose scope is broader than the CWA's. (For example, Porter-Cologne covers all "waters of the State," which are defined to include groundwater.[9]) The CWA's jurisdiction is more narrowly defined as navigable waters of the United States, and does not include groundwater.[10]

This Commission previously has found in test claims brought regarding MS4 permits issued by the Los Angeles regional board and the RWQCB that those permits contained requirements that exceeded the mandates of federal law and regulation and represented 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 Statement of Decision"); *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 Statement of Decision").

In particular, in the San Diego County Statement of Decision, the Commission held that even though an NPDES permit was issued under general federal authority under the CWA, where the regional board required "specific actions, i.e., required acts that went beyond the requirements of federal law," the "state has freely chosen to impose those requirements." In such a case, the permit provision "is not a federal mandate."[11]

The Commission's decision in the Los Angeles County test claim was reversed by the Los Angeles County Superior Court, which held that the appropriate test for determining the presence of a federal, as opposed to state, mandate was whether the provision at issue exceeded the "maximum extent practicable" ("MEP") standard in the CWA. The California Court of Appeal affirmed the Superior Court on different grounds. The California Supreme Court, in *Department*

[9] Water Code § 13050(e).

[10] *Rice v. Harken Exploration Co.* (5th Cir. 2001) 250 F.3d 264, 269.

[11] San Diego County Statement of Decision at 44-45 (citations omitted).

of Finance v. Commission on State Mandates (*"Dept. of Finance"*) (2016) 1 Cal.5th 749, in turn reversed the Court of Appeal, finding that the mandates in question were in fact state mandates. *Dept. of Finance* is discussed in Section IV.B below.

The Commission's decision regarding the San Diego County test claim was overturned by the Sacramento County Superior Court, which held that the mandates in that test claim were federal in nature and remanded the test claim to the Commission. The Superior Court's decision was in turn reversed by the Court of Appeal in *Department of Finance v. Commission on State Mandates* ("*Dept. of Finance II"*) No. C070357 (December 19, 2017) (slip op.), which held that the mandates were state mandates. *Dept. of Finance II* is discussed in Section VIII.B below.

III. MS4 PERMITTING PROGRAM

A. Federal Law Requirements

Congress first enacted the CWA in 1972 (three years after California adopted the Porter-Cologne Act) and amended it in 1987 to regulate discharges from MS4s serving a population of more than 100,000 or from systems that the United States Environmental Protection Agency ("EPA") or the state determine contribute to a violation of a water quality standard or represent a significant contribution of pollutants to waters of the United States must obtain an NPDES permit issued under the CWA.[12] The CWA establishes three basic requirements for all MS4 permits. Such permits:

(i) may be issued on a system or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[13]

In 1990, EPA promulgated regulations to implement the first phase of the MS4 permit program, setting forth which entities need to apply for permits and the information to include in

[12] 33 U.S.C. § 1342(p)(2) requires NPDES permits for the following discharges:

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

[13] 33 U.S.C. § 1342 (p)(3)(B).

the permit application. The MS4 permit application must propose management programs that the permitting authority will consider in adopting the permit, including the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[14]

EPA can suspend its permitting authority and authorize a state to administer its own permit program when that state presents "the program it proposes to establish and administer *under state law*" and demonstrates that "the *laws of such State* . . . provide adequate authority to carry out the described program."[15] NPDES permits issued under state laws must be consistent with the requirements of the suspended federal program.[16] States may, however, issue permits with requirements exceeding the requirements of the federal program.[17]

B. California Law Requirements

In 1972, California became the first state authorized to implement its own NPDES permitting program.[18] California sought authorization of its program "in order to avoid direct regulation by the federal government of persons already subject to regulation *under state law*[.]"[19] Because California is an authorized state, its permitting system is a state program operating under state law. The State Board and the nine Regional Water Quality Control Boards ("regional boards") comprise "the principal state agencies with primary responsibility for the coordination and control of water quality."[20] Such boards may issue NPDES permits that serve as "waste discharge requirements" under the Porter-Cologne Act.[21]

In assessing California's state NPDES permitting program, the California Supreme Court found that the CWA:

> reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less*

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[14] 40 C.F.R. § 122.26 (d)(2)(iv).

[15] 33 U.S.C. § 1342(b), (c)(1) (emphasis added); 40 C.F.R. § 123.1(d)(1) ("Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.").

[16] 33 U.S.C. § 1342(b).

[17] 33 U.S.C. § 1370.

[18] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1565-66.

[19] Water Code § 13370(c) (emphasis added).

[20] Water Code § 13001; *City of Burbank, supra,* 35 Cal. 4th at 619.

[21] Water Code § 13374.

> *stringent*" than the federal standard (33 U.S.C. § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority. . .[22]

The courts, the State Board and the regional boards have repeatedly acknowledged that many aspects of NPDES permits issued in California exceed the requirements of the CWA or are not otherwise required by federal law. In reviewing the 2001 MS4 Permit for San Diego County, for example, the State Board acknowledged that because NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States."[23]

In Order No. WQ 2015-0075, *In the Matter of Review of Order No. R4-2010-0176*, NPDES Permit No. CAS004001 ("Los Angeles Order"), the State Board recognized that the water boards can implement requirements "under the Porter-Cologne Act that are not compelled by federal law" and asserted that the State Board has "discretion under federal law to determine whether to require strict compliance" with water quality standards.[24] In the Los Angeles Order, the State Board thus acknowledged that Congress did not *mandate* that a state exceed the MEP requirement. California is authorized, but not required, to adopt such measures as requiring strict compliance with water quality standards when it acts as a state agency, asserting state powers.

The regional boards have also acknowledged that many of the requirements of MS4 permits exceed the requirements of federal law, and are instead based on the broader authority of the Porter-Cologne Act. For example, in a December 13, 2000 staff report regarding the RWQCB's draft 2001 San Diego County permit, the Board conceded that 40% of the draft permit requirements "exceed the federal regulations" because they were either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.

In *City of Burbank*, the California Supreme Court held that to the extent provisions in NPDES permits are not required by federal law, the State Board and regional boards are required to consider state law restrictions on agency action.[25] Explicit in the Court's decision — which held that regional board permitting decisions that go above and beyond the requirements of the CWA may only do so in accordance with Water Code Sections 13263 and 13241 — is the requirement that state-derived permit requirements are subject to state law.

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the Court of Appeal specifically considered whether permit terms in an MS4 Permit issued by the RWQCB requiring permittee compliance with numeric effluent limits were either "authorized" or "required" by the CWA. The court held that "it is well settled that the Clean Water Act authorizes states to impose water quality controls that

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[22] *City of Burbank, supra,* 35 Cal. 4th at 627-28.

[23] In Re Building Industry Association of San Diego County and Western States Petroleum Association, State Board Order WQ 2001-15.

[24] *Id.* at 11.

[25] 35 Cal.4th at 618.

are more stringent than are required under federal law" (*id.* at 881) and that the RWQCB had the "discretion" to impose certain permit terms that were not "required" by the CWA.[26]

IV. STATE MANDATES LAW

A. Overview

Article XIII B, section 6 of the California Constitution requires the State to provide a subvention of funds to local agencies any time the Legislature or a state agency requires the local agency to implement a new program or provide a higher level of service under an existing program. Article XIII B, section 6 states in relevant part:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service . . .

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."[27] The section "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues."[28] In order to implement section 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.[29] Under this scheme, the Legislature defined "Costs mandated by the state" to 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.[30]

Govt. Code § 17556 identifies seven exceptions to the rule requiring reimbursement for state mandated costs:

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[26] *Id.* at 886 ("That provision gives the EPA *discretion* to determine what pollutant controls are appropriate"), *citing Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-67 (emphasis added).

[27] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[28] *County of Fresno*, 53 Cal.3d at 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-85.

[29] 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").

[30] Govt. Code § 17514.

(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 . . . requesting the legislative authority. . . .

(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, 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.

When the state usurps a local agency's discretion as to how to implement a program, even where that program is required by federal law, and mandates a specific course of action, such a mandate is a state mandate. This principle was expressly recognized in *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3^{d} 155, where the court found that a state executive order requiring school districts to measure and address racial segregation in local schools constituted a reimbursable mandate. Similarly, when the state freely chooses to shift a federal obligation onto a local agency, rather than perform that obligation itself, a state mandate is created. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-94.

The Commission's decisions on other municipal NPDES permits have recognized this principle. In the San Diego County Statement of Decision, the Commission addressed this issue in the context of the United States Supreme Court's decision in *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700. The Commission held:

> Staff agrees with claimants about the applicability of the P.U.D. case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. *Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it.* This was not addressed in the P.U.D. decision.
>
> Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation." As in *Long Beach Unified School Dist. v. State of California*, the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen to impose these requirements. Thus, staff finds that part D.1.g. of the permit is not a federal mandate.[31]

As noted above, the Commission already has determined in the Los Angeles and San Diego County Statements of Decision that provisions in MS4 permits issued by those regional boards represent unfunded state mandates for which a subvention of funds is required. While existing mandates law supported the decision of the Commission in those test claims, the decision of the California Supreme Court in *Dept. of Finance* provides further clear and definitive guidance to the Commission in considering whether mandates are state or federal in nature.

B. In *Dept. of Finance,* the California Supreme Court Established Definitive Guidance as to How the Commission Must Assess MS4 Permit Requirements as State or Federal Mandates

In *Dept. of Finance,* the Court found that the requirements in the Los Angeles County MS4 permit to install trash receptacles at transit stops and to inspect various sites and facilities were state, not federal, mandates. In so doing, the Supreme Court set forth this test:

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

1 Cal. 5th at 765.

Dept. of Finance involved a challenge to the Commission's determination in the Los Angeles County Statement of Decision that certain provisions in the LA County MS4 permit

[31] San Diego County Statement of Decision at 45.

constituted state mandates and, concerning a provision requiring the installation and maintenance of trash receptacles at transit stops, required a subvention of state funds.

Significantly, the Supreme Court's analysis of the issues validated the process by which the Commission itself evaluated the issues in the Los Angeles County Statement of Decision, which involved a thorough examination of federal statutory or regulatory authority for the MS4 permit provisions at issue, the text of previous permits, evidence of other permits issued by the federal government and evidence from the permit development process. In affirming the Commission, the Court explicitly rejected an argument which has been repeatedly raised by the State in both test claim comments and court filings: that the provisions were simply expressions of the MEP standard required of stormwater permittees in the CWA, and thus represented purely federal mandated requirements, exempt from consideration as state mandates pursuant to Govt. Code § 17756(c).

1. The Supreme Court Applied Mandates Case Law in Reaching Its Decision

Key to the Supreme Court's decision was its application of existing mandate jurisprudence in determining whether an MS4 permit provision was a federal, as opposed to state, mandate. The Commission must also apply those key cases in its determination of this Joint Test Claim.

The question posed by the Court was this:

> [H]ow to apply [the federal mandate] exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard.

1 Cal. 5th at 763.

To answer that question, the Court considered three non-stormwater permit cases, starting with *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51. In *City of Sacramento*, the Court found that a state law requiring local governments to participate in the State's unemployment insurance program was in fact compelled by federal law, since the failure to do so would result in the loss of federal subsidies and federal tax credits for California corporations. The Court found that because of the "certain and severe federal penalties" that would accrue, the State was left "*without discretion"* (italics added by Supreme Court) and thus the State "'acted in response to a federal "mandate."'" *Dept. of Finance*, 1 Cal. 5th at 764, *quoting City of Sacramento*, 50 Cal. 3d at 74.

The Court next reviewed *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, in which the county alleged that a state requirement to provide funding for defense experts for indigent criminal defendants was a state mandate. The court in that case disagreed, finding that because this requirement reflected a binding Supreme Court precedent

interpreting the federal Constitution (*Gideon v. Wainwright* (1963) 372 U.S. 335), even absent the state law, the county still would have been bound to fund defense experts. Thus, the legislation "merely codified an existing federal mandate." 1 Cal. 5th at 764.

The Court finally considered *Hayes, supra*, where a state plan adopted under a federal special education law required local school districts to provide disabled children with certain educational opportunities. While the state argued that the plan was federally mandated, the *Hayes* court found that this was merely the "starting point" of its analysis, which was whether the "'manner of implementation of the federal program was left to the *true discretion* of the state.'" *Id.*. at 765, *quoting Hayes* at 1593 (emphasis added by Supreme Court). *Hayes* held that if the State "'freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.'" 1 Cal. 5th at 765, quoting *Hayes* at 1594.

From these cases, the Supreme Court distilled the test set forth above, holding that "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." *Id.* at 765. The Court also held that it is the State, not the test claimants, which has the burden to show that a challenged permit condition was mandated by federal law. *Id.* at 769.

Thus, the Commission must employ this test, and allocate to the State the burden of proving that the provision in question represents a federal, as opposed to state, mandate.

2. The Supreme Court Examined the Nature of Clean Water Act MS4 Permitting and Determined That Water Boards Have Great Discretion in Establishing Permit Requirements

In *Dept. of Finance,* the Supreme Court reviewed the interplay between the federal CWA and California law set forth in the Water Code and determined that with respect to the adoption of MS4 permits, the State had chosen to administer its own permitting program to implement CWA requirements. 1 Cal. 5th at 767-69 (*citing* Water Code § 13370(d)). Thus, an action involving a permit issued under the CWA was different from a situation where the State was compelled to administer its own permitting system.

The Court (at 1 Cal. 5th 767-68) found that the State's permitting authority under the CWA was similar to that in *Division of Occupational Safety & Health v. State Bd. of Control* (1987) 189 Cal.App.3d 794. There, the State had the choice of being covered by federal occupational safety and health ("OSHA") requirements or adopting its own OSHA program, which had to meet federal minimums and had to extend its standards to State and local employees. In that case, state OSHA requirements called for three-person firefighting teams instead of the two-person teams allowed under the federal program. The court found that because the State had freely exercised its option to adopt a state OSHA program, and was not compelled to do so by federal law, the three-person requirement was a state mandate.

The Supreme Court also distinguished the broad discretion provided to the State under the federal CWA stormwater permitting regulations with the facts in *City of Sacramento, supra,* where the State risked the loss of subsidies and tax credits if it failed to comply with federal law:

> Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra* . . . the RWQCB had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

Id. at 768 (citations omitted).

The Court held that the EPA regulations "gave the board discretion to determine which specific controls were necessary to meet the [MEP] standard." *Id.* at 768-69.

3. The Court Rejected the State's Argument That the Commission Must Defer to the Water Board's Determination of What Constitutes a Federal Mandate

The Supreme Court rejected another of the State's key arguments, that the Commission should defer to a regional board's determination of what in a stormwater permit constitutes a federal, versus state, mandate. *Id.*

The Court first addressed whether the Commission had ignored "the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and RWQCBs in deciding what conditions were necessary to comply with the CWA" and whether the Los Angeles County MS4 permit "itself is the best indication of what requirements *would have been imposed* by the EPA if the RWQCB had not done so," such that the Commission "should have deferred to the board's determination of what conditions federal law required." *Id.* at 768 (emphasis in original).

The Court flatly rejected these arguments. It found that in issuing the permit, "the RWQCB was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* The Court (at 1 Cal. 5th 768) cited as authority *City of Burbank, supra,* where it held that a federal NPDES permit issued by a water board (such as the Permit) may contain State-imposed conditions that are more stringent than federal law requirements.[32]

The Court next addressed the Water Boards' argument that the Commission should have deferred to the regional board's conclusion that the challenged requirements in the Los Angeles County MS4 permit were federally mandated. Finding that this determination "is largely a question of law," the Court distinguished the question of the board's authority to impose specific permit conditions from the question of who would pay for such conditions. In the former situation, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." 1 Cal. 5th at 768.

[32] 35 Cal. 4th at 627-28.

But, the Court held,

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

Id. at 769.

The Court held that "the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite." *Id.* In placing that burden on the State, the Court held that because article XIII B, section 6 established a "general rule requiring reimbursement of all state-mandated costs," a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code § 17556(c), "bears the burden of demonstrating that it applies." *Id.*

The Supreme Court concluded that the State's proposed rule of "requiring the Commission to defer to the RWQCB" would "leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission." *Id.* In doing so, the Court looked to the policies underlying article XIII B, section 6, and concluded that the Constitution "would be undermined if the Commission were required to defer to the RWQCB on the federal mandate question." *Id.*

The Court noted that the "central purpose" of article XIII B is to rein in local government spending (citing *City of Sacramento, supra,* 50 Cal. 3d at 58-59) and that the purpose of section 6 "is to protect local governments from state attempts *to impose or shift the costs* of new programs or increased levels of service by entitling local governments to reimbursement." *Id.,* citing *County of San Diego v. State of California* (1997) 15 Cal. 4th 68, 81 (emphasis supplied). Requiring the State to establish that a permit requirement is federally mandated, the Court found, "serves those purposes." *Id.*

4. Applying Its Test, the Court Upheld the Commission's Determination that Inspection and Trash Receptacle Requirements in the Los Angeles County MS4 Permit Were State Mandates

Applying the "federally compelled" test, the Supreme Court reviewed and upheld the Commission's determination that the inspection and trash receptacle requirements in the Los Angeles County MS4 Permit were state mandates.

a. The Inspection Requirements

The test claimants had argued in *Dept. of Finance* that a permit requirement that MS4 operators inspect certain industrial facilities and construction sites was a state mandate. The Commission agreed and the Supreme Court upheld that determination, citing the grounds employed by the Commission.

First, the Court noted that there was no requirement in the CWA, including the MEP provision, which "expressly required the Operators to inspect these particular facilities or construction sites." *Id.* at 770. While the CWA made no mention of inspections, the implementing federal regulations required inspections of certain industrial facilities and construction sites (not at issue at the test claim) but did not mention commercial facility inspections "at all." *Id.* Second, the Court agreed with the Appellants that state law gave the RWQCB itself "an overarching mandate" to inspect the facilities and sites. *Id.*

The Court further found that with respect to the requirement of the operators to inspect facilities covered by general industrial and general construction stormwater permits, "the State Board had placed responsibility for inspecting facilities and sites on the *RWQCB"* and that in fact the State Board was authorized to charge a fee for permittees, part of which "was earmarked to pay the RWQCB for 'inspection and regulatory compliance issues.'" *Id.* The Court cited evidence before the Commission that the RWQCB had offered to pay the County to inspect industrial facilities, an offer that made no sense "if federal law required the County to inspect those facilities." *Id.*

The Court, citing *Hayes, supra,* found that the RWQCB had primary responsibility for inspecting the facilities and sites and "shifted that responsibility to the Operators by imposing these Permit conditions." *Id.* at 771. The Court rejected the State's argument that the inspections were federally mandated "because the CWA required the RWQCB to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required." *Id.* The Court held that the mere fact that federal regulations "contemplated some form of inspections, however, does not mean that federal law required *the scope and detail* of inspections required by the Permit conditions." *Id.* (emphasis supplied).

b. The Trash Receptacle Requirement

The Supreme Court also upheld the Commission's determination that a requirement for certain Los Angeles County MS4 permittees to place trash receptacles at transit stops represented a state mandate.

The Court first found, as did the Commission, that while MS4 operators were required to "include a description of practices and procedures in their permit application" (*citing* 40 CFR § 122.26(d)(2)(iv)), the permitting agency had "discretion whether to make those practices conditions of the permit." *Id.* at 771-72. As the Commission found, the State cited no CWA regulation which required trash receptacles at transit stops, and there was evidence that EPA-issued permits in other cities did not require trash receptacles at transit stops. *Id.* at 772. This latter fact,

that "the EPA itself had issued permits in other cities, but did not include the trash receptacle condition," in the Court's view, "undermines the argument that the requirement was federally mandated." *Id.*

Claimants respectfully submit that *Dept. of Finance* answers the question of whether the mandates identified in this Joint Test Claim are federal or state in nature. As set forth below, each requirement represents the "true choice" of the RWQCB to impose the conditions at issue and to specify the means of compliance with general federal requirements. In some cases, the requirements are not even linked to federal law or regulation but rather to the RWQCB's concurrent state law powers under the Porter-Cologne Act. Nowhere in the Permit is there any RWQCB finding that the specific requirements at issue in this Joint Test Claim were determined to be the only way in which the MEP standard could be achieved. As the Supreme Court held, a RWQCB cannot simply argue that the imposition of such requirements represents the board's imposition of the federal MEP standard, thus rendering those requirements as federal.

The programs in the Permit identified in this Joint Test Claim are not mandated by the federal CWA or its implementing regulations. Under *Dept. of Finance* and other controlling precedent, these programs are state mandates. The programs also are unique to local government entities such as Claimants. The identified programs in the Permit therefore represent a state mandate for which Claimants are entitled to a subvention of funds pursuant to article XIII B, section 6 of the California Constitution.

V. STATE MANDATED PROGRAMS AND ACTIVITIES IN PERMIT

The requirements set forth in this Narrative Statement are "programs" within the meaning of article XIII B, section 6 in that they require Claimants to provide certain services to the public. The requirements are unique to local agencies because they arise from the operation of a municipal stormwater NPDES permit, which is issued only to municipalities and which require activities that are not required of private non-governmental dischargers. These requirements include the development and amendment of government planning documents, the inspection of property, the development and construction of public works projects and other purely governmental functions.[33]

The following programs and activities and higher levels of service are at issue in this Joint Test Claim:[34]

[33] Orders issued by regional boards pursuant to Division 7 of the Water Code (commencing at section 13000) are "executive orders." *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920.

[34] This Joint Test Claim specifically incorporates by reference the test claim filed by Claimants concerning requirements in the 2010 Permit, No. 11-TC-03.

A. Water Quality Improvement Plan Requirements, Provisions B, F and A.4

1. Permit Requirements

Provisions B and F of the Permit require Claimants to develop a Water Quality Improvement Plan ("WQIP") for each of the Watershed Management Areas ("WMA") identified in Table B-1 of the Permit, including the Santa Margarita WMA at issue in this Joint Test Claim.[35] The permittees are required to develop, implement, update and provide annual reports for WQIPs for each WMA. Provision B sets forth the substantive requirements for the development and content of the WQIPs for each WMA, while Provision F sets forth requirements for public participation, submittal, review and modification of the WQIPs. Provision A.4 sets forth additional requirements for amendment of the WQIP upon continued exceedances of water quality standards.[36]

Relevant portions of Provisions B.2 require Claimants to:

- identify the water quality priorities within each WMA that will be addressed by the WQIP.[37]

- consider at a minimum nine factors concerning receiving waters, receiving waters listed as impaired on the CWA section 303(d) list, TMDLs adopted by the RWQCB, receiving waters designated as sensitive or highly valued, the receiving water limitations in the Permit (which include numeric water quality standards ("WQS")), historical versus current water quality conditions, available monitoring data, evidence of erosional impacts, evidence of impacts to chemical, physical and biological integrity of receiving waters and potential improvements in overall condition of WMA that can be achieved.[38]

- consider at a minimum six factors (Permit discharge prohibitions and effluent limitations (including numeric WQS), available monitoring data, locations of MS4 outfalls that discharge to receiving waters, locations of outfalls that persistently discharge non-stormwater, locations of outfalls that are known to discharge pollutants in stormwater that cause or contribute to impacts on receiving water beneficial uses and the potential improvements in the quality of MS4 discharges that can be achieved.[39]

- use information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions ("PWQCs") as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. For each PWQC, permittees must identify the

[35] Permit Provision B.1.

[36] Due to their length, the relevant sections of Provisions A, B, and F are set forth in Attachment 1 hereto.

[37] Provision B.2.a.

[38] Provision B.2.a.

[39] Provision B.2.b.

beneficial use associated with the PWQC, the geographic extent of the PWQC within the WMA, whether the PWQC is present in dry weather and/or wet weather, the permittees whose MS4 discharges cause or contribute to the PWQC and an assessment of the adequacy of and data gaps causing or contributing to the PWQC, including consideration of special and temporal variation.[40]

- identify the highest PWQCs to be addressed by the WQIP, and provide a rationale for selecting a subset of the PWQCs identified pursuant to Provision B.2.c.(1) as the highest priorities.[41]

- identify and prioritize known and suspected sources of stormwater and non-stormwater pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest PWQCs identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest PWQCs identified for Provision B.2.c must consider pollutant generating areas, locations of the permittees' MS4, other known and suspected sources of non-stormwater or pollutants in stormwater (including from sources not within the control of the permittees), review of available data and the adequacy of available data.[42]

- evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the WMA. Potential water quality improvement strategies that may be implemented within the WMA must include structural and non-structural Best Management Practices ("BMPs"), incentives and other programs, retrofitting projects and stream, channel and/or habitat rehabilitation projects.[43]

Permit Provision B.3 provides in relevant part that Claimants must:

- identify and develop specific water quality improvement goals and strategies to address the highest PWQCs identified within a WMA. The water quality improvement goals and strategies must address the highest PWQCs by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.[44]

- develop and incorporate numeric goals into the WQIP to support WQIP implementation and measure reasonable progress towards addressing the highest PWQCs identified under Provision B.2.c. The permittees must establish and

[40] Provision B.2.c.(1).

[41] Provision B.2.c.(2).

[42] Provision B.2.d.(1)-(5).

[43] Provision B.2.e.

[44] Provision B.3.

incorporate both final and interim numeric goals in the WQIP.[45]

- develop and incorporate schedules for achieving the numeric goals into the WQIP. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The permittees must incorporate the schedules for achieving the numeric goals into the WQIP based on final and interim dates for achieving final and interim numeric goals based on eight considerations specified in Provision B.3.a.(2).(a)(i)-(iv) and Provision B.3.a.(2).(b)(i)-(iv).[46]

- identify the strategies that will be implemented in each WMA, including jurisdictional strategies (for each permittee),[47] WMA strategies implemented on a watershed basis[48] and schedules for implementing those strategies.[49]

Provision B.4 requires Claimants to:

- develop and incorporate an integrated monitoring and assessment program into the WQIP that assesses the progress toward achieving numeric goals and schedules, addressing the highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP, including the monitoring and assessment requirements of Provision D and any requirements relating to TMDLs.[50]

Provision B.5 requires Claimants to implement the iterative approach pursuant to Provision A.4 to adapt the WQIP, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of goals, strategies and schedules and adaption of the monitoring and assessment program.[51]

Provision B.6 requires Claimants to submit and commence implementation of the WQIP in accordance with Provision F.1 and to submit proposed updates to the WQIP in accordance with Provision F.2.c.

Provision F.1.a, concerning public participation, requires Claimants to:

- implement a public participation process, including public and notice and scheduling for public participation and comment on the WQIP.[52]

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[45] Provision B.3.a.(1).

[46] Provision B.3.a.(2).

[47] Provision B.3.b.(1).

[48] Provision B.3.b.(2).

[49] Provision B.3.b(3).

[50] Provision B.4.

[51] Provision B.5.

[52] Provision F.1.a.(1)(a).

- form a Water Quality Improvement Consultation Panel, consisting of various representatives, to provide recommendations during WQIP development.[53]

- coordinate schedules for participation to provide the public time and opportunity to participate during development of the WQIP.[54]

- solicit data, information and recommendations in the development and identification of PWQCs and potential water quality improvement strategies for the WMA.[55]

- review with the Consultation Panel the PWQCs the permittees plan on including in the WQIP, consider revisions to the PWQCs based on recommendations from the Panel and including the improvement strategies identified by the public and Panel when submitting the PWQCs to the RWQCB.[56]

- submit the WQIP within 6-12 months of commencement of coverage under the Order. Following release of the WQIP for comment, the permittees must consider revisions to the PWQCs and potential improvement strategies based on comments received.[57]

Provision F.1.b requires Claimants to:

- submit a complete WQIP to the RWQCB for review and public comment within 24 months of coverage under the Permit and thereafter consider revisions to the WQIP based on written comments received.[58]

- submit to the RWQCB any revisions to the WQIP within 60 days of the end of the public comment period and, upon receiving written notification of acceptance from the RWQCB, commence implementation of the WQIP in accordance with the water quality improvement strategies and schedules.[59]

- during implementation of the WQIP, correct deficiencies in the plan identified by the RWQCB in the required updates, and make the WQIP available on the Regional Clearinghouse required by Provision F.4 within 30 days of notice of acceptance.[60]

With respect to updates of the WQIP, Provision F.2.c. requires Claimants to:

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[53] Provision F.1.a.(1)b.

[54] Provision F.1.a.(1)(c)

[55] Provision F.1.a.(2)(a).

[56] Provisions F.1.a.(2)(b-d).

[57] Provisions F1.a.(2)(e-f).

[58] Provision F.1.b.(1-2).

[59] Provision F.1.b.(3), (5).

[60] Provision F.1.b.(6-7).

- develop and implement a public participation process to obtain data, information and recommendations for updating the WQIP, including publicly available and noticed schedule of opportunities for public participation and comments during updates to the WQIP and consult with the Consultation Panel on proposed updates to the WQIP and consider the Panel's recommendations in finalizing the proposed updates.[61]

- submit to the RWQCB proposed WQIP updates and supporting rationale and recommendations received from the public and the Consultation Panel and supporting rationale either in WQIP Annual reports or as part of a Report of Waste Discharge.[62]

- revise the updates as requested by the RWQCB Executive Officer and make the updated WQIP available on the Regional Clearinghouse.[63]

- following approval of a TMDL Basin Plan amendment with wasteload allocations ("WLAs") update the WQIP to incorporate the requirements of the TMDL WLAs.[64]

Provision F.3.b.(3) addresses annual WQIP reporting, and requires Claimants to:

- Submit a WQIP Annual Report by January 31 of the following year, broken into two segments, one for jurisdictional runoff management programs ("JRMPs") and one for monitoring, and to make such reports available on the Regional Clearinghouse.[65]

- Ensure that the WQIP Annual Report includes: receiving water and MS4 outfall discharge monitoring data, summarized and presented in tabular and graphical form; the progress of special studies required by Provision D.3, with the findings, interpretations and conclusions of the study or phase of the study upon its completion; findings, observations and conclusions from the assessments of receiving water and MS4 discharges required by Provision D.4; the progress of implementing the WQIP, including progress toward achieving interim and final numeric goals for the highest PWQCs for the WMA; water quality improvement strategies that were being implemented and/or no longer being implemented; water quality improvement strategies planned for implementation during the next reporting period; previous modifications or updates incorporated into the WQIP or permittee JRMPs and implemented in the WMA; and proposed modifications or updates to the WQIP or the JRMPs.[66]

- Ensure that the Annual Report include a certified JRMP Annual Report Form for each permittee in the WMA; provide to the RWQCB upon request any data or

[61] Provision F.2.c.(1)(a-b).

[62] Provision F.2.c.(1)(c).

[63] Provision F.2.c.(1)(d-e).

[64] Provision F.2.c.(2).

[65] Provision F.3.b.(3).

[66] Provision F.3.b.(3)(a-d).

documentation utilized in developing the WQIP Annual Report; and upload monitoring data utilized in developing the Annual Report into the California Environmental Data Exchange Network and monitoring and assessment data used in developing the Annual Report and made available on the Regional Clearinghouse.[67]

Provision F.3.c requires Claimants to submit a Regional Monitoring and Assessment Report ("RMAR") no later than 180 days prior to the expiration of the Permit. In so doing, Claimants must consider receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2 and the findings, interpretations and conclusions from the assessments required pursuant to Provision D.4, and submit a report assessing the following:

- The beneficial uses of receiving waters within the San Diego Region that are supported and not adversely affected by the permittees' MS4 discharges;
- The beneficial uses of these receiving waters that are adversely impacted by the discharges;
- Progress towards protecting beneficial uses in the receiving waters from the permittees' discharges;
- Pollutants or conditions of emerging concern that may impact beneficial uses in the receiving waters.

Additionally, the RMAR must include recommendations for improving the implementation and assessment of the WQIPs and JRMPs and provide any data or documentation utilized in developing the RMAR upon request by the RWQCB and make available monitoring and assessment data on the Regional Clearinghouse.

Provision A.4 requires the updating and modification of the WQIP should exceedances of water quality standards persist in receiving waters. The WQIP must address strategies to achieve compliance with receiving water limitations and effluent limitations, including "[best management practices], "retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs" and other new programs and projects that will reduce or eliminate pollutants to prevent further exceedances of water quality standards.

Provision A.4 (including A.4.a) concern compliance with discharge prohibitions and receiving water limitations (including the achievement of numeric water quality standards) and require Claimants to do the following:

- Permittees are required to achieve compliance with discharge prohibitions and receiving water limitations (including achievement of numeric water quality standards) in Provisions A.1.a, A.1.c and A.2.a.through implementation of Permit requirements, including the WQIP, which must be designed and adapted to "ultimately achieve compliance with discharge prohibitions and receiving water limitations in those

[67] Provision F.3.b(3)(e-f).

provisions. If exceedances of WQS persist in receiving waters, notwithstanding implementation of the Permit:[68]

> If the exceedance is of a WQS is addressed by a WQIP, the permittees must implement the Plan and update it as necessary. If it is an exceedance not addressed by the WQIP, the permittees must update the WQIP to set forth water quality improvement strategies that are effect and will continue to be implemented, additional BMPs or other controls that will reduce or eliminate pollutants or conditions causing or contributing to the exceedance of water quality standards; updates to the schedule for implementation of existing and additional strategies and updates to monitoring and assessment program to track progress towards achieving compliance.[69]

- If the RWQCB requires additional modifications of the WQIP, affected permittees must submit them within 90 days or as otherwise directed and if the modified WQIP is approved, the applicable permittees must revise JRMP documents to incorporate the modified strategies, schedules and monitoring requirements. Each affected permittee must then implement the updated WQIP.[70]

2. These Permit Requirements Are a State Mandate

The WQIP implementation, modification, updating, public participation, reporting and iterative process function in the event of an exceedance of a WQS provisions described above are state, not federal, mandates.

First, the federal regulation cited by the RWQCB as support of these requirements do not specify the "scope and detail" of the Permit requirements. *Dept. of Finance*, 1 Cal. 5th at 771. No federal statute or regulation requires the activities set forth in the above-cited provisions of the Permit. The Permit Fact Sheet[71] cites as authority 40 C.F.R. § 122.26(d)(2)(iv).[72] This regulation provides that a proposed management program should be set forth in a permittee's original application for a MS4 permit. The proposed management program must be based on a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from MS4 systems; a description of a program to detect and remove illicit discharges and the improper disposal into the storm sewer; a description of a program to monitor and control pollutants and discharges to MS4 systems from municipal landfills,

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[68] Provision A.4 and A.4.a.

[69] Provision A.4.a.(2)(a-d).

[70] Provision A.4.a.(3-5).

[71] The Permit Fact Sheet (Attachment F to the Permit) "sets forth the principal facts and the significant factual, legal, methodological and policy questions that the [RWQCB] considered in preparing [the Permit]." Fact Sheet at F-3. Fact Sheets are required by federal regulation to accompany various permits issued under federal law, including NPDES permits. 40 C.F.R. § 124.8.

[72] Permit Fact Sheet, F-48.

hazardous waste treatment, disposal and recovery facilities and certain other designated facilities; and a description of a program to control pollutants in stormwater from construction sites.[73]

This regulation, however, applies to an individual permittee's permit application. Nowhere does it require permittees to join together and identify water quality priorities, implement a public participation process, or develop the extensive plans and strategies required in the WQIPs. Nowhere does it require such plans to be reviewed and annually updated. Nowhere does it require the plan to be designed to achieve water quality standards.

Indeed, the Commission has already found programs less complex than those required for WQIPs to be state mandates. In the San Diego County Statement of Decision, the Commission considered whether requirements for a "watershed urban runoff program" constituted a state mandate. This urban runoff program was similar in concept to, but far less prescriptive than, the WQIP requirements. The Commission found that federal regulations did not require the urban runoff program, stating:

> As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional watershed or other basis. These requirements "exceed the mandate in federal law or regulation." As in *Long Beach Unified School District v. State of California*, the permit requires specific actions, i.e. required acts that go beyond the requirements of federal law. Adopting these permit provisions, the State has freely chosen to impose these requirements.[74]

That same analysis applies here. The proposed management program described in 40 C.F.R. § 122.26(d)(iv), even were it applicable to more than just an initial permit application, does not require the preparation of regional plans with the detailed, collaborative and prescriptive constituents required of Claimants in the Permit's WQIP provision. These Permit provisions require actions that go beyond the requirements of federal law and are thus state, not federal mandates.[75]

Extensive stormwater permit assessment and reporting requirements, like those set forth above, have been determined to be a state mandate by the Commission. In the San Diego County Statement of Decision, the Commission found the requirement to devise regional and watershed urban runoff management programs as well as program effectiveness assessment requirements (similar to those cited above in the Permit) to be state mandates.[76] Among the programs so identified were Jurisdictional and Watershed Program effectiveness assessments, Long-Term Effectiveness Assessments and other reporting programs similar in concept (but far less detailed in prescription) to the Permit requirements at issue in this Joint Test Claim. The detailed reporting

[73] 40 C.F.R. § 122.26(d)(2)(iv)(A), (B), (C), and (D).

[74] San Diego County Statement of Decision at 74 (footnote omitted).

[75] *Long Beach Unified School District*, *supra*, 225 Cal.App.3d at 173.

[76] San Diego County Statement of Decision at 72-83, 83-93.

requirements in the Permit set forth above are conceptually no different than those reviewed by the Commission in that test claim and found to be state mandates.

And, as discussed in Section VIII.B below, the Court of Appeal in *Dept. of Finance II* recently affirmed in full the Commission's findings in the San Diego County Statement of Decision that these requirements were state mandates. The court held that the permit application requirements set forth in 40 C.F.R. § 122.26 did not require these provisions in the San Diego County permit and, therefore, the program requirements at issue in the 2007 San Diego County Test Claim were state mandates. *Dept. of Finance II*, slip op. at 29-31.

Second, the Permit requires WQIPs to be designed to ultimately achieve compliance with the Permit's receiving water limitations and in particular the prohibition against discharges causing or contributing to exceedances of WQS (*see* Provision A.4). As discussed above, federal law does not require MS4 discharges to comply with WQS but, pursuant to 33 U.S.C § 1342(p)(3)(B)(iii), only requires MS4 permits to contain controls that reduce pollutants to the MEP. The CWA neither requires Claimants' discharges to comply with WQS nor requires Claimants to prepare a plan to achieve such a result.

The requirement for permittees to attain WQS, which is the end goal of the WQIP and the WQIP process set forth in Provisions B and F, is a discretionary decision by the RWQCB not required by federal law. Nothing in the CWA, its regulations, or case law requires MS4 permittees to strictly comply with WQS. The CWA's requirement that pollutants in municipal stormwater discharges are to be controlled to the "maximum extent practicable" rather than through a strict numeric limit reflects the fact that, unlike industrial dischargers, municipalities cannot control the volume, frequency, duration or composition of stormwater pollutants or the storms that convey them. Congress recognized these facts when it adopted the MEP standard for MS4 permits, rather than the numeric standard applicable to industrial dischargers.

The United States Court of Appeals for the Ninth Circuit noted EPA's BMP-based approach in *Defenders of Wildlife*, stating:

> [T]he EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. *The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits* . . . to provide for the attainment of Water Quality Standards." The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion.[77]

[77] *Defenders of Wildlife*, 191 F.3d at 1166-67 (emphasis added).

Courts in other states have also concluded that federal law does not require the imposition of numeric effluent limits in MS4 permits tied to state-adopted WQS.[78]

As noted, in the Los Angeles Order, the State Board itself concluded that federal law does not mandate strict compliance with numeric WQS in MS4 permits, finding that such compliance is discretionary, not mandatory:

> the State Water Board has *discretion* under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, [and] the State Water Board may also utilize the *flexibility* under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.[79]

Because federal law does not require strict compliance with WQS or numeric effluent limits such as those imposed on Claimants in the Permit, such requirements are imposed under color of state, not federal, law.

Third, under *Hayes,* the WQIP and related provisions represent a state mandate because their purpose is to shift to Claimants the RWQCB's responsibility to develop TMDL programs. The test for determining whether the "new program or higher level of service" is a state mandate is whether the state has a "true choice" in the matter of implementation, *i.e.*, whether the state freely chose to impose that program on local municipalities as opposed to performing the obligation itself.[80]

TMDLs are designed to improve water quality waterbodies listed as "impaired" pursuant to Section 303(d) of the CWA. The federal CWA regulations require *states* to assess these waterbodies with respect to the pollutants which impair their ability to meet assigned beneficial uses, including the amount of the total load of such pollutants which the waterbody can receive and still meet water quality standards and to develop allocations, including "waste load allocations" for "point sources," such as MS4s.[81] Following this effort, state law requires the regional boards to develop a plan to implement the TMDL.[82]

The WQIP requirements in the Permit shift that process of assessing waterbodies, determining pollutant loads allocable to different dischargers and developing implementation plans to Claimants. These provisions require Claimants to identify PWQCs in the watersheds, including assessment of receiving water conditions, impacts from MS4 discharges and the

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[78] *See, e.g., Dept. of the Environment v. Anacostia Riverkeeper* (2016) 447 Md. 88, 134 A.2d 892. In that case the Maryland Court of Appeals, the state's highest appellate court, stated: "[W]e note, importantly, that *MS4s are not subject* to the requirement of imposing effluent limitations 'necessary to meet water quality standards.'" 134 A.2d at 900 (emphasis in original).

[79] Los Angeles Order, *supra*, at 11 (emphasis added).

[80] *Hayes*, 11 Cal.App.4th at 1593-94. *See also Dept. of Finance, supra,* 1 Cal. 5th at 765.

[81] *See generally* 40 C.F.R. § 130.7(b).

[82] Water Code § 13241.

identification of potential water quality improvement strategies, require Claimants to develop goals and schedules, including final numeric goals as well as interim dates for interim goals, and require the development of jurisdictional strategies and WMA strategies. These provisions shift the RWQCB's responsibility to develop TMDLs for impaired waterbodies to Claimants.

This shift was explicitly recognized by the RWQCB in its adoption of the Permit. The Board noted in the Permit Fact Sheet that implementation of the WQIPs in the cases of watersheds with waterbodies already affected by pollutants may allow the Board to re-evaluate the status of such waterbodies and, potentially, move the waterbodies from the 303(d) list (which require TMDL implementation) to a less stringent categorization.[83] Although, as the RWQCB has asserted, WQIP implementation may have advantages over TMDLs from a policy standpoint, that is not the issue before the Commission. The issue is whether the RWQCB has shifted its federally imposed TMDL responsibility to the Permittees, thus creating a state mandate.[84]

Additionally, elements required in the development of the WQIP require Claimants to go beyond the four corners of the Permit, which applies to discharges from each Claimants' MS4 to waters of the United States. For example, in identifying sources of pollutants and/or stressors that contribute to PWQCs, Claimants are required in Provision B.2.d to consider "[o]ther known and suspected sources of non-storm water and non-storm water discharged in receiving waters within the [WMA], including . . . (a) Other MS4 outfalls (e.g., Phase II Municipal and Caltrans), (b) Other NPDES permitted discharges, (c) Any other discharges that may be considered point sources (e.g., private outfalls), and "any other discharges that may be considered non-point sources (e.g., agriculture, wildlife or other natural sources."[85] This is further evidence on the intent of the RWQCB to shift TMDL development from itself to Claimants.

The mandates set forth above are state, not federal.

3. These Are New Requirements or Require Higher Levels of Service

Previous permits covering Claimants did not require them to develop, implement, update, and provide annual reports on a WQIP for each of the WMAs. Section G of the 2010 Permit required Claimants to collaborate in the development and implementation of a Watershed Water Quality Work Plan ("Watershed Work Plan") for each watershed. Each Watershed Work Plan was required to characterize receiving water quality in the watershed, identify highest priority water quality problems, identify the sources of the highest water quality problems, develop a watershed BMP implementation strategy, include a strategy to model and monitor improvements in receiving water quality resulting from implementation of the BMPs, and include a schedule for development and implementation of the strategy outlined in the Watershed Work Plan. These requirements are the subject of a test claim on the 2010 Permit.[86] These requirements, however, are far less rigorous

[83] *See* Permit Fact Sheet at F-63 to F-65

[84] *Hayes*, 11 Cal. App.4th at 1593-94.

[85] Provision B.2.d(3).

[86] Test Claim 11-TC-03, Narrative Statement, § VI.j.

than the cited requirements of Provisions B, F and A.4 of the Permit, which impose both new programs and higher levels of service on Claimants.

4. Mandated Activities in Permit

The Permit requires Claimants to perform numerous tasks not required under either federal law or the 2010 Permit, which are set forth in Section V.A.1 above. In summary, those tasks include:

- In Provision B.2, development of PWQCs through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants and/or stressors, and identification of potential water quality improvement strategies;

- In Provision B.3, development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals, development of water quality improvement strategies on a jurisdictional and WMA basis, plus schedules for implementing the strategies;

- In Provision B.4, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP;

- In Provision B.5, use the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and JRMPs to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program;

- In Provision B.6, to submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.;

- In Provision F.1.a, to implement a public participation process concerning the WQIP, including formation of the Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential water quality improvement strategies, and after submitting the draft WQIP, to consider public comments;

- In Provision F.1.b, to submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP;

- In Provision F.2.c, to develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Consultation Panel, submitting proposed WQIP updates to the RWQCB along with

recommendations received from the public and Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate TMDL WLAs;

- In Provision F.3.b(3), to submit WQIP Annual Reports containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of water quality improvement strategies and future proposed updates to the WQIP or JRMPs;

- In Provision F.3.c, to submit the RMAR and its required assessments; and

- In Provision A.4, to follow a process to achieve compliance with discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of WQS.

In addition, we note that while the City of Menifee is located primarily in the Santa Ana River watershed and is covered by the MS4 permit issued by the California Regional Water Quality Control Board, Santa Ana Region, a small section of the city is located within the region governed by the RWQCB.[87] The Permit requires Menifee to participate in the development of the WQIP.[88] Menifee has not been allocated a share of the common costs incurred by Claimants to develop the WQIP, but the city has participated in WQIP development through attendance at meetings and other activities.[89]

5. Actual Increased Costs

To comply with the Permit's WQIP requirements, Claimants must expend resources to develop, administer, and maintain programs required under each WQIP in which they participate. This includes costs needed to conduct studies and investigations, plan and implement new program activities (research and development of required deliverables, meetings, stakeholder coordination, public outreach and workshops, etc.), and to monitor, assess, report on, and modify these programs as necessary to maintain compliance with each WQIP. The work to develop the WQIP has been done on behalf of Claimants by the District, with consultant support. To address these requirements, Claimants incurred increased costs of $160,643.32 in Fiscal Year ("FY") 2015-16 and increased costs of $803,356.83 in FY 2016-17.[90]

[87] Adams Declaration, ¶ 8.

[88] Permit, Finding 29.

[89] Adams Declaration, ¶ 8.

[90] Declarations, ¶ 8(a).

B. Critical Sediment and Hydromodification, Provision E.3.c.(2)

1. Permit Requirements

Provision E.3.c.(2)(b) of the Permit, "Hydromodification Management BMP Requirements," imposes new unfunded state-mandated requirements on Claimants. Provision E.3.c.(2) requires the following:

> (2) Hydromodification Management BMP Requirements
>
> Each Copermittee must require each Priority Development Project to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project as follows: . . .
>
> > (b) Each Priority Development Project must avoid critical sediment yield areas known to the Copermittee or identified by the optional Watershed Management Area Analysis pursuant to Provision B.3.b.(4), or implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is no net impact to the receiving water.

2. The Permit Requirements Are a State Mandate

The Commission, in the San Diego County Statement of Decision, already has determined that the hydromodification management requirement in the 2007 San Diego County MS4 permit constituted a state-mandated new program or higher level of service. [91] Claimants have included hydromodification requirements in the 2010 Permit in their test claim on that permit.[92]

Moreover, nothing in the CWA or its regulations requires local agencies to require municipal priority development projects ("PDPs") to avoid critical sediment yield areas or to implement measures to discharge critical coarse sediment to receiving waters. The Permit Fact Sheet does not cite any specific regulatory requirement, but merely indicates that the requirement is "necessary because the availability of coarse sediment supply is as much an issue for causing erosive conditions to receiving streams as are accelerated flows." [93] This determination by the RWQCB was based on its discretionary determination that this particular "implementing requirement" was necessary. Under *Dept. of Finance,* the absence of specific federal authority and the specification of the means of compliance represents a state mandate.

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[91] San Diego County Statement of Decision at 97. As noted, the Commission's determination that this constituted a state mandate was upheld by the Court of Appeal in *Dept. of Finance II,* discussed in Section VIII.B below.

[92] Test Claim 11-TC-03, Narrative Statement at VI.D.

[93] Permit Fact Sheet at F-105.

3. These Provisions Are New Programs or Require Higher Levels of Service

Previous permits did not include a requirement that PDPs avoid critical sediment yield areas or to design BMPs that will allow coarse sediment to be discharged to receiving waters. Thus, this requirement is a new program and/or higher level of service.

4. Mandated Activities in Permit

Provision E.3.c.(2) of the Permit requires the establishment of defensible standards for determining the location of critical sediment yield areas to be avoided and as to how municipal PDPs meet various criteria regarding the discharge of coarse sediment to receiving waters. It further requires monitoring, assessment and reporting, with modification of the programs as necessary.

5. Actual Increased Costs

The District, on behalf of the Claimants, has performed mapping activities in order to comply with these requirements. Additional costs related to the completion, implementation, review, and modification of these approaches are not currently known. Claimants did not incur increased costs with regard to these requirements in FY 2015-16 and incurred increased costs of $6,783.27 in FY 2016-17 with respect to these requirements.[94]

C. BMP Design Manual Update, Provisions E.3.d and F.2.b

1. Permit Requirements

Provisions E.3.d and F.2.b of the Permit, entitled "BMP Design Manual Updates," imposes new unfunded state-mandated requirements on Claimants that are not required by federal law.

Provision E.3.d requires Claimants to "update [their] BMP Design Manual . . . [to] include the following:

> (1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. . . .
>
> (2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:
>
> (a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);
>
> (b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in

[94] Declarations, ¶ 8(b).

the Water Quality Improvement Plan;

(c) Land use type of the project and pollutants associated with that land use type; and

(d) Pollutants expected to be present onsite.

(3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision E.3.c for all structural BMPs listed in the BMP Design Manual.

(4) Long-term maintenance criteria for each structural BMP listed in the BMP Design Manual; and

(5) Alternative compliance criteria, in accordance with the requirements under Provision E.3.c.(3), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

Provision F.2.b requires the following:

b. BMP DESIGN MANUAL UPDATES

Each Copermittee must update its BMP Design Manual in accordance with the following requirements:

(1) Each Copermittee must update its BMP Design Manual to incorporate the requirements of Provisions E.3.a-d concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the BMP Design Manual based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;

(2) Subsequent updates to the BMP Design Manual must be consistent with the requirements of Provisions E.3.a-d and must be submitted as part of the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b; and

(3) Updated BMP Design Manuals must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of completing the update.

2. The Permit Requirements Are a State Mandate

In the San Diego County Statement of Commission, the Commission already determined that the requirement to review and update BMPs in local guidance materials, such as a Standard Stormwater Mitigation Plan ("SSMP"), was not required by federal law or regulation and that

"nothing in the federal regulation requires agencies to update local or model SSMPs."[95] It similarly follows that nothing in the CWA, its regulations, or case law requires local agencies to update a BMP Design Manual to include specific procedures and criteria.[96]

The Commission also considered and decided that nothing in federal law or regulation required updated guidance documents to incorporate minimum low impact development ("LID") and other BMP requirements for incorporation into local plans.[97] The CWA only requires MS4 permits to impose controls that reduce the discharge of pollutants to the MEP.[98] MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options for attaining the maximum reduction possible.[99] When suggestions are no longer merely being suggested as options for consideration "but are required acts, [t]hese requirements constitute a higher level of service."[100]

The federal regulations cited in the Permit Fact Sheet[101] require municipal stormwater permit application to include a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development.[102] Requiring post-construction controls to limit pollutant discharges originating in areas of new development may be within the general purview of 40 C.F.R. § 122.26(d)(2)(iv)(A), but the specific requirements contained in the Permit are not required by that regulation. As such, no federal mandate is created. This is the lesson of *Dept. of Finance,* where the Supreme Court found that where the agency had discretion to "fashion requirements" in the Permit, it was acting to impose a state mandate. 1 Cal. 5th at 768. By adopting permit provisions that require Claimants to create and update a BMP Design Manual to include specific procedures and criteria, the RWQCB has freely chosen[103] to impose requirements and related costs that are not federally mandated and that, when mandated by the state, constitute a new program or higher level of service.[104]

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[95] San Diego County Statement of Decision at 51-54.

[96] 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; see also San Diego County Statement of Decision at 51.

[97] *Id.* at 51.

[99] 33 U.S.C. § 1342 (p)(3)(B)(iii).

[99] San Diego County Statement of Decision at 54.

[100] *Id.*; see also *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173. As discussed in Section VIII.B, the Commission's determination that these requirements were state mandates was confirmed in *Dept. of Finance II.* Slip op. at 27.

[101] Permit Fact Sheet at F-108.

[102] 40 CFR § 122.26(d)(2)(iv)(A)(2).

[103] See *Hayes, supra,* 11 Cal.App.4th at 1593-94. *See also Dept. of Finance II,* slip op. at 25-32, where the court held that the MS4 permit application regulations in 40 C.F.R. § 122.26 did not render permit requirements in the 2007 San Diego County MS4 permit as federal mandates. *See* discussion in Section VIII.B.

[104] San Diego County Statement of Decision at 51.

3. These Provisions Are New Programs or Require Higher Levels of Service

The 2010 Permit required Claimants to update a model SSMP and each Copermittee to update a local SSMP.[105] The SSMP (which is now termed the "BMP Design Manual")[106] was not required to include the specific procedures and criteria now required in the Permit and identified above.

4. Mandated Activities in Permit

Provisions E.3.d and F.2.b require Claimants to update the BMP Design Manual to include specific procedures and criteria. Claimants are further required to collaborate to update the BMP Design Manual for submission concurrent with the submission of each WQIP, and face additional costs if the update is not fully satisfactory to the RWQCB.[107]

5. Actual Increased Costs

To perform the work described above, Claimants have done program planning work and has retained a consultant to develop the specific BMP Design Manual requirements. Claimants have incurred increased costs of $629.34 in FY 2015-16 and increased costs of $630.85 in FY 2016-17 with respect to these requirements.[108]

D. Residential Inventory and Inspections, Provision E.5

1. Permit Requirements

Provisions E.5.a, E.5.c.(1)(a), E.5.c.(2)(a), and E.5.c.(3) of the Permit, generally entitled "Existing Development Management," impose several new unfunded state-mandated programs on Claimants. The Joint Test Claim addresses the extent to which these requirements apply to residential development. The test claim previously filed on the 2010 Permit addresses additional inspection requirements in that permit and carried on in the Permit.[109]

Provision E.5.a requires Claimants (except the District, which does not have jurisdiction over such developments) to maintain and update a watershed-based inventory of existing development that may discharge a pollutant load to and from the MS4. The inventory must include residential areas (Provision E.5.a(1)(d)) and a description of the area, including:

-- Identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park;

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[105] 2010 Permit, F.1.d.

[106] Provision E.3.d., footnote 30.

[107] Provision F.2.b.

[108] Declarations, ¶ 8(c).

[109] *See* discussion in Section I.F above.

> -- Identification of pollutants generated and potentially generated by the . . . area; [and]
>
> -- Whether the . . . area is tributary to and within the same hydrologic subarea as a water body segment listed as impaired on the CWA section 303(d) List and generates pollutants for which the water body segment is impaired . . .[110]

Provision E.5.a(3) requires Claimants (except the District) to annually update a map showing the location of inventoried existing development, watershed boundaries, and water bodies.[111]

Provision E.5.c requires Claimants (except the District) to inspect inventoried existing development:

> **c. EXISTING DEVELOPMENT INSPECTIONS[112]**
>
> Each Copermittee must conduct inspections of inventoried existing development to ensure compliance with applicable local ordinances and permits, and the requirements of this Order.
>
> (1) Inspection Frequency
>
> (a) Each Copermittee must establish appropriate inspection frequencies for inventoried existing development in accordance with the following requirements:
>
> (i) At a minimum, inventoried existing development must be inspected once every five years utilizing one or more of the following methods:
>
> [a] Drive-by inspections by Copermittee municipal and contract staff;
>
> [b] Onsite inspections by Copermittee municipal and contract staff; and/or
>
> [c] Visual inspections of publicly accessible inventoried facilities or areas by volunteer monitoring or patrol programs that have been trained by the Copermittee;

[110] Provision E.5.a.(2).

[111] Provisions E.5.a. and E.5.a.(3) are contained in Attachment 1

[112] Footnotes omitted.

(ii) The frequency of inspections must be appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants in storm water from the MS4 to the MEP and effectively prohibit non-storm water discharges to the MS4;

(iii) The frequency of inspections must be based on the potential for a facility or area to discharge non-storm water and pollutants in storm water, and should reflect the priorities set forth in the Water Quality Improvement Plan;

(iv) Each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development; and

(v) Inventoried existing development must be inspected by the Copermittee, as needed, in response to valid public complaints.

(b) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e. education and outreach, re-inspection, enforcement) necessary to require and confirm compliance with its applicable local ordinances and permits and the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

(2) Inspection Content

(a) Inspections of existing development must include, at a minimum:

(i) Visual inspections for the presence of actual non-storm water discharges;

(ii) Visual inspections for the presence of actual or potential discharge of pollutants;

(iii) Visual inspections for the presence of actual or potential illicit connections; and

(iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision E.5.a.(2), has not changed.

(b) Onsite inspections of existing development by the Copermittee must include, at a minimum:

(i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;

(ii) Assessment of the implementation of the designated BMPs;

(iii) Verification of coverage under the Industrial General Permit, when applicable; and

(iv) If any problems or violations are found, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

(3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried existing development. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

(a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision E.5.a.(1);

(b) Inspection and re-inspection date(s);

(c) Inspection method(s) (i.e. drive-by, onsite);

(d) Observations and findings from the inspection(s);

(e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:

(i) Description of any problems or violations found during the inspection(s);

(ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and

(iii) The date problems or violations were resolved.

2. The Permit Requirements Are a State Mandate

The Commission has previously considered whether permit requirements to inspect commercial and industrial facilities constituted unfunded state mandates.[113] In its Los Angeles County Statement of Decision, the Commission held that performing inspections "as specified in the permit, is not a federal mandate."[114] That determination was upheld in *Dept. of Finance*, as discussed in Section IV.B.4.a above. The extension of inventory requirements to residential areas similarly is a state mandate.

Federal law and regulations are likewise silent on inspections of residential properties. The inspection requirements in the Permit set forth above additionally specify the exact fashion in which Claimants are expected to perform the inventory and inspections, an example of where the RWQCB has imposed the "particular implementing requirement" by virtue of a "true choice." *Dept. of Finance*, 1 Cal. 5th at 765. The requirement in the Permit to inspect residential properties is an activity, as in the *Long Beach Unified School Dist.* case discussed above, that is "a specified action going beyond the federal requirement for inspections 'to prevent illicit discharges to the municipal separate storm sewer system.' [Citation] As such, the inspections are not federally mandated." *Id.*

3. These Provisions Are New Programs or Require Higher Levels of Service

The 2010 Permit required establishment of a residential program in the JRMP that required permittees to prioritize residential areas that posed threats to water quality, implement BMPs to address 2010 Permit requirements, enforce stormwater ordinances for residential areas and activities and address Common Interest/Home Owner Association Areas and mobile home parks.[115] The 2010 Permit, did not, however, require any residential inspection program.

Section F.3.d of the 2010 Permit required the inventorying of existing areas of development, including residential, as candidates for retrofitting based on certain limited criteria, but did not require that the inventory include the detail mandated by Permit Provision E.5.c.

4. Mandated Activities in Permit

To comply with the residential inventory and inspection program requirements in the Permit, Claimants must create and maintain a watershed-based inventory of existing residential development that includes the name, location (by hydrological subarea and address) of every residential area in the jurisdiction, a description of the residential area, including a description of whether the residential area is or includes a Common Interest Area/ Home Owner Association, or mobile home park, as well as identification of pollutants generated and potentially generated by the residential area. Claimants will then need to conduct inspections of every residential area at least once every 5 years, and possibly more often, to inspect for the presence of actual non-

[113] Los Angeles County Statement of Decision at 36.

[114] *Id.*

[115] 2010 Permit at Section F.3.c.

stormwater discharges, discharge of pollutants, illicit connections, whether there have been any changes to the area, assessment of compliance with local regulations, and assessment of BMPs. Each inspection must be tracked in an electronic database or tabular format and must include five types of information as specified in the Permit.

5. Actual Increased Costs

Claimants will be required to expend resources to develop, administer, and maintain a new program to comply with the Permit's residential inspection requirements. Because these requirements require approval of the WQIP, which has not yet occurred, Claimants did not incur increased costs with regard to these requirements in FYs 2015-16 and 2016-17, but anticipate incurring such costs in the future.[116]

Unlike the regulatory fee that may be available to fund commercial and industrial inspection programs, Claimants have no authority to impose a fee on residential property for the sake of inspecting residential property. Such a fee would constitute a "property-related" fee for a property-related service and would be subject to voter approval.[117] The Commission has already determined that "a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners."[118]

Further, voters in 2010 approved Proposition 26. Proposition 26 added article XIII C, section 1(e) to the California Constitution and prohibits charging a fee for a service that is also of benefit to others who are not charged.[119] If Claimants charge a user fee to comply with the Permit requirements, it must be charged to all users in the watershed who drain into the MS4. If they charge a smaller class of users than all those who benefit from the stormwater program, such as residential properties, they may run afoul of Proposition 26 for charging a smaller class than those who benefit from the MS4 service. For these reasons, Claimants do not have authority to impose a fee on residential properties for the sake of complying with the inspection requirements in the Permit.

E. Retrofit and Rehabilitate Stream Requirement, Provision E.5.e

1. Permit Requirements

Provision E.5.e of the Permit, entitled "Retrofitting and Rehabilitating Areas of Existing Development" imposes several new state-mandated programs on Claimants.

Provision E.5.e(1) requires Claimants to retrofit areas of existing development, stating:

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[116] Declarations, ¶ 8(d).

[117] *Howard Jarvis Taxpayer Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354.

[118] San Diego County Statement of Decision at 106.

[119] Cal. Const. art. XIII C, section 1, subd. (e)(2).

(1) Retrofitting Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to retrofit areas of existing development within its jurisdiction to address identified sources of pollutants and/or stressors that contribute to the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

(a) Each Copermittee must identify areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and/or stressors that contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(b) Candidates for retrofitting projects may be utilized to reduce pollutants that may be discharged in storm water from areas of existing development, and/or address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters;

(c) Each Copermittee must develop a strategy to facilitate the implementation of retrofitting projects in areas of existing development identified as candidates;

(d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance retrofitting projects; and

(e) Where retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects (i.e. projects that can receive and/or treat storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment) adjacent to and/or downstream of the areas of existing development.

Provision E.5.e.(2) requires:

(2) Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to rehabilitate streams, channels, and/or habitats in areas of existing development within its jurisdiction to address the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

(a) Each Copermittee must identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation, focusing on areas where stream, channel, and/or habitat rehabilitation projects will address the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(b) Candidates for stream, channel, and/or habitat rehabilitation projects may be utilized to address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters, rehabilitate channelized or hydromodified streams, restore wetland and riparian habitat, restore watershed functions, and/or restore beneficial uses of receiving waters;

(c) Each Copermittee must develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in areas of existing development identified as candidates;

(d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and

(e) Where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects (i.e. projects that can receive storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment).

2. The Permit Requirements Are a State Mandate

Nothing in the CWA, its regulations, or case law requires local agencies to develop, fund, and implement a retrofitting and rehabilitation program. The most analogous provisions in CWA regulations require municipal NPDES 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."[120] This requirement however applies only to structural flood control devices and does not extend to requiring the type of comprehensive retrofitting and rehabilitation programs required in the Permit, such as requirements linking the retrofitting program to the WQIP requirements discussed above.

The requirement for Claimants to address streams, channels and/or habitat is also unsupported by any requirement in federal law and regulation, and none is cited in the Permit Fact Sheet.[121] In fact, the discussion in the Fact Sheet shows that the decision to include these requirements was the result of the RWQCB's discretionary choice to recognize the "[i]nterest and opportunity to . . . rehabilitate channels located in areas of existing development."[122] The inclusion of the requirements represent the "true choice" of the RWQCB, as such, are a state mandate.[123]

3. These Provisions Are New Programs or Require Higher Levels of Service

Although the 2010 Permit required a retrofitting program (which is subject to a pending test claim before the Commission),[124] it did not require stream, channel and/or habitat rehabilitation program requirements, or contain all elements set forth in the Permit. The Permit Fact Sheet acknowledges that existing retrofitting requirements in the 2010 Permit were "modified to also include identifying projects to rehabilitate channels within areas of existing development."[125]

4. Mandated Activities in Permit

Permit Provision E.5.e. requires Claimants to develop a program to retrofit existing development and rehabilitate areas of existing development and in particular, streams, channels, and/or habitats in areas of existing development. Implementation of the retrofit requirement requires Claimants to, among other things, identify areas of existing development as candidates for retrofitting, with a focus on areas where pollutants or stressors are contributing to highest PWQCs and develop a strategy to facilitate the implementation of retrofitting projects. Implementation of the rehabilitation program requires Claimants to identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation; develop a strategy to facilitate the implementation of rehabilitation projects in areas of existing development identified as candidates; identify areas of existing development where PDPs may be allowed or should be encouraged to implement or contribute toward the implementation of alternative

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120 40 C.F.R. § 122.26 (d)(2)(iv)(A)(1). As discussed in Section VIII.B, the court in *Dept. of Finance II* determined that the MS4 permit application regulations in 40 C.F.R. § 122.26 did not mandate the specific requirements in the 2007 San Diego County stormwater permit at issue in that case.

121 *See* Permit Fact Sheet at F-118 to F-119.

122 Permit Fact Sheet at F-118.

123 *Dept. of Finance*, 1 Cal. 5th at 765.

124 Test Claim 11-TC-03, § VI.I.

125 Permit Fact Sheet at F-118.

compliance stream, channel, and/or habitat rehabilitation projects; and, where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the WQIP, collaborate and cooperate with each other and/or entities in the WMA to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects.

5. Actual Increased Costs

Claimants must undertake efforts to develop, administer, and maintain a new program to comply with the Permit's retrofit and stream rehabilitation requirements. Claimants have incurred increased costs of $2,642.62 in FY 2015-16 and increased costs of $7,591.73 in FY 2016-17 with respect to these requirements.[126]

F. Enforcement Response Plans, Provision E.6

1. Permit Requirements

Provision E.6 of the Permit, entitled "Enforcement Response Plans" imposes new requirements to develop and implement an Enforcement Response Plan as part of the JRMP document. JRMP update requirements are addressed in Section V.G, below. Provision E.6 requires the following:

6. Enforcement Response Plans

Each Copermittee must develop and implement an Enforcement Response Plan as part of its jurisdictional runoff management program document. The Enforcement Response Plan must describe the applicable approaches and options to enforce its legal authority established pursuant to Provision E.1, as necessary, to achieve compliance with the requirements of this Order. The Enforcement Response Plan must be in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include the following:

a. ENFORCEMENT RESPONSE PLAN COMPONENTS

The Enforcement Response Plan must include the following individual components:

(1) Illicit Discharge Detection and Elimination Enforcement Component;

(2) Development Planning Enforcement Component;

(3) Construction Management Enforcement Component; and

(4) Existing Development Enforcement Component.

[126] Declarations, ¶ 8.e.

b. ENFORCEMENT RESPONSE APPROACHES AND OPTIONS

Each component of the Enforcement Response Plan must describe the enforcement response approaches that the Copermittee will implement to compel compliance with its statutes, ordinances, permits, contracts, orders, or similar means, and the requirements of this Order. The description must include the protocols for implementing progressively stricter enforcement responses. The enforcement response approaches must include appropriate sanctions to compel compliance, including, at a minimum, the following tools or their equivalent:

(1) Verbal and written notices of violation;

(2) Cleanup requirements;

(3) Fines;

(4) Bonding requirements;

(5) Administrative and criminal penalties;

(6) Liens;

(7) Stop work orders; and

(8) Permit and occupancy denials.

c. CORRECTION OF VIOLATIONS

(1) Violations must be corrected in a timely manner with the goal of correcting the violations within 30 calendar days after the violations are discovered, or prior to the next predicted rain event, whichever is sooner.

(2) If more than 30 calendar days are required to achieve compliance, then a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

d. ESCALATED ENFORCEMENT

(1) The Enforcement Response Plan must include a definition of "escalated enforcement." Escalated enforcement must include any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan. Escalated enforcement may be defined differently for development planning, construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas.

(2) Where the Copermittee determines escalated enforcement is not required, a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

(3) Escalated enforcement actions must continue to increase in severity, as necessary, to compel compliance as soon as possible.

e. REPORTING OF NON-COMPLIANT SITES

(1) Each Copermittee must notify the San Diego Water Board in writing within five (5) calendar days of issuing escalated enforcement (as defined in the Copermittee's Enforcement Response Plan) to a construction site that poses a significant threat to water quality as a result of violations or other noncompliance with its permits and applicable local ordinances, and the requirements of this Order. Written notification may be provided electronically by email to the appropriate San Diego Water Board staff.

(2) Each Copermittee must notify the San Diego Water Board of any persons required to obtain coverage under the statewide Industrial General Permit and Construction General Permit and failing to do so, within five (5) calendar days from the time the Copermittee become aware of the circumstances. Written notification may be provided electronically by email to RB9_Nonfilers@waterboards.ca.gov.

2. The Permit Requirements Are a State Mandate

In the Permit Fact Sheet, the RWQCB cites 40 C.F.R. § 122.26(d)(1)(ii) and § 122.26(d)(2)(i), which require a permittee to have legal authority to control discharges and the contribution of pollutants to its MS4. The RWQCB further cites 40 C.F.R. § 122.26(d)(2)(i)(E), which requires MS4 permittees to have the legal authority to "[r]equire compliance with conditions in ordinances, permits, contracts or orders." Like the inspection requirements reviewed by the Supreme Court in *Dept. of Finance* and the various programmatic requirements reviewed by the Court of Appeal in *Dept. of Finance II*, these general requirements do not specify the particular implementing requirements set forth in Provision E.6 of the Permit. These regulations go only to the requirement that Claimants *have adequate legal authority* to compel compliance with requirements addressing their MS4 systems. Since these regulations do not require the specific provisions in the Permit, they are not a federal mandate. *Dept. of Finance II,* slip op. at 25-32.

These regulations do not, for example, require that MS4 operators devise an enforcement plan in the first place, much less one with the specified content set forth in Provision E.6. The regulations do not require the development of a definition of "escalated enforcement," much less an escalated enforcement program in the first place. The regulations do not address the speed by which violations must be corrected, or their documentation or reporting to the RWQCB. Provision E.6 constitutes a directive from the RWQCB setting forth in detail how Claimants are to conduct enforcement.[127]

As noted in more detail in Section V.G.2 below, nothing in the CWA, its regulations, or case law requires local agencies to create and implement an Enforcement Response Plan as part of a JRMP. Likewise, nothing in federal law or regulation requires Claimants to develop and implement an Enforcement Response Plan, to include protocols for implementing progressively

[127] *Long Beach Unified School District*, 225 Cal.App.3d at 173.

stricter enforcement responses, to create a definition for "escalated enforcement," or to notify the RWQCB in writing within 5 days of issuing certain escalated enforcement.

With regard to the statewide general stormwater permits, this Commission has already determined that enforcement of those permits is a state obligation, a determination affirmed by the Supreme Court in *Dept. of Finance.* 1 Cal. 5th at 771. The RWQCB itself has responsibility to ensure that facilities that should be covered under such permits have obtained such coverage.

3. These Provisions Are New Programs or Require Higher Levels of Service

Nothing in the 2010 Permit required a local agency to develop an Enforcement Response Plan. The most analogous provision in the 2010 Permit only required permittees to "develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of … water quality protection permit requirements and ordinances" and contains a less inclusive list of required sanctions.[128] The cited provision of the Permit also mandates specific elements of the Response Plan. Thus, these requirements in the Permit represent new programs and require higher levels of service.

4. Mandated Activities in Permit

To comply with the requirements in the Permit, Claimants will need to devise required elements of the Enforcement Response Plan to comply with the requirements of Provision E.6. The draft plan will be required to be reviewed by each Claimant and adapted to the specific circumstances of the Claimant. Claimant staff will be required to be trained in the implementation of the Enforcement Response Plan elements, including recording rationales for delayed responses to enforcement and notification to the RWQCB.

5. Actual Increased Costs

To comply with the Permit's requirement to develop and implement an Enforcement Response Plan, the District, on behalf of the Claimants, is undertaking program development and planning efforts, as well as JRMP update efforts. Claimants did not incur increased costs with respect to these requirements in FY 2015-16 and incurred increased costs of $630.85 in FY 2016-17 with respect to these requirements.[129]

G. Jurisdictional Urban Runoff Management Plan Update, Provision F.2.a

1. Permit Requirements

Provision F.2.a of the Permit, entitled "Jurisdictional Runoff Management Program Document Updates," imposes new requirements on Claimants to update their JRMPs.

[128] 2010 Permit, Section F.2.f.

[129] Declarations, ¶ 8(f).

Provision F.2.a requires the following:

> Each Copermittee must update its jurisdictional runoff management program document in accordance with the following requirements:
>
> (1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;
>
> (2) Each Copermittee must update its jurisdictional runoff management program document to incorporate the [eight] requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the jurisdictional runoff management program document based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;
>
> (3) Each Copermittee must submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;
>
> (4) The Copermittee must revise proposed modifications to its jurisdictional runoff management program as directed by the San Diego Water Board Executive Officer; and
>
> (5) Updated jurisdictional runoff management program documents must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of submitting the Water Quality Improvement Plan Annual Report.

2. The Permit Requirements Are a State Mandate

In the San Diego County Statement of Decision, the Commission already determined whether certain elements in a JRMP were state mandates and also whether the requirement to review and update BMP requirements listed in a SUSMP and to develop, submit and implement an updated Model SUSMP constituted a state mandate.[130] The Commission likewise determined that nothing in federal law or regulations permittees to collaborate in the development of standards, to undertake street sweeping and conveyance system cleaning, and to undertake educational activities in the JRMP.[131] The Commission's determination that these requirements were state

[130] San Diego County Statement of Decision at 41-54.

[131] *Id.* at 54-72, 81-83.

mandates was upheld by the Court of Appeal in *Dept. of Finance II*, slip op. at 25-26, 27-28, 31-32.

Nothing in federal law or regulation requires local agencies, including Claimants, to create, review and update a JRMP where that update consists of at least eight elements (legal authority establishment and enforcement, illicit discharge detection and elimination, development planning, construction management, existing development management, enforcement response plans, public education and participation, and fiscal analysis), provide supporting rationale for modifications, provide public and stakeholder input during the update process and provide a regional clearinghouse for the plan.

3. These Provisions Are New Programs or Require Higher Levels of Service

Provision F of the 2010 Permit required Claimants to update their JRMPs. The Permit, however, requires numerous additional requirements from those in the 2010 Permit, and thus imposes a higher level of service. These include the comprehensive requirements of Provision E of the Permit and also the requirement to integrate the development of the JRMP with the submittals of the WQIP and related documents.

4. Mandated Activities in Permit

To comply with the requirements in the Permit, Claimants will need to develop new programs and modify existing programs. Specifically, Claimants have to revise ordinances to expand legal authority, modify policies, procedures and regulations applicable to development planning, modify inspection procedures and standards, develop an enforcement response plan, increase public education activities, and expand illicit discharge detection and elimination programs. As part of each of these modifications, Claimants also have to establish a public participation and stakeholder involvement process.

5. Actual Increased Costs

In compliance with the above-cited requirements. Claimants are engaged in a process through District management to plan, conduct program development and retain a consultant. Claimants must also submit updates to the jurisdictional runoff management program, with the supporting rationale for the modifications, either in the WQIP Annual Report required pursuant to Provision F.3.b.(3) or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. Claimants have incurred increased costs of $629.34 in FY 2015-16 and increased costs of $630.85 in FY 2016-17 with respect to these requirements.[132]

[132] Declarations, ¶ 8(g).

H. Transitional Dry Weather Field Screening Requirements, Provision D.2.a.(2)

1. Permit Requirements

Permit Provision D.2.a.(2) requires Claimants to field screen MS4 outfalls in its inventory developed under Provision D.2.a.(1). This field screening requires that, depending on the number of outfalls that discharge to receiving waters in a WMA, a certain percentage must be visually inspected at specified intervals during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than .1 inch. Claimants must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow. To determine whether flow may be transient or persistent, Claimants must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. Claimants are further required to use the results of the field screening monitoring to update the MS4 outfall discharge monitoring station inventory with new information on whether the outfall produces persistent flow, transient flow, or no dry weather flow.[133]

2. The Permit Requirements Are a State Mandate

The Permit Fact Sheet cites requirements in the MS4 application regulations in 40 C.F.R. § 122.26(d)(2) relating to field screening requirements, inspection procedures for prevent illegal discharges and a schedule to remove illicit discharges into the MS4.[134] None of these regulations, however, require Claimants to undertake the requirements set forth in Provision D.2.a.(2), including with respect to specification of the number of inspections, the specification of transient versus persistent flow, the specific items to be visually monitored and the need to update the MS4 outfall discharge inventory. Because the "scope and detail" of the Permit provisions is not spelled out in the federal regulations, the Permit requirements are a state mandate. Moreover, the absence of any requirements for such permit provisions in the federal MS4 permit application regulations cited by the Fact Sheet renders them state mandates. *Dept. of Finance II,* slip op. at 25.

3. These Provisions Are New Programs or Require Higher Levels of Service

The 2010 Permit did not contain the transitional dry weather field screening requirements set forth in Provision D.2.a.(2). It is therefore a new requirement and/or a requirement for a higher level of service in the Permit.

4. Mandated Activities in Permit

Permit Provision D.2.a.(2) requires Claimants to visually inspect 80 percent of the MS4 outfalls in their inventory at least twice per year and make the visual observations required by the

[133] Because of its length, Provision D.2.a.(2) is included in Appendix 1.

[134] *See* Permit Fact Sheet at F-78 and F-79.

Permit, further inspect at least three times after storm events to determine whether waters were transient or persistent and with the information collected, update the inventory of MS4 outfalls.

5. Actual Increased Costs

The District, on behalf of the Claimants, is conducting mapping, program planning and scheduling efforts, field work, data entry and training efforts to comply with Provision D.2.a.(2). Claimants have incurred increased costs of $20,775.05 in FY 2015-16 and increased costs of $54,411.76 in FY 2016-17 with respect to these requirements.[135]

I. Special Studies Requirements, Provision D.3

1. Permit Requirements

Permit Provision D.3 requires Claimants to undertake various special studies to address pollutant and/or stressor data gaps and/or to develop information necessary "to more effectively address" pollutants and/or stressors that are causing or contributing to the highest priority water quality conditions identified in the WQIP or which are impacting receiving waters on a regional basis in the area under the RWQCB's jurisdiction (the "San Diego Region"). Provision D.3 requires at least two special studies in each WMA and one special study for the San Diego Region, with the option of replacing one WMA study with another San Diego Region study.

Such studies meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs.[136]

2. The Permit Requirements are State Mandates

The Permit Fact Sheet cites no federal statutory or regulatory requirement for the special studies required by Provision D.3.[137] While the Fact Sheet references a special studies requirement in the 2010 Permit, that requirement is included in the test claim brought on that permit.[138] Without any grounding in federal law or requirements, Provision D.3 is a state mandate. Though not cited in the Fact Sheet discussion of the special studies, provisions in the Porter-Cologne Act would appear to authorize the RWQCB's requirement, including Water Code § 13267, which authorizes the RWQCB to obtain from dischargers "technical or monitoring program reports" which the RWQCB may require to "investigate the quality of any waters of the state within its region."[139]

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[135] Declarations, ¶ 8(h).

[136] Because of its length, Provision D.3 is included in Attachment 1.

[137] Permit Fact Sheet at F-82 to F-83.

[138] *See* Test Claim 11-TC-03, Section VI.L.

[139] Water Code § 13267(a)-(b)(1).

Additionally, Water Code § 13383, which authorizes the RWQCB to establish "reporting" requirements for any person who discharges to navigable waters, is cited by the RWQCB as authority for Permit requirements. *See* Permit Finding 4 ("CWC section 13383 authorizes the San Diego Water Board to establish monitoring, inspection, entry, *reporting* and recordkeeping requirements. This Order establishes monitoring and reporting requirements to implement federal and *State* requirements.") (emphasis added).

These requirements are state mandates, not federal mandates. Moreover, in requiring the special studies, the RWQCB has not limited the scope to discharges into and from the MS4 operated by the permittees, which is the scope of the Permit as a federal NPDES permit. The inclusion of the special studies requirement in Provision D.3 represents the choice of the RWQCB to require Claimants to perform the studies.

3. These Provisions Are New Programs or Require Higher Levels of Service

The special studies requirement in Provision D.3 were not part of the 2010 Permit. As noted, there were special studies requirements in the 2010 Permit which are the subject of Test Claim 11-TC-03. However, the studies required under Provision D.3 are different and new to Claimants.

4. Mandated Activities in Permit

Permit Provision D.3 requires that Claimants undertake at least three special studies. These studies require planning into issues to be addressed, review of data, review of data gaps, devising a monitoring plan meeting several requirements.

5. Actual Increased Costs

Claimants have identified candidate special studies and expect to retain a consultant or consultants to assist in the preparation of the studies. Claimants did not incur increased costs in FY 2015-16 and incurred increased costs of $508.45 in FY 2016-17 with respect to these requirements.[140]

J. Assessment Requirements, Provision D.4

1. Permit Requirements

Provision D.4 of the Permit requires Claimants to evaluate data collected pursuant to the receiving waters and MS4 outfall monitoring and special studies requirements in Permit Provisions D.1, D.2 and D.3, as well as information collected during implementation of the JRMP requirements set forth in Provision E, "to assess the progress of the water quality improvement strategies in the [WQIP] toward achieving compliance with Provisions A.1.a, A1.c and A.2a." Provision D.4 requires assessments of: receiving waters, MS4 outfall discharges of non-

[140] Declarations, ¶ 8(i).

stormwater and stormwater, the special studies required under Provision D.3 and an integrated assessment of the WQIP.

With respect to the receiving waters assessment, Provision D.4.a. requires that Claimants assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQIP; and identify data gaps in the monitoring data necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b.(2) or the Report of Waste Discharge.

With respect to MS4 outfall discharges, Permit Provision D.4.b. requires that Claimants conduct both a non-stormwater discharges reduction assessment and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within each Claimant's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilizing a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; reviewing monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to Claimants' MS4s; assessing the effectiveness of water quality improvement strategies ("WQIS") toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identifying modifications necessary to increase the effectiveness of WQIS; and, identifying data gaps in monitoring data.

With respect to stormwater discharges, the Permit requires Claimants to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s; analyze monitoring data and use a watershed model or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater and pollutant loads discharged from Claimants' monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from Claimants' monitored MS4 outfalls during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for

storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring constitutes for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

With respect to Special Studies assessments, Provision D.4.c. requires Claimants to annually evaluate the results and findings from the special studies required by Provision D.3 and assess their relevant to efforts to characterize receiving water conditions, understand the source of pollutants and/or stressors and control and reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

With respect to the integrated assessment of the WQIP, Provision D.4.d. requires Claimants to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluation of the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, Claimants are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.[141]

2. The Permit Requirements Are a State Mandate

There are no federal or statutory requirements for the specific provisions set forth in Permit Provision D.4. In the Fact Sheet, the RWQCB cites provisions in 40 C.F.R. § 122.42(c), which

[141] Due to the length of the requirements in Provision D.4, the text is set forth in Attachment 1.

contain requirements for annual MS4 permittee reports.[142] But these regulations are bare-bone in their demands, requiring only the "status of implementing the components of the storm water management program that are established as permit conditions"[143] and the "[i]dentification of water quality improvements or degradation."[144]

Neither of these regulations requires specific mandates in the Provision D.4 assessments. In that provision, the RWQCB has required Claimants to undertake detailed and specified steps to make the assessments required by the Permit. Provision D.4 sets forth the requirements for Claimants' evaluation of monitoring and implementation under the Permit. Given that the federal stormwater regulations "gives the state discretion whether to impose a particular implementing requirement" and the state exercises is discretion to impose that requirement as a "true choice," the requirement "is not federally mandated." *Dept. of Finance,* 1 Cal. 5th at 765.

The California Supreme Court also found that even where federal CWA regulations contemplated some actions by MS4 operators, where the "scope and detail" of the Permit requirements was not specified in the regulations, a state mandate existed. *Id.* at 771. That is the case not only with the annual report requirements but also the general requirements of 40 C.F.R. § 122.26(d)(2) cited in the Fact Sheet as support for the D.4 requirements.[145] For example, 40 C.F.R. § 122.26(d)(2)(iv)(B)(3) requires only a "description of procedures" to investigate the possibility of illicit discharges into the MS4. Similarly, 40 C.F.R. § 122.26(d)(2)(iii)(B) only requires in the MS4 permit application an estimate of the annual pollutant load discharged from MS4 outfalls, along with a "description" of procedures for estimating these loads, including "any modelling, data analysis, and calculation methods." This regulation does not require the "scope and detail" of Provision D.4.b.2, with its specification of the types of land uses, minimum monitored storms or identification of modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies.

And, 40 C.F.R. § 122.26(d)(2)(v), cited in support of Provision D.4.a.2, requires only "[e]stimated reductions" in pollutant loadings from MS4 as the result of the management programs required in the regulations. Provision D.4 requires assessment of both "status and trends" of receiving water conditions in a variety of waterbodies, determining the conditions of those waters, identifying the most critical beneficial uses and determining whether they are being protected, identifying short-term and/or long-term improvements or degradation of the critical beneficial uses, determining whether the water quality improvement strategies are contributing toward progress in achieving the interim and final numeric goals of the WQIP and identifying data gaps in monitoring. The "scope and detail" of these requirements is not required in the regulations.

Further, as discussed in Section VIII.B, the court in *Dept. of Finance II* specifically held that the absence of an explicit or express requirement in the MS4 permit application regulations

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[142] Permit Fact Sheet at F-84 and F-86.

[143] 40 C.F.R. § 122.42(c)(1) (cited as support for Provision D.4.b(2), assessment of stormwater pollutant discharges from MS4 outfalls and Provision D.4.d, requiring integrated assessment of the WQIP).

[144] 40 C.F.R. § 122.42(c)(7) (cited as support for Provision D.4.a, assessment of receiving waters).

[145] Permit Fact Sheet at F-85 and F-86.

(40 C.F.R. § 126.22) for stormwater permit provisions, the provisions are state mandates. *Dept. of Finance II*, slip op. at 25.

Additionally, the Fact Sheet indicates that Provision D.4 "requires the Copermittees assess the progress of water quality improvement strategies in the [WQIP] toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a."[146] As previously discussed, these provisions include the achievement of water quality standards and, as such, exceed the requirements of the CWA.[147] This is further evidence that the requirements of D.4 are not federally mandated.

3. These Provisions Are New Programs or Require Higher Levels of Service

The requirements of Provision D.4 were not contained in the 2010 Permit and are thus a new program and/or a requirement for a higher level of service.

4. Mandated Activities in Permit

Permit Provision D.4 requires Claimants to undertake numerous activities, including collection and assessment of monitoring and other data, assessment and identification of critical beneficial uses and their status, identification of improvement or degradation of those uses, assessment of water quality improvement strategies in the WQIP, assessment of transient and persistent dry weather flows and their status, ranking of MS4 outfalls regarding potential threats to receiving water quality, identification of pollutant sources, use of a model or other method to calculate volumes and pollutant loads discharged in both dry and wet weather conditions, which must be updated annually, assessment of the effectiveness of water quality improvements strategies toward reducing or eliminating non-stormwater and pollutant loads and pollutants in stormwater discharges, identification of necessary modifications to water quality strategies, evaluation of the need for updates in analyses and assumptions used to develop the WQIP, performance of statistical trends analysis, integration of data generated in the monitoring and special studies, assessment of the effectiveness of the WQIP and identification of necessary modifications to the WQIP, re-evaluation of the water quality improvement strategies in the WMA and re-evaluation and adaption of the water quality monitoring and assessment program for the WMA.

5. Actual Increased Costs

The District, on behalf of the Claimants, is planning to retain consultant support to assist in the preparation of the assessments required by Permit Provision D.4 studies. Claimants did not incur increased costs in FY 2015-16 and incurred increased costs of $1,818.33 in FY 2016-17 with respect to these requirements.[148]

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[146] *Id.* at F-83 to F-84.

[147] *See* discussion in Section V.A, above.

[148] Declarations, ¶ 8(j).

K. Alternative Compliance Program to Onsite Structural BMP Implementation, Provisions B.3.b.(4) and E.3.c.(3)

1. Permit Requirements

Permit Provision E.3.c.(3) sets forth requirements for PDPs, including municipal PDPs, that allows a PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control. To qualify for this alternative Claimants must undertake a Watershed Management Area Analysis set forth in Provision B.3.b.(4).

Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. Claimants must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from hydromodification BMP performance requirements. Additionally, pursuant to Provision E.3.c.(3)(a), Claimants must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. PDPs, including PDPs for municipal projects, wishing to enter an alternative compliance program, must fund, contribute funds to or implement a candidate project, provided that Claimants have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) ("onsite BMP requirements").

Additionally, if the PDP sponsor chooses to fund a candidate project, Claimants are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite structural BMPs; if the PDP chooses to implement a candidate project, Claimants are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that the design is conducted by professionals who are competent and proficient in the fields pertinent to the project design; and, that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer. Additionally, Claimants must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP sponsor wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that Claimants determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, Claimants must develop and implement an in-lieu fee structure.[149]

[149] Due to their length, Provisions B.3.b.(4) and E.3.c.(3) are included in Appendix 1.

2. The Permit Requirements Are a State Mandate

Nothing in the CWA nor its implementing regulations authorizes the requirements of the above-cited provisions, and the RWQCB cites no such authority in its discussion in the Permit Fact Sheet.[150] And, the requirement for PDPs to be equipped with LID and hydromodification BMPs is itself not required by federal law or regulation.

Indeed, the issue of whether similar requirements exceed the requirements of federal law, and thus constitute represent reimbursable state mandates, was considered by the Commission in the San Diego County Statement of Decision, where the Commission determined that "nothing in the federal regulation requires agencies to update local or model SSMPs." San Diego County Statement of Decision at 51. In addition, the Commission determined that the hydromodification requirement constituted "a state-mandated, new program or higher level of service." *Id.*[151] *Dept. of Finance* confirms that the imposition of these detailed requirements represents a state, not federal mandate. *See* discussion in Section IV.B, above.

The CWA only requires MS4 permits to impose controls that reduce the discharge of pollutants to the MEP. MEP is not defined, but the CWA suggests management practices, control techniques, and system, design, and engineering methods as options.[152] When suggestions are no longer merely being suggested as options for consideration "but are required acts, [t]hese requirements constitute a higher level of service." The Commission's analysis was confirmed by the Supreme Court in *Dept. of Finance*: "[T]he State was not compelled by federal law to impose any particular requirement. Instead . . . the Regional Board had discretion to fashion requirements which it determined would meet the CWA's [MEP] standard." 1 Cal. 5th at 768.

Federal regulations (40 C.F.R. § 122.26(d)(2)(iv)(A)(2)) require as part of an MS4 permit application a plan for developing, implementing and enforcing controls to reduce the discharge from MS4s that originate in areas of new development. Requiring post-construction controls to limit pollutant discharges originating in areas of new development may fall within these requirements, but the specific requirements contained in the Permit are not contained in the regulations. By adopting these provisions, the RWQCB freely chose to impose requirements and related costs that were not federally mandated and that, when mandated by the state, constituted a new program or higher level of service.

In the San Diego County Statement of Decision, the Commission found that LID and hydromodification requirements were not reimbursable because the County of San Diego and the other permittees retained the ability to assess fees for new development. With the passage of California's Proposition 26 in November 2010, however, all costs associated with *developing* the LID and hydromodification programs may not be recoverable through fees. Proposition 26, which

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[150] Permit Fact Sheet at F-105 to F-107.

[151] As discussed below, these determinations were affirmed in *Dept. of Finance II*, slip op. at 26-27.

[152] 33 U.S.C. § 1342(p)(3)(B)(iii). And, as discussed in Section VIII.B, the court in *Dept. of Finance II* determined that the MEP standard "by its nature is discretionary and does not by itself impose a federal mandate" for purposes of article XIIIB, section 6 of the California Constitution.

amends article XIII C of the California Constitution, defines virtually any revenue device enacted by a local government as a "tax" requiring voter approval, unless it falls within certain enumerated exceptions.

In the San Diego County Statement of Decision, the Commission found that LID and hydromodification requirements applicable to municipal projects were not reimbursable state mandates because the permittees were under no obligation to construct projects that would trigger these requirements.[153] The Commission cited the California Supreme Court's decision in *Department of Finance v. Commission on State Mandates (KHSD)* (2003) 30 Cal. 4th 727. In *KHSD*, the Court held that certain hearing requirements imposed upon school districts did not constitute a reimbursable state mandate because they were a requirement of voluntary program in which the school districts had elected to participate. The Court held that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement."[154]

The Supreme Court relied on *City of Merced v State of California* (1984) 153 Cal.App.3d 777. In that case, the city elected to take property by eminent domain, under which it was required by then-recent legislation to compensate the owner for loss of "business goodwill." The city sought reimbursement from the state, arguing that this new statutory requirement was a reimbursable state mandate. The Court of Appeal concluded that the city's increased costs flowed from its optional decision to condemn the property, and, "whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. . . .Thus, payment for loss of goodwill is not a state-mandated cost."[155]

The facts that dictated the Court's decision in *KHSD* are not present in the Permit. For one, the Permit is not a voluntary program, but one requiring Claimants to take immediate actions related to control of pollutants in stormwater and hydromodification, including requirements that were not triggered by any voluntary action on the part of the permittees. The Permit *requires* Claimants to incur costs related to BMPs and hydromodification on municipal PDPs, such as recreational facilities, parking lots, streets, roads, highways. Moreover, the development and upkeep of these municipal land uses is not optional. These PDPs are integral to Claimants' function as municipal entities, and the failure to make necessary repairs, upgrades and extensions can result in public health and safety issues and expose Claimants to liability.

The rationale of *City of Merced* is likewise inapplicable. In that case, the city could have *chosen* to avoid the goodwill reimbursement by purchasing the property rather than taking it by eminent domain. Under the Permit, Claimants had no such option, as the permit required Claimants to incur new, additional costs on every qualifying municipal PDP.

[153] San Diego County Statement of Decision at 46, 52.

[154] *Id.* at 742.

[155] *Id.* at 783.

Moreover, the California Supreme Court has rejected the applicability of *City of Merced* in circumstances beyond those present in *KHSD*. In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal. 4th 859, the Court considered similar regulatory requirements to those at issue in *KHSD*. The Court discussed its decision in *KHSD*, at length, and cautioned against future reliance on *City of Merced*, holding:

> [W]e agree with the District and amici curiae that *there is reason to question an extension of the holding of City of Merced so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514 whenever an entity makes an initial discretionary decision that in turn triggers mandated costs*. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra*, 190 Cal.App.3d 521, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (Id., at pp. 537–538.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra*, 153 Cal.App.3d 777, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.[156]

Thus, strict reliance on *City of Merced* is only appropriate in the very limited circumstances presented in *KHSD*. Those conditions are not present in the Permit, which imposes requirements on Claimants that are either wholly unrelated to voluntary action by Claimants, or are triggered by municipal projects that Claimants must implement with little to no discretion because they are integral to Claimants function as municipal entities. As set forth above, and in greater detail below, these requirements exceed federal law and represent reimbursable state mandates.

3. These Provisions Are New Programs or Require Higher Levels of Service

The requirements of Provisions B.3.b.(4) and E.3.c.(3) were not contained in the 2010 Permit. The 2010 Permit included separate waiver programs for LID and hydromodification BMPs, but those requirements did not include the requirement to perform a Watershed Management Area Analysis or specify the particular prescriptive elements of the cited Permit provisions. Additionally, as noted in Section I.F above, the LID and hydromodification waiver

[156] *Id.* at 887-88.

programs (as well as other LID and hydromodification requirements) in the 2010 Permit are included in the test claim filed on that permit by Claimants.

4. Mandated Activities in Permit

Provisions B.3.b (4) and E.3.c (3) require Claimants to conduct an analysis of the WMA, including GIS layers, that describes aspects of the WMA, including hydrologic processes, existing streams, land uses, coarse sediment yield areas and locations of flood control structures and to come up with a list of candidate projects as alternatives to on-site BMP requirements. Claimants must also submit Water Quality Equivalency calculations to the RWQCB executive officer. Claimants must ensure that if a PDP sponsor chooses to fund a candidate project, the funding is sufficient to mitigate for the impacts of not installing on-site BMPs and that the funding source is reliable; if the sponsor chooses to implement the project, that the pollutant control and/or hydromodification management are sufficient to mitigate for impacts of not installing on-site BMPs, that the candidate project is designed by qualified personnel and constructed within a limited time frame; that if the PDP sponsor wishes to propose an alternative to a candidate project, that Claimants must determine that there will a great overall water quality benefit and develop an in-lieu fee structure.

Municipal PDP sponsors must comply with the requirements applicable to PDPs generally, including the funding, compliance, mitigation and design requirements outlined above.

Additionally, the requirements of Permit Provisions B.3.b (4) and E.3.c (3) are not discretionary because conditions in the WMA often do not permit the use of onsite BMPs or, in infill projects, there is not sufficient land area to accommodate onsite BMPs.

5. Actual Increased Costs

To implement the requirements of Provisions B.3.b.(4) and E.3.c (3), the District, on behalf of the Claimants, is engaged in the process of project planning, mapping, coordination and the identification of consultant support. Claimants did not incur increased costs in FY 2015-16 and incurred increased costs of $38,062.87 in FY 2016-17 with respect to these requirements.[157]

L. Dry Weather Receiving Water Hydromodification Monitoring, Provision D.1.c.(6)

1. Permit Requirements

Provision D.1.c.(6) of the Permit requires Claimants to do the following:

(6) Dry Weather Receiving Water Hydromodification Monitoring

In addition to the hydromodification monitoring conducted as part of the Copermittees' Hydromodification Management Plans, hydromodification monitoring for each long-term

[157] Declarations, ¶ 8(k).

receiving water monitoring station is required at least once during the term of this Order. The Copermittees must collect the following hydromodification monitoring observations and measurements within an appropriate domain of analysis during at least one dry weather monitoring event for each long-term receiving water monitoring station:

(a) Channel conditions, including:

(i) Channel dimensions,

(ii) Hydrologic and geomorphic conditions, and

(iii) Presence and condition of vegetation and habitat;

(b) Location of discharge points;'

(c) Habitat integrity;

(d) Photo documentation of existing erosion and habitat impacts, with location (i.e. latitude and longitude coordinates) where photos were taken;

(e) Measurement or estimate of dimensions of any existing channel bed or bank eroded areas, including length, width, and depth of any incisions;
and

(f) Known or suspected cause(s) of existing downstream erosion or habitat impact, including flow, soil, slope, and vegetation conditions, as well as upstream land uses and contributing new and existing development.

2. The Permit Requirements Are a State Mandate

As set forth above in the discussion of the provisions in Section V.K, there is no requirement in the CWA or its implementing regulations for hydromodification controls or for an HMP. It thus follows that there is no federal requirement for the hydromodification monitoring set forth in Permit Provision D.1.C.(6). The Permit Fact Sheet cites no such authority in its brief discussion on this requirement.[158]

3. This Provision is a New Requirement and/or Higher Level of Service

As the text of Provision D.1.c.(6) sets forth, the RWQCB in the Permit is requiring monitoring "[i]n addition" to the monitoring conducted as part of Claimants' HMP, which was required under the 2010 Permit. It is thus a new requirement and/or higher level of service.

[158] *See* Permit Fact Sheet at F-75.

4. Mandated Requirements in Permit

Provision D.1.c.(6) requires Claimants to collect observations and measurements during one dry weather monitoring event at each long-term receiving water monitoring station, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development.

5. Actual Increased Costs

The requirements of Provision D.1.c.(6) will require Claimants to undertake the observation and monitoring of various receiving water stations, and to evaluate the known or suspected causes of erosion or habitat impacts. Claimants have not yet undertaken these required steps because they must be included within the WQIP, which has not been approved by the RWQCB. Thus, no increased costs were incurred in FYs 2015-16 or 2016-17, though such costs will be incurred in future fiscal years.[159]

VI. STATEWIDE COST ESTIMATE

This Joint Test Claim concerns a regional municipal stormwater permit covering municipalities in San Diego County, south Orange County and southwest Riverside County. In a test claim filed by Orange County permittees concerning the requirements of the Permit (San Diego Region Order No. R9-2010-0100 and Order No. R9-2015-0001, 15-TC-02), those permittees estimated FY 2016-17 costs of $1,396,250 plus an undetermined share of a cost of $6,445,232. Based on communications with San Diego County representatives, implementation costs for the regional permit may exceed $1,000,000.

For all requirements set forth in the Permit that are the subject of this Joint Test Claim, Claimants estimate that approximately $914,425.79 was spent in FY 2016-17.[160] Adding that amount to the estimate provided in test claim 15-TC-02, plus an estimated $1,000,000 for San Diego County permittees, Claimants estimate that the statewide cost estimate for FY 2016-17 for the Permit is $3,310,675.70, plus an undetermined share of a cost of $6,445,232.

VII. FUNDING SOURCES

A. Claimants Lack Fee Authority To Offset Their Costs

The ability of a local government to impose fees or taxes on individuals residing, owning property or conducting business within its jurisdiction is limited by various provisions within the California Constitution. Any fee or tax imposed by Claimants would have to comply with the relevant constitutional requirements. As explained below, those constitutional provisions

[159] Declarations, ¶ 8(l).

[160] Declarations, ¶¶ 8(a-l).

effectively prevent Claimants from recouping the costs in implementing any of the Permit requirements at issue in this Joint Test Claim by imposing fees. Any tax or jurisdiction-wide property related fee to fund costs associated with Claimants' stormwater management program could only be imposed if approved by a vote of the electorate and would likely require approval by a supermajority or 2/3 vote. Please also see the discussion in Section V.D.5 above, concerning the unavailability of fees for the inspection of residential areas.

B. Activities Mandated By The Permit Do Not Convey Unique Benefits On Or Deal With Unique Burdens Being Imposed On The MS4 By Individual Persons, Businesses Or Property Owners.

The provisions of the Permit that are the subject of this Joint Test Claim involve requirements to develop programs and perform activities that apply throughout Claimants' jurisdictions and are not related to services being performed directly for individual businesses, property owners, or residents. The programs are intended to improve the overall water quality of receiving water, which benefits all persons within the jurisdiction. It would be impossible to identify benefits that any individual resident, business or property owner within the jurisdiction is receiving that are distinct from benefits that all persons within the jurisdictions are receiving. Claimants, therefore, cannot develop a fee structure that allocates the total costs of complying with the mandates in the Permit to individuals that would be based on the unique benefit that such individuals are receiving from that program or activity.

The Permit is intended to deal with water quality impacts from stormwater that is being conveyed by Claimants' MS4s and to reduce pollutants being discharged from the MS4. Most of the requirements in the Permit involve developing programs to minimize the likelihood of pollutants being carried by runoff into the MS4 and to otherwise reduce those pollutants before being discharged into receiving waters.

The vast majority of the water that enters MS4 enters as runoff after flowing over properties being put to a vast array of uses. Except in rare cases, it would be difficult to identify the volume of water or amount of pollutants attributable to an individual property owner. Unlike a sanitary sewer system, where water is being discharged directly into the sanitary sewer and the operator of a sanitary sewer can measure or reasonably approximate the volume being discharged into its conveyance system and thus approximate the burden being placed on its system by an individual property, the operator of an MS4 cannot approximate the individual burden being placed on the MS4 by an individual property owner. It is therefore difficult, if not impossible, for Claimants to develop a fee structure that is based on the burden that an individual property would be placing on the MS4.

As explained below, because of the impossibility of developing a fee structure based on the benefits enjoyed or burdens imposed by prospective payors, and because none of the activities being performed in response to the Permit requirements at issue are being provided directly to any prospective payor, Claimants would not have the authority to charge a fee to recoup the costs of complying with the mandates in the Permit.

C. Article XIII C of the California Constitution Further Limits Claimants' Power to Impose Fees

Proposition 26 amended Article XIII C of the California Constitution and defines virtually any revenue device enacted by a local government as a tax requiring voter approval unless it falls within certain enumerated exceptions.

Article XIII C, section 2(d) provides that:

> 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. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Article XIII C, section 1(d) defines special tax as

> … any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

Article XIII C, section 1(e) defines a tax as

> … any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (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.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, 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.

Valid fees therefore must recover no more than the amount necessary to recover costs of the governmental program being funded by the fee. The person or business being charged the fee, the payor, may only be charged a fee based on the portion of the total government costs attributable to burdens being placed on the government by that payor or an amount based on the direct benefits the payor receives from the program or facility being funded by the fee. The services and work products produced by Claimants in response to the requirements of the Permit are not being provided directly to any individual nor are they related to a specific benefit conferred on any individual. Any fee charged by Claimants for costs related to the requirements of the Permit at issue in this Joint Test Claim, therefore would not meet the requirement of article XIII C, sections 1(e) (1) or 1(e) (2) and would not be a valid fee. The fee also would not fall under subsections (e)(3) through (e)(7).

D. Any Fee or Tax Charged By Claimants Not Based On Benefits Received or Burdens Imposed By Payor Must Be Approved By a Vote of The Electorate

A fee or charge that does not fall within the seven exceptions listed in article XIII C, section 1(e) and does not meet the other requirements of article XIII C is automatically deemed a tax, which must be approved by the voters.

Any tax that is intended to fund a specific program such as a stormwater management program is a "special tax." subject to the requirements of article XIII A, section 4, and article XIII C, section 2(d). Article XIII A, section 4 and Article XIII C, section 2(d) require Special Taxes be approved by 2/3 of the voters of the portion of the jurisdiction subject to the fee.

If a fee were imposed on owners or occupants or real property that is triggered by their ownership or use of property within the jurisdiction it would constitute a property related fee governed by article XIII D of the California Constitution.

Article XIII D requires voter approval of most property related fees. Relevant portions of article XIII D, section 3(a) provide that:

> (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 except … (2) Any special tax receiving a two-thirds vote pursuant to § 4 of Article XIII A … (4) Fees or charges for property related services as provided by this article.…"

Article XIII D, section 2(e) defines fee or charge as:

> "… any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."

Article XIII D, section 2(h) defines property-related service as "… a public service having a direct relationship to property ownership."

Article XIII D, section 6(c) requires voter approval for most new or increased fees and charges. It provides: "Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. …"

In *Howard Jarvis Taxpayers Association, supra,* the Court of Appeal struck down a fee that the City of Salinas attempted to enact to fund the city's stormwater program. The court held in that case that a stormwater fee was a property related fee governed by article XIII D and that such a fee could not be imposed unless it was approved by the voters.

The fee at issue in that case was a storm drainage fee enacted by the Salinas City Council, but not approved by City voters. The purpose of the fee was to fund and maintain a program put in place to comply with the City's obligations under its MS4 permit. The fee would be imposed on "users of the storm water drainage system," and the City characterized the fee as a user fee recovering the costs incurred by the City for the use of the City's storm and surface water management system by property owners and occupants.

The City attempted to develop a methodology that based the fee on the amount of runoff leaving certain classes of property. The fee was charged to the owners and occupiers of all developed parcels and the amount of the fee was based on the impervious area of the parcel. The rationale used by the City for basing the fee on impervious area was that the impervious area of a property most accurately measured the degree to which the property contributed runoff to the City's drainage facilities. Undeveloped parcels and developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

The City asserted that the fee did not require voter approval requirements of article XIII D, section 6(c) on two grounds. The first ground was that the fee was not a "property related" fee but rather a "user fee" which the property owner could avoid simply by maintaining a storm water management facility on the property. The City argued that because it was possible to own property without being subject to the fee, it was not a fee imposed "as an incident of property ownership." *Id.* at 1354. The second ground asserted by the City was that, even if the fee could be characterized as a property related fee, it was exempted from the voter approval requirements by the provisions

of article XIII D, section 6(c) that allow local governments to enact fees for sewer and water services without prior voter approval. *Id.*

The court rejected both arguments, finding that because the fee was not directly based on or measured by use, comparable to the metered use of water or the operation of a business, it could not be characterized as a use fee. Rather the fee was based on ownership or occupancy of a parcel and was based on the size of the parcel and therefore must be viewed as a property related fee. *Id.* at 1355.

The court also found that the "Proportional Reduction" provision of the City's fee did not alter the nature of the fee as a property related fee. A property owner's operation of a private storm drain system reduced the amount owed to the City to the extent that runoff into the City's system is reduced but did not eliminate the need to pay a fee. The reduction was not proportional to the amount of services requested or used by the occupant, but rather was based on the physical properties of the parcel. Thus, the Court determined that the fee was ultimately a fee for a public service having a direct relationship to the ownership of developed property. The court concluded that the storm drainage fee "burden[s] landowners *as landowners*," and thus it was in reality a property related fee subject to the requirements of article XIII D and not a user fee. The fee was therefore subject to the voter-approval requirements of article XIII D unless one of the exceptions in section 6(c) of that section applied. *Id.*

The court then went on to reject the City's contention that the fee fell within the exemption from the voter-approval requirement applicable to fees for sewer or water services. The court concluded that that the term "sewer services" was ambiguous in the context of both section 6(c) and article XIII D as a whole. The court found that, because article XIII D was enacted through the initiative process, the rule of judicial construction that an enactment must be strictly construed required the court to take a narrow reading of the sewer exemption. The court went on to hold that the sewer services exception in article XIII D, section 6(c) was applicable only to sanitary sewerage and *not* to services related to stormwater. *Id.* at 1357-58.

The court observed:

> The City itself treats storm drainage differently from its other sewer systems. The stated purpose of [the City storm drainage fee ordinance] was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways … the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water

Id. at 1358.

The court likewise rejected the argument that the storm drainage fee fell within provisions of article XIII D, section 6(c) exempting fees for water services from the voter approval requirements, holding:

> [W]e cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." Government Code section 53750, enacted to explain some of the terms used in articles XIII C and XIII D, defines "'[w]ater' "as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

Id.

In summary, articles XIII A, XIII C, and XIII D of the California Constitution severely limit Claimants' power to impose fees. Any fees developed by Claimants to fund the portions of the MS4 Permit that are the subject of this unfunded mandate claim could only be imposed by some form of special tax or property related fee that would require approval by either a 2/3 vote of the electorate subject to the tax; or a majority vote of the property owners subject to the property related fee.

E. Claimants Have Limited Other Funding Sources

Claimants 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. As set forth in the Section 6 Declarations, ¶ 9, some Claimants have access to a Riverside County stormwater fund, to fuel tax and community services revenue, to lighting and maintenance revenues and/or development/business registration fees and the District has access to a Benefit Assessment for stormwater costs. However, as also set forth in the declarations, these funding sources do not cover the entire cost of compliance with the provisions set forth in this Test Claim. Additionally, Claimants are subject to the limitations of Proposition 26 (see discussion above), which limits their ability to recover costs through fees.

VIII. PRIOR MANDATE DETERMINATIONS

A. Los Angeles County Test Claims

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 Los Angeles RWQCB Order No. 01-182 constituted unfunded state mandates. Order No. 01-182, like the 2010 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.

The Commission's decision was challenged by the Department of Finance, the State Water Resources Control Board and the Los Angeles Regional Water Quality Control Board in an action filed in superior court. In September 2011, the Los Angeles County Superior Court set aside the Los Angeles County Statement of Decision, ruling that the appropriate test for determining whether a requirement in the MS4 permit was a federal or state mandate was whether the requirement met the MEP standard. The Superior Court's ruling was affirmed by the California Court of Appeal on different grounds. In turn, the California Supreme Court reversed the Superior Court in *Dept. of Finance*, as discussed in Section IV.B above. This case is presently before the Los Angeles County Superior Court for consideration of issues not addressed in *Dept. of Finance*.

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 the San Diego County Statement of Decision, in which it found the following requirements to be reimbursable state mandates:

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

2. A requirement 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.

The Department of Finance, the State Board and the RWQCB challenged the Commission in a writ of mandate proceeding brought in Sacramento County Superior Court. On January 5, 2012, the Commission's decision was overturned by the Superior Court and remanded to the Commission. The San Diego County claimants appealed to the California Court of Appeal, which issued its decision in *Dept. of Finance II* on December 19, 2017, upholding the Commission's decision on the state nature of the mandates.

In *Dept. of Finance II*, the Court of Appeal applied "the analytical regime" of *Dept. of Finance* (slip op. at 3) to the facts of the San Diego County test claim and concluded that all of the mandates at issue were state, not federal. The opinion contains important guidance for the Commission regarding the relationship of what constitutes "MEP" and federal versus state mandates and as to how federal law, regulation or EPA case authority are to be reviewed as authority for permit requirements.

First, with regard to the question of MEP, the court addressed the state's argument that the permit requirements were federal mandates because the RWQCB "had no discretion but to impose conditions that satisfied the 'maximum extent practicable' standard." *Id.* at 21. In response, the court held that the MEP standard "by its nature is discretionary and does not by itself impose a federal mandate" for purposes of article XIII B, section 6 of the California Constitution. *Id.* The court determined that under the CWA and the federal stormwater regulations themselves, the water board was given discretion to determine what permit conditions would meet the MEP standard. *Id.* at 21-22.

The court also addressed the State's argument that the case before it differed from that in *Dept. of Finance* because, among other things, "the San Diego Regional Board here made a finding its requirements were 'necessary' in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make." *Id.* at 22. In response, the court held that the fact that the San Diego board

> found the permit requirements were "necessary" to meet the standard establishes only that the San Diego Regional Board exercised its discretion. Nowhere did the San Diego Regional Board find its conditions were the only means by which the permittees could meet the standard. Its use of the word "necessary" did not equate to finding the permit requirement was the *only* means of meeting the standard.

Id. at 23-24. The court concluded that the RWQCB "had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce storm water pollutants to the maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates." *Id.* at 24.

Second, the court rejected the argument that general requirements for permit requirements found in federal law or regulation were sufficient to determine that permit provisions adopted thereunder represented a federal mandate. By contrast, the court found that to be "a federal mandate for purposes of section 6 . . . the federal law or regulation must 'expressly' or 'explicitly' require the condition imposed in the permit." *Id.* at 25. In that case, the court found, the state had

cited to "no law, regulation, or EPA case authority presented to the Commission or the trial court that expressly required any of the challenged permit requirements." *Id.*

The court then examined each of the seven specific mandates imposed by the RWQCB in the 2007 San Diego County permit and found none to be required by federal law. In particular, the court examined the MS4 permit application regulation 40 C.F.R. § 122.26, which had been cited by the RWQCB as authority for the permit requirements. *Id.* at 25-32. In each case, the court concluded that none of the permit requirements at issue in the test claim were required by those regulations and, thus, constituted state mandates.

IX. CONCLUSION

The Permit imposes many new mandated activities and programs on Claimants that are not required to be imposed on local governments under federal law. As detailed above, the costs to develop and implement these new programs and activities are substantial. At the same time, Claimants lack the ability/authority to develop and impose fees to fully fund these programs. The costs incurred and to be incurred to comply with these state-mandated programs all satisfy the criteria for reimbursable mandates, and Claimants respectfully request that the Commission make such findings as to each of the mandated programs and activities set forth herein, and find that they require funding under the California Constitution.

SECTION 6 DECLARATIONS

IN SUPPORT OF JOINT TEST CLAIM OF RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ET AL. TO SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R9-2015-0100, AN ORDER AMENDING ORDER NO. R9-2013-0001, NPDES NO. CAS0109266, AS AMENDED BY ORDER NO. R9-2015-0001, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION, PROVISIONS A.4, B.2, B.3 (EXCEPT B.3.c), B.3.b.(4), B.4, B.5, B.56, D.1.c.(6), D.2.a.(2), D.3, D.4, E.3.c.(2), E.3.c.(3), E.3.d, E.5.c.(1)a, E.5.c.(2)(a), E.5.c.(3), E.5.e., E.6, F.1.a., F.1.b., F.2.a., F.2.b., F.2.c., F.3.b.(3) AND F.3.c., EFFECTIVE JANUARY 7, 2016

DECLARATION OF EDWIN QUINONEZ

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

I, Edwin Quinonez, hereby declare and state as follows:

1. I am Chief of the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District ("District"). In that capacity, I share responsibility for the compliance of the District with regard to the requirements of California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, and as amended by Order No. R9-2015-0100 (the "Permit"), as they apply to the District.

2. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I also have been informed by District staff with familiarity of pertinent sections of Order No. R9-2010-0016 ("2010 Permit") that the Permit sections set forth herein were not in the 2010 Permit.

3. I also have an understanding of the District's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the District and other permittees under the Permit have agreed to share certain costs of complying with the Permit.

4. I have reviewed a spreadsheet prepared by my staff at the District, setting forth calculated percentages for costs shared under the Permit, including costs incurred by the District. A true and correct copy of that spreadsheet is attached hereto as Exhibit A.

5. 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 do so as to the matters set forth herein.

6. In Section 5 and attachments and exhibits filed by the District and other permittees in support of this Joint Test Claim, the specific sections of the Permit at issue in this Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the attachments and exhibits as though fully set forth herein.

7. The District first incurred costs under the Permit on January 7, 2016, the effective date of the Permit. The District had begun efforts to determine how to comply with the Permit prior to the effective date, and those efforts continued on and after the effective date.

8. Based on my understanding of the Permit and on the information provided by my staff concerning the applicable requirements of the 2010 Permit, I believe that the Permit required the District to undertake the following new and/or upgraded activities and which are unique to local government entities and which were not required in the 2010 Permit:

a. Water Quality Improvement Plan Requirements: Provisions B.2-B.6, F.1.a, F.1.b, F.2.c, F.3.b(3), F.3.c and A.4 of the Permit require the permittees, including the District, to undertake a number of requirements related to the development of a Water Quality Improvement Plan ("WQIP") and related requirements, including development of priority water quality conditions ("PWQCs") through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants and/or stressors, and identification of potential water quality improvement strategies ("WQIS"); development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals, development of WQIS on a jurisdictional and Watershed Management Area ("WMA") basis, schedules for implementing the strategies, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric

goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP; use of the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and Jurisdictional Runoff Management Programs ("JRMPs") to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program; submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.; implement a public participation process concerning the WQIP, including formation of a Water Quality Improvement Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential WQIS, and after submitting the draft WQIP, to consider public comments; submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP; develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Consultation Panel, submitting proposed WQIP updates to the RWQCB along with recommendations received from the public and Consultation Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate Total Maximum Daily Load Waste Load Allocations ("TMDL WLAs"); to submit WQIP Annual Reports and a Regional Monitoring and Assessment Report containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of WQIS and future proposed updates to the WQIP or JRMPs; and, follow a process to achieve compliance with discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of

water quality standards. Using funds contributed from each permittee, including the District, through an Implementation Agreement, the District has retained consultants to submit elements of these requirements, including analysis, public comment coordination and response and response to RWQCB comments. In addition, the District has conducted mapping GIS analysis and watershed characteristics studies, efforts that also involved cost sharing through the Implementation Agreement. Based on my review of the spreadsheet attached as Exhibit A, in Fiscal Year ("FY") 2015-16, the District's calculated share of such costs was $32,524.91 and that in FY 2016-17 the District's calculated share of such costs was $116,445.64.

b. Critical Sediment Source Requirements: Provision E.3.c(2) of the Permit requires the permittees to ensure that Priority Development Projects ("PDPs") either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. Using funds contributed from each permittee, including the District, through the Implementation Agreement, the District has done mapping in support of this requirement. Based on my review of the spreadsheet attached as Exhibit A, the District did not incur costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the District's calculated share of such costs in FY 2016-17 was $639.93.

c. BMP Design Manual Update Requirements: Provisions E.3.d and F.2.b of the Permit requires the District to update its BMP ("Best Management Practices") Design Manual by including updated procedures for determining the nature and extent of stormwater requirements applicable to development and redevelopment projects, to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs, for designing structural BMPs and for long-term maintenance criteria for each structural BMP listed in the Manual and alternative compliance criteria if the District allows PDPs to utilize alternative compliance under Provision

E.3.c(3). In addition, such updated manual must be submitted concurrent with the submittal of the WQIP and must correct deficiencies in the Manual based on comments from the RWQCB and subsequent updates to the Manual must be submitted to the RWQCB in WQIP Annual Reports or as part of the Report of Waste Discharge. Using funds contributed from each permittee, including the District, through the Implementation Agreement, the District is addressing these requirements through preliminary planning work and program development and has retained a consultant for further work. Based on my review of the spreadsheet attached as Exhibit A, in FY 2015-16, the District's calculated share of such shared costs was $157.48 and in FY 2016-17, the District's calculated share of such costs was $125.11.

d. [reserved].

e. Stream Rehabilitation Requirements: Provisions E.5.e(1) of the Permit requires the District to describe in its JRMP and implement a program to retrofit areas of existing development based on various factors, a requirement to identifying areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and stressors that contribute to the highest PWQCs in the WQIP, to develop a strategy to facilitate the implementation of retrofitting projects in candidate areas, and other requirements, including to collaborate with other permittees and/or entities in the WMA to develop and implementing regional retrofitting projects if retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest PWQCs in the WQIP. In addition, Provision E.5.e(2) of the Permit requires the District to similarly identify streams, channels and/or habitats in areas of exiting development in its JRMP document, and to implement the program by identifying such streams, etc. as candidates for rehabilitation, focusing on areas where stream rehabilitation projects will address the highest PWQCs identified

in the WQIP and develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in candidate areas of existing development and to collaborate and cooperate with other permittees and/or entities in the WMA to identify develop and implement regional stream, etc. rehabilitation projects if projects within specified areas are determined to be infeasible to address the highest PWQCs in the WQIP. Using funds contributed from each permittee, including the District, through the Implementation Agreement, the District is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet attached as Exhibit A, in FY 2015-16, the District's calculated share of such shared costs was $157.48 and in FY 2016-17, the District's calculated share of such costs was $125.11.

f. Enforcement Response Plan Requirements: Provision E.6 of the Permit requires the District to develop and implement an "Enforcement Response Plan" ("ERP") as part of its JRMP document. The ERP must include enforcement components for illicit discharge detection and elimination, development planning, construction management and existing development. Each ERP component must describe the enforcement response to violations of various requirements, including the Permit, and provide protocols to implement progressively strict enforcement, using eight specified requirements or their equivalent. The Permit further requires that violations be corrected in a "timely manner" and that if more than 30 calendar days are required to achieve compliance, then a "rationale" must be recorded in an electronic database or tabular system used to track violations. The ERP further is required to include a definition of "escalated enforcement" and where the District determines that escalated enforcement is not required, the rationale must be recorded. The District is further required to notify the RWQCB within five calendar days of issuing escalated enforcement to a construction site that poses a

significant threat to water quality and to provide a similar notice of persons who have failed to obtain coverage under the statewide Industrial General Permit and Construction General Permit. The District, using funds contributed from each permittee including the District through the Implementation Agreement, is addressing these requirements through program development and planning efforts and will further address these requirements through JRMP update efforts. Based on my review of the spreadsheet attached as Exhibit A, the District did not incur costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the District's calculated share of such costs was $125.11.

g. JRMP Update Requirements: Provision F.2.a of the Permit requires the District to update its JRMP document along specified requirements to, among other things, document the requirements of Provision E concurrent with the submittal of the WQIP and correct any deficiencies in the JRMP document based on comments received from the RWQCB in updates submitted with the WQIP annual report; submit updates to its JRMP, with supporting rationale, either in the WQIP Annual Report or as part of the Report of Waste Discharge; revise proposed modifications to its JRMP as directed by the RWQCB Executive Officer; and make updated JRMP document available on the Regional Clearinghouse. The District, using funds contributed from each permittee including the District through the Implementation Agreement, is revising the JRMP model through program development and planning efforts. Based on my review of the spreadsheet attached as Exhibit A, in FY 2015-16, the District's calculated share of such shared costs was $157.48 and in FY 2016-17, the District's calculated share of such costs was $125.11.

h. Field Screening Requirements: Permit Provision D.2.a(2) requires the permittees, including the District, to field screen MS4 outfalls in its inventory developed under Provision D.2.a(1). This field screening requires that 80 percent of the District's MS4 outfalls be visually

inspected two times per year during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than 0.1 inch. The District must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flows. To determine whether flow may be transient or persistent, the District must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. The District is further required to use the results of the field screening monitoring to update the MS4 outfall discharge monitoring station inventory with new information on whether the outfall produces persistent flow, transient flow, or no dry weather flow. The District, using funds contributed from each permittee, including the District, through the Implementation Agreement, has conducted mapping, program planning and scheduling efforts, field work, data entry and training efforts with regard to these requirements. Based on my review of the spreadsheet attached as Exhibit A, in FY 2015-16, the District's calculated share of such costs was $3,183.36 and in FY 2016-17, the District's calculated share of such costs was $6,649.47.

i. Special Studies Requirements: Provision D.3 of the Permit requires the permittees, including the District, to initiate special studies with respect to issues in the WMA. The Permit requires that at least two special studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that cause or contribute to the highest PWQCs in the WQIP and one special study for the entire San Diego Region to address studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressor that are impacting receiving waters on a regional basis in the San Diego Region. Such studies meet several

requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs. Using funds contributed from the permittees, including the District, through the Implementation Agreement, the District has selected, with the approval of the permittees, candidate special studies and that it is planned that a consultant or consultants will be selected to conduct the studies. Based on my review of the spreadsheet attached as Exhibit A, the District did not incur costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the District's calculated share of such costs was $100.83.

j. Assessment Requirements: Provision D.4 of the Permit requires the permittees, including the District, to undertake assessments of receiving waters, MS4 outfall discharges, special studies and to conduct an integrated assessment of the WQIP.

(1) With respect to the receiving waters assessment, Permit Provision D.4.a requires that permittees, including the District, assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQIP; and identify data gaps in the monitoring data

necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b.(2) or the Report of Waste Discharge.

(2) With respect to MS4 outfall discharges, Permit Provision D.4.b requires that permittees, including the District, conduct both a non-stormwater discharges reduction assessment and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within the District's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilize a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; review monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to the District's MS4; assess the effectiveness of WQIS toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identify modifications necessary to increase the effectiveness of WQIS; and identify data gaps in

monitoring data. With respect to stormwater discharges, the Permit requires the permittees, including the District, to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s in various reports; analyze monitoring data and use a watershed model or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater and pollutant loads discharged from the District's monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from the District during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring

constitutes for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

(3) With respect to Special Studies assessments, Permit Provision D.4.c requires the permittees, including the District, to annually evaluate the results and findings from the special studies required by Permit Provision D.3 and assess their relevant to efforts to characterize receiving water conditions, understand source of pollutants and/or stressors and control and reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

(4) With respect to the integrated assessment of the WQIP, Permit Provision D.4.d requires the permittees, including the District, to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluate the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, the permittees, including the District, are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation

must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.

Using funds contributed from each permittee, including the District, through the Implementation Agreement, the District is planning to retain consultant support for the assessment efforts required in the Permit and is currently engaged in planning and program development work, including the identification of prospective consultants. Based on my review of the spreadsheet attached as Exhibit A, the District did not incur shared costs in FY 2015-16 and that in FY 2016-17, the District's calculated share of such costs for FY 2016-17 was $360.61.

k. Alternative Compliance Program to Onsite Structural BMP Implementation:

Permit Provision E.3.c(3) sets forth requirements for PDPs, including District PDPs, to allow the PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control as an alternative to onsite BMPs. To qualify for this alternative, the permittees, including the District, must undertake a Watershed Management Area Analysis set forth in Provision B.3.b(4). Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. The permittees must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from onsite stormwater and hydromodification BMP performance requirements. Additionally, the permittees, including the District, must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. For PDPs, including District PDPs, wishing to enter an alternative compliance program, they must fund, contribute

funds to or implement a candidate project, provided that the permittees, including the District, have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c(1) and E.3.c(2)(a) ("onsite BMP requirements"). Additionally, if the PDP chooses to fund a candidate project, the permittees are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite structural BMPs; if the PDP choose to implement a candidate project, the permittees are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that design is conducted under appropriate professionals who are competent and proficient in the fields pertinent to the project design; and that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer; the permittees must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that the permittees determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, the permittees must develop and implement an in-lieu fee structure. On information and belief, I understand and therefore state that many areas located within the WMA do not have appropriate

conditions for the installation of many onsite structural BMPs. Thus, the alternative compliance program set forth in Permit Provision E.3.c(3) is required for PDPs to be constructed in such areas. Using funds contributed from each permittee, including the District, through the Implementation Agreement, the District has conducted meetings, is coordinating project planning, is mapping and is planning to retain consultant support for the alternative compliance efforts required in the Permit. Based on my review of the spreadsheet attached as Exhibit A, the District did not incur shared costs in FY 2015-16 and that in FY 2016-17, the District's calculated share of such costs was $7,548.59.

l. Dry Weather Hydromodification Monitoring Requirements: Provision D.1.c(6) of the Permit requires the permittees, including the District, to collect observations and measurements during dry weather monitoring event at each long-term receiving water monitoring station established under the Hydromodification Plan, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions, and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development. Based on my review of the spreadsheet attached as Exhibit A, the District incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the District will incur costs with regard to these requirements after approval of the WQIP.

9. I am informed and believe that there are no dedicated state or federal 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. In 1991, the District established the Santa Margarita Watershed Benefit Assessment to fund its MS4 compliance activities. The Benefit Assessment paid for aspects of the District's compliance with the Permit. There was no increase in the fees generated by the Benefit Assessment over the course of the Permit. 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. I further am informed and believe that the only other source to pay for these new programs and activities is the District's general fund.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 3, 2018 at Riverside, California.

Edwin Quinonez

Edwin Quinonez

EXHIBIT A

Santa Margarita 2015 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.35	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$25,050.37	
				Total	$129,581.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.23	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	1418	$68.62	$97,307.24	
	Development/Research/Revisions	Monitoring Program Mgr	152	$59.76	$9,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.69	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	---	---	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$254,534.27	
				Total	$587,163.19	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,581.71*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.19*
County of Riverside	16.06%	$20,878.99	17.15%	$100,716.97
Murrieta	24.41%	$31,735.01	25.79%	$151,434.25
Temecula	26.92%	$34,995.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.64

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	$3,226.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	**$629.34**

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	**$101.07**	17.15%	**$108.21**
Murrieta	24.41%	**$153.65**	25.79%	**$162.70**
Temecula	26.92%	**$169.44**	28.89%	**$182.28**
Wildomar	7.58%	**$47.70**	8.33%	**$52.55**
RCFC&WCD	25.02%	**$157.48**	19.83%	**$125.11**

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	$108.21
Murrieta			25.79%	$162.70
Temecula			28.89%	$182.28
Wildomar			8.33%	$52.55
RCFC&WCD			19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	---	---	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

SECOND DECLARATION OF JULIANNA ADAMS

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

I, JULIANNA ADAMS, hereby declare and state as follows:

1. I am a Senior Civil Engineer within the Watershed Protection Division of the Riverside County Flood Control and Water Conservation District ("District"). My job responsibilities have included serving as the supervisor for various stormwater permit programs overseen by the division, including the Santa Margarita River watershed, which is regulated by a stormwater permit issued by the California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and as amended by Order No. R9-2015-0100 (the "Permit").

2. In that capacity for the District, I have first-hand and personal knowledge of Permit requirements and of monies spent by the District on behalf of itself and on behalf of permittees to address requirements under the Permit. I make this declaration based on my own personal knowledge, except for matters set forth herein 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 do so as to the matters set forth herein.

3. I have knowledge of sections of the Permit as set forth in the Section 5 Narrative Statement and the Section 6 Declarations of this Test Claim and how they are implemented by the permittees subject to the Permit (the "Permittees"), who are also the claimants under this Test Claim ("Claimants").

4. The District is designated as Principal Permittee under the Permit, and in that role, coordinates joint responses to the Permit requirements set forth in this Test Claim, which

responses are being paid for as shared costs by the Claimants under the Implementation Agreement entered into by and between the Permittees.

5. I have knowledge of and have reviewed financial records showing expenditures made by the Claimants under the Implementation Agreement to fund Permit requirements. In connection with that review, I prepared spreadsheets listing my calculations of the share of costs paid by each Claimant with respect to items in the Permit included in the Test Claim. A true and correct copy of a compilation of those spreadsheets, which was provided to Claimant representatives on December 26, 2017, is attached as Exhibit A hereto.

6. I have knowledge of various requirements under the former stormwater permit covering the Permittees (California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016) (the "2010 Permit") that were the subject of a test claim filed with the Commission on State Mandates ("Commission").

7. I am informed and believe and therefore state that the following requirements of the 2010 Permit that were the subject of the test claim filed with the Commission have been incorporated, in whole or in part, in the Permit:

(a) 2010 Permit Section B.2, found in Permit Provision E.2(a);

(b) 2010 Permit Section F.1.d and F.1.h, found in part in Permit Provision E.3.b(1-2);

(c) 2010 Permit Section F.1, found in Permit Provision E.3.e(2);

(d) 2010 Permit Section F.2.d, found in Permit Provision E.4.c; and

(e) 2010 Permit Section F.1.i and F.3.a.10, found in Permit Provision E.3.a and E.5.b(1).

8. The City of Menifee is not a permittee under the Permit and is not required to share in the cost of Permit compliance under the Implementation Agreement. However, because

a small section of the city is located within the area covered by the Permit, the Permit requires the City of Menifee to participate in activities relating to the development of a Water Quality Improvement Plan ("WQIP"). I am informed and believe and therefore state that representatives of the City of Menifee have participated in WQIP development activities, including attendance at meetings.

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

Executed January 4, 2018 at Riverside, California.

Julianna Adams

Julianna Adams

EXHIBIT A

Santa Margarita 2013 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.85	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$25,050.37	
				Total	$129,581.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.23	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	1418	$68.62	$97,307.24	
	Development/Research/Revisions	Monitoring Program Mgr	137	$59.76	$8,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.68	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	—	—	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$254,594.27	
				Total	$587,163.18	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,581.71*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.15*
County of Riverside	16.06%	$20,878.99	17.15%	$100,716.97
Murrieta	24.41%	$31,735.01	25.79%	$151,484.25
Temecula	26.92%	$34,995.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.64

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	$3,226.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	**$629.34**

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	**$101.07**	17.15%	**$108.21**
Murrieta	24.41%	**$153.65**	25.79%	**$162.70**
Temecula	26.92%	**$169.44**	28.89%	**$182.28**
Wildomar	7.58%	**$47.70**	8.33%	**$52.55**
RCFC&WCD	25.02%	**$157.48**	19.83%	**$125.11**

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	$108.21
Murrieta			25.79%	$162.70
Temecula			28.89%	$182.28
Wildomar			8.33%	$52.55
RCFC&WCD			19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	----	----	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

DECLARATION OF SCOTT BRUCKNER

COUNTY OF RIVERSIDE

I, Scott Bruckner, hereby declare and state as follows:

1. I am a Senior Management Analyst for the County of Riverside ("County") and am employed in the County's Executive Office. In that capacity, I share responsibility for the compliance of the County with regard to the requirements of California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, and as amended by Order No. R9-2015-0100 (collectively, the "Permit"), as they apply to the County.

2. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. In addition, in my former position with the Riverside County Flood Control and Water Conservation District ("District"), I had responsibility for implementation of the Permit for the District and on behalf of other permittees. I also am aware of the requirements of pertinent sections of Order No. R9-2010-0016 ("2010 Permit") which was issued by the RWQCB in 2010 and as to which the County issued a notice of intent to comply, and am familiar with those requirements.

3. I also have an understanding of the County's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the County and other Copermittees under the Permit agreed to share certain costs of complying with the Permit.

4. I have reviewed a spreadsheet provided by the District, setting forth calculated percentages for costs shared by the permittees under the Permit concerning the requirements discussed below. A true and correct copy of that spreadsheet is attached hereto as Exhibit A. In

addition, I have reviewed financial estimates of direct costs incurred by the County, prepared by County staff, with regard to the Permit requirements described below. A true and correct copy of a spreadsheet prepared by staff and including such costs is attached hereto as Exhibit B.

5. 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 do so as to the matters set forth herein.

6. In Section 5 and attachments and exhibits of the Joint Test Claim filed by the County and other permittees, the specific sections of the Permit at issue in this Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the attachments and exhibits as though fully set forth herein.

7. To my personal knowledge, based on a review of the County's general ledger, the County first incurred costs under the Permit on January 20, 2016, when a County employee, Claudia Steiding, initiated review and planning of Permit implementation.

8. Based on my understanding of the Permit and the applicable requirements of the 2010 Permit, I believe that the Permit required the County to undertake the following new and/or upgraded activities and which are unique to local government entities and which were not required in the 2010 Permit:

a. Water Quality Improvement Plan Requirements: Provisions B.2-B.6, F.1.a, F.1.b, F.2.c, F.3.b(3), F.3.c and A.4 of the Permit require the permittees, including the County, to undertake a number of requirements related to the development of a Water Quality Improvement Plan ("WQIP") and related requirements, including development of priority water quality conditions ("PWQCs") through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants

and/or stressors, and identification of potential water quality improvement strategies ("WQIS); development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals, development of WQIS on a jurisdictional and Watershed Management Area ("WMA") basis, schedules for implementing the strategies, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP; use of the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and Jurisdictional Runoff Management Programs ("JRMPs") to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program; to submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.; implement a public participation process concerning the WQIP, including formation of a Water Quality Improvement Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential WQIS, and after submitting the draft WQIP, to consider public comments; submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP; develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Consultation Panel, submitting proposed WQIP updates to the RWQCB along with recommendations received from the public and Consultation Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate TMDL WLAs; to submit

WQIP Annual Reports and a Regional Monitoring and Assessment Report containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of WQIS and future proposed updates to the WQIP or JRMPs; and, follow a process to achieve compliance with discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of water quality standards. It is my understanding and belief that using funds contributed from each permittee, including the County, through an Implementation Agreement, the District has retained consultants to submit elements of these requirements, including analysis, public comment coordination and response and response to RWQCB comments. In addition, the District has conducted mapping GIS analysis and watershed characteristics studies, efforts that also involved cost sharing through the Implementation Agreement. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in Fiscal Year ("FY") 2015-16, the County's calculated share of such shared costs was $20,873.99 and in FY 2016-17, the City's calculated share of that cost was $100,716.97. In addition, based on my review of financial information prepared by County staff and attached as Exhibit B, the County incurred estimated additional direct costs of $19,165.25 in FY 2015-16 and $159,063.39 in FY 2016-17 to address these requirements.

b. Critical Sediment Source Requirements: Provision E.3.c(2) of the Permit requires the County to ensure that Priority Development Projects ("PDPs") either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. It is my understanding and belief that using funds contributed from each permittee, including the County, through the Implementation Agreement, the District has done mapping in support of these requirements. Based on my review of the spreadsheet provided by

the District and attached as Exhibit A, the County did not incur shared costs in FY 2015-16 for these requirements and that in FY 2016-17, the County's calculated share of such costs was $553.50. In addition, based on my review of financial information prepared by County staff and attached as Exhibit B, the County incurred estimated additional direct costs of $3,556.48 in FY 2016-17 to address these requirements.

c. BMP Design Manual Update Requirements: Provisions E.3.d and F.2.b of the Permit requires the County to update its BMP Design Manual by including updated procedures to determine the nature and extent of stormwater requirements applicable to development and redevelopment projects, to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs, for designing structural BMPs and for long-term maintenance criteria for each structural BMP listed in the Manual and alternative compliance criteria if the County allows PDPs to utilize alternative compliance under Provision E.3.c(3). In addition, such updated manual must be submitted concurrent with the submittal of the WQIP and must correct deficiencies in the Manual based on comments from the RWQCB and subsequent updates to the Manual must be submitted to the RWQCB in WQIP Annual Reports or as part of the Report of Waste Discharge. It is my understanding and belief that using funds contributed from each permittee, including the County, through the Implementation Agreement, the District is addressing these requirements through preliminary planning work and program development and has retained a consultant for further work. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the County's calculated share of such costs was $101.07 and in FY 2016-17, the County's calculated share of such costs was $108.21.

d. Residential Inventory and Inspection Requirements: Provisions E.5.a, E.5.c(1)(a), E.5.c(2)(a) and E.5.c(3) of the Permit require the County to inventory various

residential areas, including the identification of pollutants generated and potentially generated by the residential area, to annually update a map showing such areas, and to inspect areas of inventoried existing residential development, under specified frequencies, and as appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants from the MS4 and to effectively prohibit non-stormwater discharges to the MS4, to respond to public complaints and based upon inspection findings, the permittees, including the County, must implement followup actions. These Permit provisions further specify the content of inspections, including areas where visual inspections are required to be made, as well as assessment of compliance with ordinances and permits relating to stormwater and non-stormwater discharges and runoff, the implementation of designated BMPS, and the taking and documenting of actions in accordance with the Enforcement Response Plan required in Permit Provision E.6. The County is further required to track all inspections and re-inspections and retain all inspection records in an electronic database or tabular format, including the name of the inspected facility, the date, methods, observations and findings, and the description of any problems or violations, enforcement actions and the date that problems or violations were resolved. Based on my review of the District's spreadsheet attached as Exhibit A, the County incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the County will incur costs with respect to these requirements after WQIP approval occurs.

e. Retrofitting Areas of Existing Development and Stream Rehabilitation Requirements: Provisions E.5.e(1) of the Permit requires the County to describe in its JRMP and implement a program to retrofit areas of existing development based on various factors, a requirement to identifying areas of existing development as candidates for retrofitting, focusing

on areas where retrofitting will address pollutants and stressors that contribute to the highest PWQCs in the WQIP, to develop a strategy to facilitate the implementation of retrofitting projects in candidate areas, and other requirements, including to collaborate with other permittees and/or entities in the WMA to develop and implementing regional retrofitting projects if retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest PWQCs in the WQIP. In addition, Provision E.5.e(2) of the Permit requires the County to similarly identify streams, channels and/or habitats in areas of exiting development in its JRMP document, and to implement the program by identify such streams, etc. as candidates for rehabilitation, focusing on areas where stream rehabilitation projects will address the highest PWQCs identified in the WQIP and develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in candidate areas of existing development and to collaborate and cooperate with other permittees and/or entities in the WMA to identify, develop and implement regional stream, etc. rehabilitation projects if projects within specified areas are determined to be infeasible to address the highest PWQCs in the WQIP. I am informed and believe that, using funds contributed from each permittee, including the County, through the Implementation Agreement, the District is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the County's calculated share of such costs was $101.07 and the County's calculated share of such costs in FY 2016-17 was $108.21.

f. Enforcement Response Plan Requirements: Provision E.6 of the Permit requires the County to develop and implement an "Enforcement Response Plan" ("ERP") as part of its

JRMP document. The ERP must include enforcement components for illicit discharge detection and elimination, development planning, construction management and existing development. Each ERP component must describe the enforcement response to violations of various requirements, including the Permit, and provide protocols for implement progressively strict enforcement, using eight specified requirements or their equivalent. The Permit further requires that violations be corrected in a "timely manner" and that if more than 30 calendar days are required to achieve compliance, then a "rationale" must be recorded in an electronic database or tabular system used to track violations. The ERP further is required to include a definition of "escalated enforcement" and where the County determines that escalated enforcement is not required, the rationale must be recorded. The County is further required to notify the RWQCB within five calendar days of issuing escalated enforcement to a construction site that poses a significant threat to water quality and to provide a similar notice of persons who have failed to obtain coverage under the statewide Industrial General Permit and Construction General Permit. I am informed and believe that the District, using funds contributed from each permittee including the County through the Implementation Agreement, is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the County did not incur shared costs with respect to these requirements in FY 2015-16 and that the County's calculated share of such costs in FY 2016-17 was $108.21.

g. JRMP Update Requirements: Provision F.2.a of the Permit requires the County to update its JRMP document along specified requirements to, among other things, document the requirements of Provision E concurrent with the submittal of the WQIP and correct any

deficiencies in the JRMP document based on comments received from the RWQCB in updates submitted with the WQIP annual report; submit updates to its JRMP, with supporting rationale, either in the WQIP Annual Report or as part of the Report of Waste Discharge; must revise proposed modifications to tis JRMP as directed by the RWQCB Executive Officer; and to make updated JRMP document available on the Regional Clearinghouse. I am informed and believe that the District, using funds contributed from each permittee including the County through the Implementation Agreement, is revising the JRMP model through program development and planning efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the County's calculated share of such costs was $101.07 and in FY 2016-17, the County's calculated share of such costs was $108.21.

h. Field Screening Requirements: Permit Provision D.2.a(2) requires the permittees, including the County, to field screen MS4 outfalls in its inventory developed under Provision D.2.a(1). This field screening requires that 80 percent of the County's MS4 outfalls be visually inspected two times per year during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than .1 inch. The County must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flows. To determine whether flow may be transient or persistent, the County must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. The County is further required to use the results of the field screening monitoring to update the MS4 outfall discharge monitoring station inventory with new information on whether the outfall produces persistent flow, transient flow, or no dry weather flow. I am informed and believe that the

District, using funds contributed from each permittee including the County through the Implementation Agreement, has conducted mapping, program planning and scheduling efforts, field work, data entry and training efforts with regard to these requirements. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the County's calculated share of such costs was $2,043.03 and in FY 2016-17, the County's calculated share of such costs was $5,751.30. Based on my review of financial information prepared by County staff and attached as Exhibit B, the County incurred estimated additional direct costs of $3,711.72 in FY 2015-16 and $16,584.25 in FY 2016-17 to address these requirements.

i. Special Studies Requirements: Provision D.3 of the Permit requires the permittees, including the County, to initiate special studies with respect to issues in the WMA. The Permit requires that at least two special studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that cause or contribute to the highest PWQCs in the WQIP and one special study for the entire San Diego Region to address studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressor that are impacting receiving waters on a regional basis in the San Diego Region. Such studies meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs. I am informed and believe and therefore state that using funds contributed from the permittees,

including the County, through the Implementation Agreement, the District has selected, with the approval of the permittees, candidate studies and that it is planned that a consultant or consultants will be selected to conduct the studies. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16 the County incurred no shared costs with respect to such requirements and that in FY 2016-17, the County's calculated share of such costs was $87.21.

j. Assessment Requirements: Provision D.4 of the Permit requires the permittees, including the County, to undertake assessments of receiving waters, MS4 outfall discharges, special studies and to conduct an integrated assessment of the WQIP.

(1) With respect to the receiving waters assessment, Permit Provision D.4.a requires that permittees, including the County, assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQ1IP; and identify data gaps in the monitoring data necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b.(2) or the Report of Waste Discharge.

(2) With respect to MS4 outfall discharges, Permit Provision D.4.b requires that permittees, including the County, conduct both a non-stormwater discharges reduction

assessment and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within the County's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilize a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; and, review monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to the County's MS4; assess the effectiveness of WQIS toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identify modifications necessary to increase the effectiveness of WQIS; and identify data gaps in monitoring data. With respect to stormwater discharges, the Permit requires the permittees, including the County, to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s in various reports; analyze monitoring data and use a watershed model or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater

and pollutant loads discharged from the County's monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from the County during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring constitutes for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

(3) With respect to Special Studies assessments, Permit Provision D.4.c requires the permittees, including the County, to annually evaluate the results and findings from the special studies required by Permit Provision D.3 and assess their relevant to efforts to characterize

receiving water conditions, understand source of pollutants and/or stressors and control and reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

(4) With respect to the integrated assessment of the WQIP, Permit Provision D.4.d requires the permittees, including the County, to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluating the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, the permittees, including the County, are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.

I am informed and believe that using funds contributed from each Copermittee, including the County, through the Implementation Agreement, the District is planning to retain consultant support for the assessment efforts required in the Permit and is currently engaged in planning and program development work, including the identification of prospective consultants. Based on

my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the County incurred no shared costs with respect to such requirements and in FY 2016-17, the County's calculated share of such costs was $311.90.

k. Alternative Compliance Program to Onsite Structural BMP Implementation:

Permit Provision E.3.c(3) sets forth requirements for PDPs, including County PDPs, to allow the PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control as an alternative to onsite BMPs. To qualify for this alternative, the permittees, including the County, must undertake a Watershed Management Area Analysis set forth in Provision B.3.b(4). Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. The permittees must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from onsite stormwater and hydromodification BMP performance requirements. Additionally, the permittees, including the County, must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. For PDPs, including County PDPs, wishing to enter an alternative compliance program, they must fund, contribute funds to or implement a candidate project, provided that the permittees, including the County, have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c(1) and E.3.c(2)(a) ("onsite BMP requirements"). Additionally, if the PDP chooses to fund a candidate project, the permittees, including the County, are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully

implementing onsite structural BMPs; if the PDP choose to implement a candidate project, the permittees, including the County, are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that design is conducted under appropriate professionals who are competent and proficient in the fields pertinent to the project design; and that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer; the permittees, including the County, must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that the permittees, including the County, determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, the permittees, including the County, must develop and implement an in-lieu fee structure. On information and belief, I understand and therefore state that many areas located within the WMA do not have appropriate conditions for the installation of many onsite structural BMPs. Thus, the alternative compliance program set forth in Permit Provision E.3.c(3) is required for PDPs to be constructed in such areas. I am informed and believe that using funds contributed from each permittee, including the County, through the Implementation Agreement, the District has conducted meetings, is coordinating project planning, is mapping and is planning to retain

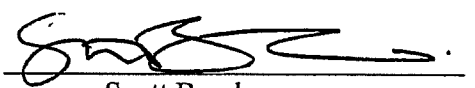
consultant support for the alternative compliance efforts required in the Permit. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16 the County incurred no shared costs with respect to such requirements and that in FY 2016-17, the County's calculated share of such costs was $6,528.98.

l. Dry Weather Hydromodification Monitoring Requirements: Provision D.1.c(6) of the Permit requires the permittees, including the County, to collect observations and measurements during dry weather monitoring event at each long-term receiving water monitoring station established under the Hydromodification Plan, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions, and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the County will incur costs with regard to these requirements after WQIP approval occurs.

9. I am informed and believe that there are no dedicated state, regional or federal 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 informed and believe that certain of the programs set forth above are funded in part by the proceeds of fuel taxes collected in the County and by community services association revenue. I am further informed and believe that such proceeds are not sufficient to fund all programs and activities set forth in this Declaration. I am not aware

of any other fee or tax that the County would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other source to pay for these new programs and activities is the County's general fund.

I declare under penalty of perjury that foregoing is true and correct. Executed January 5, 2018 at Riverside, California.



Scott Bruckner

EXHIBIT A

Santa Margarita 2013 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.95	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$25,050.87	
				Total	$129,981.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.23	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	1418	$68.62	$97,307.24	
	Development/Research/Revisions	Monitoring Program Mgr	152	$59.76	$9,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.69	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	—	—	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$254,534.27	
				Total	$587,163.19	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,981.91*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.19*
County of Riverside	16.06%	$20,878.99	17.15%	$100,716.97
Murrieta	24.41%	$31,735.01	25.79%	$151,434.25
Temecula	26.92%	$34,995.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.64

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	**$3,226.78**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	**$629.34**

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	**$101.07**	17.15%	**$108.21**
Murrieta	24.41%	**$153.65**	25.79%	**$162.70**
Temecula	26.92%	**$169.44**	28.89%	**$182.28**
Wildomar	7.58%	**$47.70**	8.33%	**$52.55**
RCFC&WCD	25.02%	**$157.48**	19.83%	**$125.11**

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	$108.21
Murrieta			25.79%	$162.70
Temecula			28.89%	$182.28
Wildomar			8.33%	$52.55
RCFC&WCD			19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	---	---	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

EXHIBIT B

UNFUNDED MANDATES TEST CLAIM FOR 2015 SANTA MARGARITA MS4 PERMIT
FY 2015/16

A.) **Provisions B and F, WQIP Requirements, and Provision A.4**

Department	Department Description	Project No.	Estimated Costs	Notes
Transportation	Transportation Planning	Z5508000	$7,236.49	Reviews, discussions, meetings, and technical support for WQIP efforts
Transportation	Transportation Planning	Z5508000	$11,928.75	Approximately 50% of the NPDES coordinator's time has been spent specifically on the SMR WQIP.
Transportation	Transportation Planning	Z5509004	$0.00	Cost charged specifically to unfunded mandates project number.
			$19,165.24	

H.) **Monitoring costs for additional field screening, Provision D.1.a(2)**

Department	Activity Description	Project No.	Total	Notes
Transportation		**Z5509000**	$3,711.72	Municipal Facility Inspections
			$3,711.72	

Estimated Total Costs for FY 2015/2016 =	**$22,876.96**

UNFUNDED MANDATES TEST CLAIM FOR 2015 SANTA MARGARITA MS4 PERMIT
FY 2016/17

A.) **Provisions B and F, WQIP Requirements, and Provision A.4**

Department	Department Description	Project No.	Estimated Costs	Notes
Transportation	Transportation Planning	Z5508000	$93,683.66	Reviews, discussions, meetings, and technical support for WQIP efforts
Transportation	Transportation Planning	Z5508000	$60,249.75	Approximately 75% of the NPDES coordinator's time has been spent specifically on the SMR WQIP.
Transportation	Transportation Planning	Z5509004	$5,129.98	Cost charged specifically to unfunded mandates project number.
			$159,063.39	

B.) **Critical Sediment and Hydromod requirements, Provision E.3.c.2**

Department	Activity Description	Project No.	Estimated Costs	Notes
Transportation	WMAA Meetings		3,556.48	Approx. 8 hrs for review, and 8 hrs for WMAA Meetings at a rate of $222.28/hr
			3,556.48	

H.) **Monitoring costs for additional field screening, Provision D.1.a(2)**

Department	Activity Description	Project No.	Total	Notes
Transportation		**Estimate**	$1,050.00	3 staff members for 2 days + vehicle
Transportation		**Z5509000**	$15,534.25	Municipal Facility Inspections
			$16,584.25	

Estimated Total Costs for FY 2016/2017 =	**$162,619.87**

SECOND DECLARATION OF BOB MOEHLING

CITY OF MURRIETA

I, Bob Moehling, hereby declare and state as follows:

1. I am City Engineer for the City of Murrieta ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, and as amended by Order No. R9-2015-0100 (collectively, the "Permit"), as they apply to the City.

2. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I also am aware of the requirements of pertinent sections of Order No. R9-2010-0016 ("2010 Permit") which was issued by the RWQCB in 2010 and as to which the City issued a notice of intent to comply, and am familiar with those requirements.

3. I also have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Copermittees under the Permit agreed to share certain costs of complying with the Permit.

4. I have reviewed a spreadsheet provided by the Riverside County Flood Control and Water Conservation District ("District"), setting forth calculated percentages for costs shared under the Permit. A true and correct copy of that spreadsheet is attached hereto as Exhibit A.

5. 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 do so as to the matters set forth herein.

6. In Section 5 and attachments and exhibits of the Joint Test Claim filed by the City and other permittees, the specific sections of the Permit at issue in this Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the attachments and exhibits as though fully set forth herein.

7. To my personal knowledge, based on the review of documents provided by the District, the City first incurred costs under the Permit on or about April 20, 2016, when it prepared for and then attended a meeting of other permittees concerning Permit requirements. Exhibit B to this Declaration is a true and correct copy of an agenda and meeting notes of that meeting which were provided by the District. That exhibit reflects that James Ozouf, an employee of the City, attended that meeting.

8. Based on my understanding of the Permit and the applicable requirements of the 2010 Permit, I believe that the Permit required the City to undertake the following new and/or upgraded activities and which are unique to local government entities and which were not required in the 2010 Permit:

a. Water Quality Improvement Plan Requirements: Provisions B.2-B.6, F.1.a, F.1.b, F.2.c, F.3.b(3), F.3.c and A.4 of the Permit require the permittees, including the City, to undertake a number of requirements related to the development of a Water Quality Improvement Plan ("WQIP") and related requirements, including development of priority water quality conditions ("PWQCs") through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants and/or stressors, and identification of potential water quality improvement strategies ("WQIS); development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals,

development of WQIS on a jurisdictional and Watershed Management Area ("WMA") basis, schedules for implementing the strategies, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP; use of the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and Jurisdictional Runoff Management Programs ("JRMPs") to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program; to submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.; implement a public participation process concerning the WQIP, including formation of a Water Quality Improvement Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential WQIS, and after submitting the draft WQIP, to consider public comments; submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP; develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Consultation Panel, submitting proposed WQIP updates to the RWQCB along with recommendations received from the public and Consultation Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate TMDL WLAs; to submit WQIP Annual Reports, a Regional Monitoring and Assessment Report and other reports containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of WQIS and future

proposed updates to the WQIP or JRMPs; and, follow a process to achieve compliance with discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of water quality standards. It is my understanding and belief that using funds contributed from each permittee, including the City, through an Implementation Agreement, the District has retained consultants to submit elements of these requirements, including analysis, public comment coordination and response and response to RWQCB comments. In addition, the District has conducted mapping GIS analysis and watershed characteristics studies, efforts that also involved cost sharing through the Implementation Agreement. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City's calculated share of such costs in FY 2015-16 was $31,735.01 and that in FY 2016-17, the City's calculated share of such costs was $151,434.25. I am informed and believe that the City incurred additional direct costs in these fiscal years with respect to these requirements but cannot at this time quantify those costs.

b. Critical Sediment Source Requirements: Provision E.3.c(2) of the Permit requires the City to ensure that Priority Development Projects ("PDPs") either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District has done mapping in support of these requirements. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no shared costs in FY 2015-16 with regard to these requirements and that the City's calculated share of such costs in FY 2016-17 was $832.21.

c. BMP Design Manual Update Requirements: Provisions E.3.d and F.2.b of the Permit requires the City to update its BMP Design Manual by including updated procedures to determine the nature and extent of stormwater requirements applicable to development and redevelopment projects, to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs, for designing structural BMPs and for long-term maintenance criteria for each structural BMP listed in the Manual and alternative compliance criteria if the City allows PDPs to utilize alternative compliance under Provision E.3.c(3). In addition, such updated manual must be submitted concurrent with the submittal of the WQIP and must correct deficiencies in the Manual based on comments from the RWQCB and subsequent updates to the Manual must be submitted to the RWQCB in WQIP Annual Reports or as part of the Report of Waste Discharge. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through preliminary planning work and program development and has hired a consultant for further work. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $153.65 and that in FY 2016-17, the City's calculated share of such costs was $162.70. I am informed and believe that the City incurred additional direct costs in these fiscal years with respect to these requirements but cannot at this time quantify those costs.

d. Residential Inventory and Inspection Requirements: Provisions E.5.a, E.5.c(1)(a), E.5.c(2)(a) and E.5.c(3) of the Permit require the City to inventory various residential areas, including the identification of pollutants generated and potentially generated by the residential area, to annual update a map showing such areas, and to inspect areas of inventoried existing residential development, under specified frequencies, and as appropriate to

confirm that BMPs are being implemented to reduce the discharge of pollutants from the MS4 and to effectively prohibit non-stormwater discharges to the MS4, to respond to public complaints and based upon inspection findings, the permittees, including the City, must implement followup actions. These Permit provisions further specify the content of inspections, including areas where visual inspections are required to be made, as well as assessment of compliance with ordinances and permits relating to stormwater and non-stormwater discharges and runoff, the implementation of designated BMPS, and the taking and documenting of actions in accordance with the Enforcement Response Plan required in Permit Provision E.6. The City is further required to track all inspections and re-inspections and retain all inspection records in an electronic database or tabular format, including the name of the inspected facility, the date, methods, observations and findings, and the description of any problems or violations, enforcement actions and the date that problems or violations were resolved. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs with regard to these requirements after WQIP approval.

e. Retrofitting Areas of Existing Development and Stream Rehabilitation Requirements: Provisions E.5.e(1) of the Permit requires the City to describe in its JRMP and implement a program to retrofit areas of existing development based on various factors, a requirement to identifying areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and stressors that contribute to the highest PWQCs in the WQIP, to develop a strategy to facilitate the implementation of retrofitting projects in candidate areas, and other requirements, including to collaborate with other

permittees and/or entities in the WMA to develop and implementing regional retrofitting projects if retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest PWQCs in the WQIP. In addition, Provision E.5.e(2) of the Permit requires the City to similarly identify streams, channels and/or habitats in areas of exiting development in its JRMP document, and to implement the program by identifying such streams, etc. as candidates for rehabilitation, focusing on areas where stream rehabilitation projects will address the highest PWQCs identified in the WQIP and develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in candidate areas of existing development and to collaborate and cooperate with other permittees and/or entities in the WMA to identify develop and implement regional stream, etc. rehabilitation projects if projects within specified areas are determined to be infeasible to address the highest PWQCs in the WQIP. I am informed and believe that, using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $153.65 and that in FY 2016-17, the calculated share of such costs was $162.70. I am further informed and believe that the City incurred additional direct costs in these fiscal years with respect to these requirements but cannot at this time quantify those costs.

f. Enforcement Response Plan Requirements: Provision E.6 of the Permit requires the City to develop and implement an "Enforcement Response Plan" ("ERP") as part of its JRMP document. The ERP must include enforcement components for illicit discharge detection and elimination, development planning, construction management and existing development.

Each ERP component must describe the enforcement response to violations of various requirements, including the Permit, and provide protocols to implement progressively strict enforcement, using eight specified requirements or their equivalent. The Permit further requires that violations be corrected in a "timely manner" and that if more than 30 calendar days are required to achieve compliance, then a "rationale" must be recorded in an electronic database or tabular system used to track violations. The ERP further is required to include a definition of "escalated enforcement" and where the City determines that escalated enforcement is not required, the rationale must be recorded. The City is further required to notify the RWQCB within five calendar days of issuing escalated enforcement to a construction site that poses a significant threat to water quality and to provide a similar notice of persons who have failed to obtain coverage under the statewide Industrial General Permit and Construction General Permit. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no shared costs for this requirement in FY 2015-16 and in FY 2016-17, the City incurred a calculated share of those costs of $162.70. I am further informed and believe that the City incurred additional direct costs in that fiscal year with respect to these requirements but cannot at this time quantify those costs.

g. JRMP Update Requirements: Provision F.2.a of the Permit requires the City to update its JRMP document along specified requirements to, among other things, document the requirements of Provision E concurrent with the submittal of the WQIP and correct any deficiencies in the JRMP document based on comments received from the RWQCB in updates

submitted with the WQIP annual report; submit updates to its JRMP, with supporting rationale, either in the WQIP Annual Report or as part of the Report of Waste Discharge; must revise proposed modifications to its JRMP as directed by the RWQCB Executive Officer; and to make updated JRMP document available on the Regional Clearinghouse. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is revising the JRMP model through program development and planning efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $153.65 and that in FY 2016-17, the City's calculated share of costs was $162.70. I am further informed and believe that the City incurred additional direct costs in these fiscal years with respect to these requirements but cannot at this time quantify those costs.

h. Field Screening Requirements: Permit Provision D.2.a(2) requires the permittees, including the City, to field screen MS4 outfalls in its inventory developed under Provision D.2.a(1). This field screening requires that 80 percent of the City's MS4 outfalls be visually inspected two times per year during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than .1 inch. The City must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flows. To determine whether flow may be transient or persistent, the City must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. The City is further required to use the results of the field screening monitoring to update the MS4 outfall discharge monitoring station inventory with new information on whether the outfall produces persistent

flow, transient flow, or no dry weather flow. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, has conducted mapping, program planning and scheduling efforts, field work, data entry and training efforts with regard to these requirements. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $3,106.05 and that in FY 2016-17, the City's calculated share of such costs was $8,647.44. I am informed and believe that the City incurred additional direct costs in these fiscal years with respect to these requirements but cannot at this time quantify those costs.

i. Special Studies Requirements: Provision D.3 of the Permit requires the permittees, including the City, to initiate special studies with respect to issues in the WMA. The Permit requires that at least two special studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that cause or contribute to the highest PWQCs in the WQIP and one special study for the entire San Diego Region to address studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressor that are impacting receiving waters on a regional basis in the San Diego Region. Such studies meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs. I am informed and believe and therefore state that using funds contributed from the permittees,

including the City, through the Implementation Agreement, the District has selected candidate studies, with the approval of the permittees, and that it is planned that a consultant or consultants will be selected to conduct the studies. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not incur shared costs with respect to this requirement in FY 2015-16 and in FY 2016-17, the City's calculated share of such costs was $131.13.

j. Assessment Requirements: Provision D.4 of the Permit requires the permittees, including the City, to undertake assessments of receiving waters, MS4 outfall discharges, special studies and to conduct an integrated assessment of the WQIP.

(1) With respect to the receiving waters assessment, Permit Provision D.4.a requires that permittees, including the City, assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQ1IP; and identify data gaps in the monitoring data necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b.(2) or the Report of Waste Discharge.

(2) With respect to MS4 outfall discharges, Permit Provision D.4.b requires that permittees, including the City, conduct both a non-stormwater discharges reduction assessment

and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within the City's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilize a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; and, review monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to the City's MS4; assess the effectiveness of WQIS toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identify modifications necessary to increase the effectiveness of WQIS; and identify data gaps in monitoring data. With respect to stormwater discharges, the Permit requires the permittees, including the City, to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s in various reports; analyze monitoring data and use a watershed model or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater and pollutant loads discharged from the

City's monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from the City during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring constitutes for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

(3) With respect to Special Studies assessments, Permit Provision D.4.c requires the permittees, including the City, to annually evaluate the results and findings from the special studies required by Permit Provision D.3 and assess their relevant to efforts to characterize receiving water conditions, understand source of pollutants and/or stressors and control and

reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

(4) With respect to the integrated assessment of the WQIP, Permit Provision D.4.d requires the permittees, including the City, to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluating the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, the permittees, including the City, are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.

I am informed and believe that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is planning to retain consultant support for the assessment efforts required in the Permit and is currently engaged in planning and program development work, including the identification of prospective consultants. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not

incur costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the City's calculated share of such costs was $468.96.

k. Alternative Compliance Program to Onsite Structural BMP Implementation: Permit Provision E.3.c(3) sets forth requirements for PDPs, including City PDPs, to allow the PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control as an alternative to onsite BMPs. To qualify for this alternative, the permittees, including the City, must undertake a Watershed Management Area Analysis set forth in Provision B.3.b(4). Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. The permittees must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from onsite stormwater and hydromodification BMP performance requirements. Additionally, the permittees, including the City, must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. For PDPs, including City PDPs, wishing to enter an alternative compliance program, they must fund, contribute funds to or implement a candidate project, provided that the permittees, including the City, have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c(1) and E.3.c(2)(a) ("onsite BMP requirements"). Additionally, if the PDP chooses to fund a candidate project, the permittees, including the City, are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite structural BMPs; if the PDP choose to implement a candidate project, the permittees, including

the City, are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that design is conducted under appropriate professionals who are competent and proficient in the fields pertinent to the project design; and that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer; the permittees, including the City, must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that the permittees, including the City, determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, the permittees, including the City, must develop and implement an in-lieu fee structure. On information and belief, I understand and therefore state that many areas located within the WMA do not have appropriate conditions for the installation of many onsite structural BMPs. Thus, the alternative compliance program set forth in Permit Provision E.3.c(3) is required for PDPs to be constructed in such areas. I am informed and believe that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District has conducted meetings, is coordinating project planning, is mapping and is planning to retain consultant support for the alternative compliance efforts required in the Permit. Based on my review of the spreadsheet

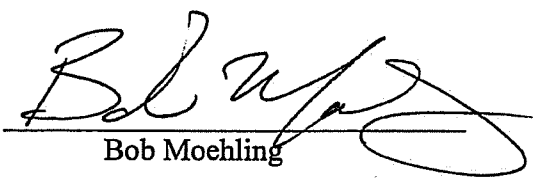
provided by the District and attached as Exhibit A, the City did not incur shared costs with respect to these requirements in FY 2015-16 and that the City's calculated share of such costs for FY 2016-17 was $9,816.73. I am informed and believe that the City will incur future direct costs with respect to these requirements.

l. Dry Weather Hydromodification Monitoring Requirements: Provision D.1.c(6) of the Permit requires the permittees, including the City, to collect observations and measurements during dry weather monitoring event at each long-term receiving water monitoring station established under the Hydromodification Plan, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions, and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs for these requirements after approval of the WQIP.

9. I am informed and believe that there are no dedicated state or federal 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. The City has access to funding obtained through County Service Area 152, which funds, in part, the obligations of the City under the Permit. The City also can collect some inspection fees during the new development process, but not for existing development. I am informed and believe that neither of these funding sources is sufficient to cover the cost of

the programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury that foregoing is true and correct. Executed January 4, 2018 at Murrieta, California.



Bob Moehling

EXHIBIT A

Santa Margarita 2015 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.95	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$25,050.37	
				Total	$129,981.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.28	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	1418	$68.62	$97,307.24	
	Development/Research/Revisions	Monitoring Program Mgr	152	$59.76	$9,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.69	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	---	---	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$254,534.27	
				Total	$587,163.19	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,981.91*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.19*
County of Riverside	16.06%	$20,872.99	17.15%	$100,716.97
Murrieta	24.41%	$31,725.01	25.79%	$151,434.25
Temecula	26.92%	$34,955.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.84

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	**$3,226.78**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	**$108.21**
Murrieta			25.79%	**$162.70**
Temecula			28.89%	**$182.28**
Wildomar			8.33%	**$52.55**
RCFC&WCD			19.83%	**$125.11**

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	---	---	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

EXHIBIT B

AGENDA

SANTA MARGARITA REGION
WATERSHED MANAGEMENT AREA WORKGROUP

10:00 a.m. – 11:00 a.m. Wednesday, April 20, 2016
City of Temecula – Great Oaks Room
41000 Main Street, Temecula, CA

I. Introductions

II. Santa Margarita Region MS4 Program

- A. HMP Monitoring Program (2010 Permit)
- B. WQIP Development Updates
- C. SMR Implementation Agreement Update
- D. Monitoring Program Update
- E. Spring Training

III. 2015 Regional Permit Petitions Update

IV. Open Discussion

- A. San Diego RWQCB
- B. Round Table

V. Next Workgroup Meeting – July 20, 2016

VI. Adjourn to Co-Permittee Staff Business Meeting

P8/203

NPDES
SANTA MARGARITA WATERSHED MANAGEMENT AREA
WORKGROUP
Meeting Notes
for
April 20, 2016

Attendees:

Scott Bruckner	Riverside County Flood Control District
Kyle Gallup	Riverside County Flood Control District
David Garcia	Riverside County Flood Control District
Stuart McKibbin	Riverside County Flood Control District
Eric Lomeli	Riverside County Flood Control District
Rebekah Guill	Riverside County Flood Control District
Wayne Chiu	San Diego Regional Water Board
Laurie Walsh	San Diego Regional Water Board
Jason Farag	City of Wildomar
Aldo Licitra	City of Temecula
James Ozouf	City of Murrieta
Tad Nakatani	D-Max Engineering, rep. City of Menifee

I. ***Introductions***

Scott Bruckner welcomed everyone to the first SMR WMA Workgroup meeting, and detailed format for future meetings:

- Meetings will continue to be held quarterly, on the third Wednesday of the month;
- General Permit implementation will be the focus; WQIP specific items to be addressed as necessary;
- Informal format, not publicly attended, minutes won't be recorded, but meeting notes will be taken and distributed.

II. ***Santa Margarita Region MS4 Program Updates***

A. **HMP Monitoring Program** – Revision of the HMP has been completed. The 2010 Permit does not explicitly specify a method for submittal. After discussion with Regional Board staff, Co-Permittees have decided to begin implementation, and submit the revised HMP with the Annual Report this October. Wayne confirmed that a letter could be issued acknowledging receipt/acceptance of the revision.

B. **WQIP Development Updates** – Kyle Gallup, Engineering Project Manager of the District's Watershed/Water Conservation Planning Section introduced himself, and provided brief updates on WQIP development. Wayne and Laurie provided some insight to the group regarding size of Water Quality Improvement Consultation Panel.

C. **SMR Implementation Agreement Update** – The Co-Permittees, including San Diego County and Menifee, are currently looking at a draft, and are looking to execute by July 1.

D. **Spring Training** – Construction training provided on April 7, Municipal and Commercial/Industrial to be provided April 21 in Temecula.

III. ***2015 Regional Permit Petitions Update***

The Regional Board requested an additional 30 days to file responses and the administrative record, which the SWRCB granted. Date for filing responses is now May 16. The SWRCB has taken up the San Francisco Regional Permit petitions as well; the two Permit petitions have anti-backsliding and anti-degradation arguments from the NGOs in common - a possibility exists that the SWRCB could decide to address both petitions together.

IV. ***Open Discussion***

A. **San Diego RWQCB** – Orange County submitted WQIP Deliverable #1, public comment period is currently open.

B. **Permittee** – No updates.

V. ***Next Workgroup Meeting*** –July 20, 2016 at 10 am.

VI. ***Adjourn to Co-Permittee Staff Meeting***

DECLARATION OF PATRICK THOMAS

CITY OF TEMECULA

I, Patrick Thomas, hereby declare and state as follows:

1. I am the Director of Public Works in the Department of Public Works/Land Development Division for the City of Temecula ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, and as amended by Order No. R9-2015-0100 (collectively, the "Permit"), as they apply to the City.

2. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I also am aware of the requirements of pertinent sections of Order No. R9-2010-0016 ("2010 Permit") which was issued by the RWQCB in 2010 and as to which the City issued a notice of intent to comply, and am familiar with those requirements.

3. I also have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other permittees under the Permit agreed to share certain costs of complying with the Permit.

4. I have reviewed a spreadsheet provided by the Riverside County Flood Control and Water Conservation District ("District"), which sets forth calculated percentages for costs shared by the permittees under the Permit. A true and correct copy of that spreadsheet is attached hereto as Exhibit A.

5. 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 do so as to the matters set forth herein.

6. I understand that in Section 5 and attachments and exhibits of the Joint Test Claim filed by the City and other permittees, the specific sections of the Permit at issue in this Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the attachments and exhibits as though fully set forth herein.

7. To my personal knowledge, based on my review of documents provided by the District, the City first incurred costs under the Permit on or about April 20, 2016, when a City representative attended a meeting of the NPDES Santa Margarita Watershed Management Area Workgroup. Exhibit B to this Declaration are true and correct copies of an agenda and notes of that meeting. That exhibit reflects that Aldo Licitra, who was at that time an employee of the City, attended that meeting.

8. Based on my understanding of the Permit and the applicable requirements of the 2010 Permit, I believe that the Permit required the City to undertake the following new and/or upgraded activities and which are unique to local government entities and which were not required in the 2010 Permit:

a. Water Quality Improvement Plan Requirements: Provisions B.2-B.6, F.1.a, F.1.b, F.2.c, F.3.b(3), F.3.c and A.4 of the Permit require the permittees, including the City, to undertake a number of requirements related to the development of a Water Quality Improvement Plan ("WQIP") and related requirements, including development of priority water quality conditions ("PWQCs") through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants

and/or stressors, and identification of potential water quality improvement strategies ("WQIS); development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals, development of WQIS on a jurisdictional and Watershed Management Area ("WMA") basis, schedules for implementing the strategies, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP; use of the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and Jurisdictional Runoff Management Programs ("JRMPs") to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program; to submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.; implement a public participation process concerning the WQIP, including formation of a Water Quality Improvement Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential WQIS, and after submitting the draft WQIP, to consider public comments; submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP; develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Panel, submitting proposed WQIP updates to the RWQCB along with recommendations received from the public and Consultation Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate TMDL WLAs; to submit WQIP Annual Reports and a

Regional Monitoring and Assessment Report and assessment reports containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of WQIS and future proposed updates to the WQIP or JRMPs; and, follow a process to achieve compliance with discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of water quality standards. It is my understanding and belief that using funds contributed from each permittee, including the City, through an Implementation Agreement, the District has retained consultants to submit elements of these requirements, including analysis, public comment coordination and response and response to RWQCB comments. In addition, the District has conducted mapping GIS analysis and watershed characteristics studies, efforts that also involved cost sharing through the Implementation Agreement. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City's calculated share of such costs in Fiscal Year (FY) 2015-16 was $34,995.13 and that in FY 2016-17, the City's calculated share of that cost was $169,658.22. In addition, based on my review of City payroll records and other expenditures, the City incurred estimated additional direct costs of $10,066.41 in FY 2015-16 and $41,765.25 in FY 2016-17 to address these requirements.

b. Critical Sediment Source Requirements: Provision E.3.c(2) of the Permit requires the City to ensure that Priority Development Projects ("PDPs") either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District has done mapping in support of this requirement. Based on my review of the spreadsheet provided by the

District and attached as Exhibit A, the City incurred no costs with respect to this item in FY 2015-16 and that the City's calculated share of such shared costs in FY 2016-17 was $932.37.

c. BMP Design Manual Update Requirements: Provisions E.3.d and F.2.b of the Permit requires the City to update its BMP Design Manual by including updated procedures to determine the nature and extent of stormwater requirements applicable to development and redevelopment projects, to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs, for designing structural BMPs and for long-term maintenance criteria for each structural BMP listed in the Manual and alternative compliance criteria if the City allows PDPs to utilize alternative compliance under Provision E.3.c(3). In addition, such updated manual must be submitted concurrent with the submittal of the WQIP and must correct deficiencies in the Manual based on comments from the RWQCB and subsequent updates to the Manual must be submitted to the RWQCB in WQIP Annual Reports or as part of the Report of Waste Discharge. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through preliminary planning work and program development and has retained a consultant for further work. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $169.44 and that in FY 2016-17, the City's calculated share of such costs was $182.28. I am informed and believe that the City will incur future costs with regard to these requirements.

d. Residential Inventory and Inspection Requirements: Provisions E.5.a, E.5.c(1)(a), E.5.c(2)(a) and E.5.c(3) of the Permit require the City to inventory various residential areas, including the identification of pollutants generated and potentially generated by residential areas, to annually update a map showing such areas, and to inspect areas of

inventoried existing residential development, under specified frequencies, and as appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants from the MS4 and to effectively prohibit non-stormwater discharges to the MS4, to respond to public complaints and based upon inspection findings, the permittees, including the City, must implement followup actions. These Permit provisions further specify the content of inspections, including areas where visual inspections are required to be made, as well as assessment of compliance with ordinances and permits relating to stormwater and non-stormwater discharges and runoff, the implementation of designated BMPS, and the taking and documenting of actions in accordance with the Enforcement Response Plan required in Permit Provision E.6. The City is further required to track all inspections and re-inspections and retain all inspection records in an electronic database or tabular format, including the name of the inspected facility, the date, methods, observations and findings, and the description of any problems or violations, enforcement actions and the date that problems or violations were resolved. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs with regard to these requirements after approval of the WQIP.

e. Retrofitting Areas of Existing Development and Stream Rehabilitation Requirements: Provisions E.5.e(1) of the Permit requires the City to describe in its JRMP and implement a program to retrofit areas of existing development based on various factors, a requirement to identifying areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and stressors that contribute to the highest PWQCs in the WQIP, to develop a strategy to facilitate the implementation of retrofitting

projects in candidate areas, and other requirements, including to collaborate with other permittees and/or entities in the WMA to develop and implementing regional retrofitting projects if retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest PWQCs in the WQIP. In addition, Provision E.5.e(2) of the Permit requires the City to similarly identify streams, channels and/or habitats in areas of exiting development in its JRMP document, and to implement the program by identifying such streams, etc. as candidates for rehabilitation, focusing on areas where stream rehabilitation projects will address the highest PWQCs identified in the WQIP and develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in candidate areas of existing development and to collaborate and cooperate with other permittees and/or entities in the WMA to identify develop and implement regional stream, etc. rehabilitation projects if projects within specified areas are determined to be infeasible to address the highest PWQCs in the WQIP. I am informed and believe that, using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $169.44 and that in FY 2016-17, the City's calculated share of such costs was $182.28. In addition, based on my review of City payroll records and other expenditures, the City incurred estimated additional direct costs of $2,013.28 in FY 2015-16 and $6,960.88 in FY 2016-17 to address these requirements.

f. Enforcement Response Plan Requirements: Provision E.6 of the Permit requires the City to develop and implement an "Enforcement Response Plan" ("ERP") as part of its

JRMP document. The ERP must include enforcement components for illicit discharge detection and elimination, development planning, construction management and existing development. Each ERP component must describe the enforcement response to violations of various requirements, including the Permit, and provide protocols to implement progressively strict enforcement, using eight specified requirements or their equivalent. The Permit further requires that violations be corrected in a "timely manner" and that if more than 30 calendar days are required to achieve compliance, then a "rationale" must be recorded in an electronic database or tabular system used to track violations. The ERP further is required to include a definition of "escalated enforcement" and where the City determines that escalated enforcement is not required, the rationale must be recorded. The City is further required to notify the RWQCB within five calendar days of issuing escalated enforcement to a construction site that poses a significant threat to water quality and to provide a similar notice of persons who have failed to obtain coverage under the statewide Industrial General Permit and Construction General Permit. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no shared costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the City's calculated share of such costs was $182.28. I am informed and believe that the City will incur future direct costs with regard to these requirements.

g. JRMP Update Requirements: Provision F.2.a of the Permit requires the City to update its JRMP document along specified requirements to, among other things, document the

requirements of Provision E concurrent with the submittal of the WQIP and correct any deficiencies in the JRMP document based on comments received from the RWQCB in updates submitted with the WQIP annual report; submit updates to its JRMP, with supporting rationale, either in the WQIP Annual Report or as part of the Report of Waste Discharge; must revise proposed modifications to its JRMP as directed by the RWQCB Executive Officer; and to make updated JRMP document available on the Regional Clearinghouse. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is revising the JRMP model through program development and planning efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $169.44 and in FY 2016-17, the City's calculated share of such costs was $182.28. I am informed and believe that the City will incur future direct costs with regard to these requirements.

h. Field Screening Requirements: Permit Provision D.2.a(2) requires the permittees, including the City, to field screen MS4 outfalls in its inventory developed under Provision D.2.a(1). This field screening requires that 80 percent of the City's MS4 outfalls be visually inspected two times per year during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than .1 inch. The City must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flows. To determine whether flow may be transient or persistent, the City must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. The City is further required to use the results of the field screening monitoring to update the MS4 outfall discharge

monitoring station inventory with new information on whether the outfall produces persistent flow, transient flow, or no dry weather flow. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, has conducted mapping, program planning and scheduling efforts, field work, data entry and training efforts with regard to these requirements. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $3,425.13 and that in FY 2016-17, the City's calculated share of such costs was $9,688.10. In addition, based on my review of City payroll records and other expenditures, the City incurred estimated additional direct costs of $8,053.15 in FY 2015-16 and $20,882.63 in FY 2016-17 to address these requirements.

i. Special Studies Requirements: Provision D.3 of the Permit requires the permittees, including the City, to initiate special studies with respect to issues in the WMA. The Permit requires that at least two special studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that cause or contribute to the highest PWQCs in the WQIP and one special study for the entire San Diego Region to address studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressor that are impacting receiving waters on a regional basis in the San Diego Region. Such studies meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs. I am

informed and believe and therefore state that using funds contributed from the permittees, including the City, through the Implementation Agreement, the District has, with the approval of the permittees, selected candidate studies and that it is planned that a consultant or consultants will be selected to conduct the studies. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no costs in FY 2015-16 and that in FY2016-17, the City's calculated share of such costs was $146.91. I am informed and believe that the City will incur future costs with regard to these requirements.

j. Assessment Requirements: Provision D.4 of the Permit requires the permittees, including the City, to undertake assessments of receiving waters, MS4 outfall discharges, special studies and to conduct an integrated assessment of the WQIP.

(1) With respect to the receiving waters assessment, Permit Provision D.4.a requires that permittees, including the City, assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQ1IP; and identify data gaps in the monitoring data necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b(2) or the Report of Waste Discharge.

(2) With respect to MS4 outfall discharges, Permit Provision D.4.b requires that permittees, including the City, conduct both a non-stormwater discharges reduction assessment and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within the City's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilize a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; and, review monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to the City's MS4; assess the effectiveness of WQIS toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identify modifications necessary to increase the effectiveness of WQIS; and identify data gaps in monitoring data. With respect to stormwater discharges, the Permit requires the permittees, including the City, to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s in various reports; analyze monitoring data and use a watershed model

or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater and pollutant loads discharged from the City's monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from the City during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring constitutes for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

(3) With respect to Special Studies assessments, Permit Provision D.4.c requires the permittees, including the City, to annually evaluate the results and findings from the special

studies required by Permit Provision D.3 and assess their relevant to efforts to characterize receiving water conditions, understand source of pollutants and/or stressors and control and reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

(4) With respect to the integrated assessment of the WQIP, Permit Provision D.4.d requires the permittees, including the City, to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluating the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, the permittees, including the City, are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.

I am informed and believe that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is planning to retain consultant support for the assessment efforts required in the Permit and is currently engaged in planning and

program development work, including the identification of prospective consultants. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the City's calculated share of such costs was $525.40. I am further informed and believe that the City will incur future costs with regard to these requirements.

k. Alternative Compliance Program to Onsite Structural BMP Implementation: Permit Provision E.3.c(3) sets forth requirements for PDPs, including City PDPs, to allow the PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control as an alternative to onsite BMPs. To qualify for this alternative, the permittees, including the City, must undertake a Watershed Management Area Analysis set forth in Provision B.3.b(4). Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. The permittees must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from onsite stormwater and hydromodification BMP performance requirements. Additionally, the permittees, including the City, must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. For PDPs, including City PDPs, wishing to enter an alternative compliance program, they must fund, contribute funds to or implement a candidate project, provided that the permittees, including the City, have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c(1) and E.3.c(2)(a) ("onsite BMP requirements"). Additionally, if the PDP

chooses to fund a candidate project, the permittees, including the City, are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite structural BMPs; if the PDP choose to implement a candidate project, the permittees, including the City, are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that design is conducted under appropriate professionals who are competent and proficient in the fields pertinent to the project design; and that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer; the permittees, including the City, must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that the permittees, including the City, determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, the permittees, including the City, must develop and implement an in-lieu fee structure. On information and belief, I understand and therefore state that many areas located within the WMA do not have appropriate conditions for the installation of many onsite structural BMPs. Thus, the alternative compliance program set forth in Permit Provision E.3.c(3) is required for PDPs to be constructed in such areas. I am informed and believe that using funds contributed from each permittee, including

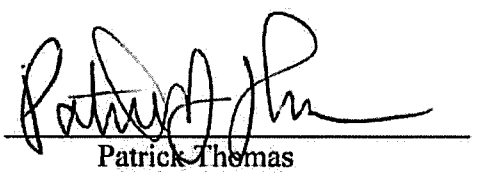
the City, through the Implementation Agreement, the District has conducted meetings, is coordinating project planning, is mapping and is planning to retain consultant support for the alternative compliance efforts required in the Permit. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City incurred no costs in FY 2015-16 with respect to these requirements and that in FY 2016-17, the City's calculated share of such costs was $10,998.10. I am further informed and believe that the City will incur future costs with respect to these requirements.

l. Dry Weather Hydromodification Monitoring Requirements: Provision D.1.c(6) of the Permit requires the permittees, including the City, to collect observations and measurements during dry weather monitoring event at each long-term receiving water monitoring station established under the Hydromodification Plan, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions, and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs with regard to these requirements after approval of the WQIP.

9. I am informed and believe that there are no dedicated state, regional or federal 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. The City can collect some inspection fees during the

development process. I am informed and believe that such fees are not sufficient to cover the cost of the programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury that foregoing is true and correct. Executed January 5, 2018 at Temecula, California.



Patrick Thomas
Director of Public Works

EXHIBIT A

Santa Margarita 2015 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.85	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$25,050.37	
				Total	$129,981.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.23	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc Engineer)	1418	$68.62	$97,307.24	
	Development/Research/Revisions	Monitoring Program Mgr	152	$59.76	$9,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.69	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	—	—	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	—	—	$254,534.27	
				Total	$587,163.19	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,981.91*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.19*
County of Riverside	16.06%	$20,873.99	17.15%	$100,716.97
Murrieta	24.41%	$31,735.01	25.79%	$151,434.25
Temecula	26.92%	$34,995.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.64

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	$3,226.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	$108.21
Murrieta			25.79%	$162.70
Temecula			28.89%	$182.28
Wildomar			8.33%	$52.55
RCFC&WCD			19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	—	—	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

EXHIBIT B

AGENDA

SANTA MARGARITA REGION
WATERSHED MANAGEMENT AREA WORKGROUP

10:00 a.m. – 11:00 a.m. Wednesday, April 20, 2016
City of Temecula – Great Oaks Room
41000 Main Street, Temecula, CA

I. Introductions

II. Santa Margarita Region MS4 Program

- A. HMP Monitoring Program (2010 Permit)
- B. WQIP Development Updates
- C. SMR Implementation Agreement Update
- D. Monitoring Program Update
- E. Spring Training

III. 2015 Regional Permit Petitions Update

IV. Open Discussion

- A. San Diego RWQCB
- B. Round Table

V. Next Workgroup Meeting – July 20, 2016

VI. Adjourn to Co-Permittee Staff Business Meeting

P8/203

NPDES
SANTA MARGARITA WATERSHED MANAGEMENT AREA WORKGROUP
Meeting Notes
for
April 20, 2016

Attendees:

Scott Bruckner	Riverside County Flood Control District
Kyle Gallup	Riverside County Flood Control District
David Garcia	Riverside County Flood Control District
Stuart McKibbin	Riverside County Flood Control District
Eric Lomeli	Riverside County Flood Control District
Rebekah Guill	Riverside County Flood Control District
Wayne Chiu	San Diego Regional Water Board
Laurie Walsh	San Diego Regional Water Board
Jason Farag	City of Wildomar
Aldo Licitra	City of Temecula
James Ozouf	City of Murrieta
Tad Nakatani	D-Max Engineering, rep. City of Menifee

I. ***Introductions***

Scott Bruckner welcomed everyone to the first SMR WMA Workgroup meeting, and detailed format for future meetings:

- Meetings will continue to be held quarterly, on the third Wednesday of the month;
- General Permit implementation will be the focus; WQIP specific items to be addressed as necessary;
- Informal format, not publicly attended, minutes won't be recorded, but meeting notes will be taken and distributed.

II. ***Santa Margarita Region MS4 Program Updates***

A. **HMP Monitoring Program** – Revision of the HMP has been completed. The 2010 Permit does not explicitly specify a method for submittal. After discussion with Regional Board staff, Co-Permittees have decided to begin implementation, and submit the revised HMP with the Annual Report this October. Wayne confirmed that a letter could be issued acknowledging receipt/acceptance of the revision.

B. **WQIP Development Updates** – Kyle Gallup, Engineering Project Manager of the District's Watershed/Water Conservation Planning Section introduced himself, and provided brief updates on WQIP development. Wayne and Laurie provided some insight to the group regarding size of Water Quality Improvement Consultation Panel.

C. **SMR Implementation Agreement Update** – The Co-Permittees, including San Diego County and Menifee, are currently looking at a draft, and are looking to execute by July 1.

D. **Spring Training** – Construction training provided on April 7, Municipal and Commercial/Industrial to be provided April 21 in Temecula.

III. ***2015 Regional Permit Petitions Update***

The Regional Board requested an additional 30 days to file responses and the administrative record, which the SWRCB granted. Date for filing responses is now May 16. The SWRCB has taken up the San Francisco Regional Permit petitions as well; the two Permit petitions have anti-backsliding and anti-degradation arguments from the NGOs in common - a possibility exists that the SWRCB could decide to address both petitions together.

IV. ***Open Discussion***

A. **San Diego RWQCB** – Orange County submitted WQIP Deliverable #1, public comment period is currently open.

B. **Permittee** – No updates.

V. ***Next Workgroup Meeting*** –July 20, 2016 at 10 am.

VI. ***Adjourn to Co-Permittee Staff Meeting***

SECOND DECLARATION OF MATT BENNETT

CITY OF WILDOMAR

I, MATT BENNETT, hereby declare and state as follows:

1. I am Deputy City Engineer for the City of Wildomar ("City"). In that capacity, I share responsibility for the compliance of the City with regard to the requirements of California Regional Water Quality Control Board, San Diego Region ("RWQCB") Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, and as amended by Order No. R9-2015-0100 (collectively, the "Permit"), as they apply to the City.

2. I have reviewed sections of the Permit as set forth herein and am familiar with those provisions. I also am aware of the requirements of pertinent sections of Order No. R9-2010-0016 ("2010 Permit") which was issued by the RWQCB in 2010 and as to which the City issued a notice of intent to comply, and am familiar with those requirements.

3. I also have an understanding of the City's sources of funding for programs and activities required to comply with the Permit. I also am aware of arrangements under which the City and other Copermittees under the Permit agreed to share certain costs of complying with the Permit.

4. I have reviewed a spreadsheet provided by the Riverside County Flood Control and Water Conservation District ("District"), setting forth calculated percentages for costs shared by the permittees under the Permit. A true and correct copy of that spreadsheet is attached hereto as Exhibit A.

5. 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 do so as to the matters set forth herein.

6. In Section 5 and attachments and exhibits of the Joint Test Claim filed by the City and other permittees, the specific sections of the Permit at issue in this Joint Test Claim have been set forth. I hereby incorporate such provisions of Section 5 and the attachments and exhibits as though fully set forth herein.

7. To my personal knowledge, based on my review of documents provided by the District, the City first incurred costs under the Permit on April 20, 2016, when a City employee, Jason Farag, attended a meeting of the NPDES Santa Margarita Watershed Management Area Workgroup. True and correct copies of the agenda and notes of that meeting that were provided to the City by the District are attached as Exhibit B.

8. Based on my understanding of the Permit and the applicable requirements of the 2010 Permit, I believe that the Permit required the City to undertake the following new and/or upgraded activities and which are unique to local government entities and which were not required in the 2010 Permit:

a. Water Quality Improvement Plan Requirements: Provisions B.2-B.6, F.1.a, F.1.b, F.2.c, F.3.b(3), F.3.c and A.4 of the Permit require the permittees, including the City, to undertake a number of requirements related to the development of a Water Quality Improvement Plan ("WQIP") and related requirements, including development of priority water quality conditions ("PWQCs") through assessment of receiving water conditions, assessment of impacts from MS4 discharges, identification of PWQCs, identification of MS4 sources of pollutants and/or stressors, and identification of potential water quality improvement strategies ("WQIS); development of water quality improvement goals, strategies and schedules through development and incorporation of numeric goals into the WQIP, schedules for achieving the numeric goals, development of WQIS on a jurisdictional and Watershed Management Area ("WMA") basis,

schedules for implementing the strategies, development and incorporation into the WQIP of an integrated monitoring and assessment program that assess the progress toward achieving numeric goals and schedules, progress toward achieving highest PWQCs for each WMA and each permittee's overall efforts to implement the WQIP; use of the iterative approach in Provision A.4 to adapt the WQIP, monitoring and assessment program and Jurisdictional Runoff Management Programs ("JRMPs") to become more effective in achieving compliance with Provisions A.1.a, A.1.c and A.2.a, including re-evaluation of PWQCs, adaptation of water quality improvement goals, strategies and schedules in the WQIP and adaptation of the monitoring and assessment program; to submit, implement and update the WQIP in accordance with Provisions F.1 and F.2.c.; implement a public participation process concerning the WQIP, including formation of a Water Quality Improvement Consultation Panel, soliciting data and comments regarding the development of PWQCs and potential WQIS, and after submitting the draft WQIP, to consider public comments; submit a final WQIP to the RWQCB for review and public comment, consider public comment, revise the WQIP and re-submit it to the RWQCB and then commence implementation of the WQIP; develop and utilize a public participation process in connection with comments on updates to the WQIP, including consultation with the Panel, submitting proposed WQIP updates to the RWQCB along with recommendations received from the public and Consultation Panel and revise the updated WQIP as requested by the RWQCB and update the WQIP to incorporate TMDL WLAs; to submit WQIP Annual Reports and a Regional Monitoring and Assessment Report containing numerous requirements relating to monitoring, discussion of special studies and assessments, progress towards WQIP implementation, and discussion of WQIS and future proposed updates to the WQIP or JRMPs; and, follow a process to achieve compliance with discharge prohibitions and receiving water

limitations in Provisions A.1.a, A.1.c and A.2.a and including revisions of the WQIP to address continued exceedances of water quality standards. It is my understanding and belief that using funds contributed from each permittee, including the City, through an Implementation Agreement, the District has retained consultants to submit elements of these various requirements, including analysis, public comment coordination and response and response to RWQCB comments. In addition to this work, the District has also conducted mapping GIS analysis and watershed characteristics studies, efforts that also involved cost sharing through the Implementation Agreement. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in Fiscal Year ("FY") 2015-16, the City's calculated share of such shared costs was $9,852.61 and in FY 2016-17, the City's calculated share of that cost was $48,908.03. In addition, based on information provided by City staff, the City incurred estimated additional direct costs of approximately $1,429.75 in FY 2015-16 and approximately $15,365.00 in FY 2016-17 to address these requirements.

b. Critical Sediment Source Requirements: Provision E.3.c(2) of the Permit requires the City to ensure that Priority Development Projects ("PDPs") either avoid critical sediment yield areas or implement measures that allow critical coarse sediment to be discharged to receiving waters. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District has done mapping in support of these requirements. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not incur costs with respect to these requirements in FY 2015-16 and in FY 2016-17, the City's calculated share of such shared costs was $268.78.

c. BMP Design Manual Update Requirements: Provisions E.3.d and F.2.b of the Permit requires the City to update its BMP Design Manual by including updated procedures to determine the nature and extent of stormwater requirements applicable to development and redevelopment projects, to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs, for designing structural BMPs and for long-term maintenance criteria for each structural BMP listed in the Manual and alternative compliance criteria if the City allows PDPs to utilize alternative compliance under Provision E.3.c(3). In addition, such updated manual must be submitted concurrent with the submittal of the WQIP and must correct deficiencies in the Manual based on comments from the RWQCB and subsequent updates to the Manual must be submitted to the RWQCB in WQIP Annual Reports or as part of the Report of Waste Discharge. It is my understanding and belief that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through preliminary planning work and program development and has retained a consultant for further work. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $47.70 and in FY 2016-17, the City's calculated share of such costs was $52.55. I am informed and believe that the City will incur future direct costs with respect to these requirements.

d. Residential Inventory and Inspection Requirements: Provisions E.5.a, E.5.c(1)(a), E.5.c(2)(a) and E.5.c(3) of the Permit require the City to inventory various residential areas, including the identification of pollutants generated and potentially generated by the residential area, to annual update a map showing such areas, and to inspect areas of inventoried existing residential development, under specified frequencies, and as appropriate to

confirm that BMPs are being implemented to reduce the discharge of pollutants from the MS4 and to effectively prohibit non-stormwater discharges to the MS4, to respond to public complaints and based upon inspection findings, the permittees, including the City, must implement followup actions. These Permit provisions further specify the content of inspections, including areas where visual inspections are required to be made, as well as assessment of compliance with ordinances and permits relating to stormwater and non-stormwater discharges and runoff, the implementation of designated BMPS, and the taking and documenting of actions in accordance with the Enforcement Response Plan required in Permit Provision E.6. The City is further required to track all inspections and re-inspections and retain all inspection records in an electronic database or tabular format, including the name of the inspected facility, the date, methods, observations and findings, and the description of any problems or violations, enforcement actions and the date that problems or violations were resolved. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs with regard to these requirements after approval of the WQIP.

e. Retrofitting Areas of Existing Development and Stream Rehabilitation Requirements: Provisions E.5.e(1) of the Permit requires the City to describe in its JRMP and implement a program to retrofit areas of existing development based on various factors, a requirement to identifying areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and stressors that contribute to the highest PWQCs in the WQIP, to develop a strategy to facilitate the implementation of retrofitting projects in candidate areas, and other requirements, including to collaborate with other

permittees and/or entities in the WMA to develop and implementing regional retrofitting projects if retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest PWQCs in the WQIP. In addition, Provision E.5.e(2) of the Permit requires the City to similarly identify streams, channels and/or habitats in areas of existing development in its JRMP document, and to implement the program by identifying such streams, etc. as candidates for rehabilitation, focusing on areas where stream rehabilitation projects will address the highest PWQCs identified in the WQIP and develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in candidate areas of existing development and to collaborate and cooperate with other permittees and/or entities in the WMA to identify develop and implement regional stream, etc. rehabilitation projects if projects within specified areas are determined to be infeasible to address the highest PWQCs in the WQIP. I am informed and believe that, using funds contributed from each permittee, including the City, through the Implementation Agreement, the District is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $47.70 and in FY 2017-17, the City's calculated share of such costs was $52.55. I am informed and believe that the City will incur direct costs in the future with respect to these requirements.

f. Enforcement Response Plan Requirements: Provision E.6 of the Permit requires the City to develop and implement an "Enforcement Response Plan" ("ERP") as part of its JRMP document. The ERP must include enforcement components for illicit discharge detection and elimination, development planning, construction management and existing development.

Each ERP component must describe the enforcement response to violations of various requirements, including the Permit, and provide protocols to implement progressively strict enforcement, using eight specified requirements or their equivalent. The Permit further requires that violations be corrected in a "timely manner" and that if more than 30 calendar days are required to achieve compliance, then a "rationale" must be recorded in an electronic database or tabular system used to track violations. The ERP further is required to include a definition of "escalated enforcement" and where the City determines that escalated enforcement is not required, the rationale must be recorded. The City is further required to notify the RWQCB within five calendar days of issuing escalated enforcement to a construction site that poses a significant threat to water quality and to provide a similar notice of persons who have failed to obtain coverage under the statewide Industrial General Permit and Construction General Permit. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is addressing these requirements through program development and planning efforts and that the requirements will be further addressed through JRMP update efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not incur costs with respect to these requirements in FY 2015-16 and in FY 2016-17, the City's calculated share of such costs was $52.55. I am informed and believe that the City will incur future direct costs with respect to these requirements.

g. JRMP Update Requirements: Provision F.2.a of the Permit requires the City to update its JRMP document along specified requirements to, among other things, document the requirements of Provision E concurrent with the submittal of the WQIP and correct any deficiencies in the JRMP document based on comments received from the RWQCB in updates

submitted with the WQIP annual report; submit updates to its JRMP, with supporting rationale, either in the WQIP Annual Report or as part of the Report of Waste Discharge; must revise proposed modifications to its JRMP as directed by the RWQCB Executive Officer; and to make updated JRMP document available on the Regional Clearinghouse. I am informed and believe that the District, using funds contributed from each permittee including the City through the Implementation Agreement, is revising the JRMP model through program development and planning efforts. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, in FY 2015-16, the City's calculated share of such shared costs was $47.70 and in FY 2016-17, the City's calculated share of such costs was $52.55. I am informed and believe that the City will incur future direct costs with respect to these requirements.

h. Field Screening Requirements: Permit Provision D.2.a(2) requires the permittees, including the City, to field screen MS4 outfalls in its inventory developed under Provision D.2.a(1). This field screening requires that 80 percent of the City's MS4 outfalls be visually inspected two times per year during dry weather conditions. In addition, the field screening must occur only after an antecedent dry period of at least 72 hours after any storm event producing measureable rainfall greater than .1 inch. The City must also evaluate whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flows. To determine whether flow may be transient or persistent, the City must conduct at least three consecutive monitoring and/or inspection visits at the outfall to see if water is flowing, pooled or ponded more than 72 hours after a measureable rainfall event of 0.1 inch or greater. The City is further required to use the results of the field screening monitoring to update the MS4 outfall discharge monitoring station inventory with new information on whether the outfall produces persistent flow, transient flow, or no dry weather flow. I am informed and believe that the District, using

funds contributed from each permittee including the City through the Implementation Agreement, has conducted mapping, program planning and scheduling efforts, field work, data entry and training efforts with regard to these requirements. Based on my review of the District spreadsheet attached as Exhibit A, in FY 2015-16, the City's calculated share of such costs was $964.32 and in FY 2016-17, the City's calculated share of such costs was $2,792.82. Based on my review of information provided by City staff, the City incurred estimated additional direct costs of approximately $4,237.00 in FY 2015-16 and approximately $821.75 in FY 2016-17 to address these requirements.

i. Special Studies Requirements: Provision D.3 of the Permit requires the permittees, including the City, to initiate special studies with respect to issues in the WMA. The Permit requires that at least two special studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that cause or contribute to the highest PWQCs in the WQIP and one special study for the entire San Diego Region to address studies to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address pollutants and/or stressors that are impacting receiving waters on a regional basis in the San Diego Region. Such studies meet several requirements, including that they be related to the highest PWQCs in the WMA and/or the San Diego Region, that if the studies are source identification studies, that they be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to the Permit, as well as a compilation of known information, an identification of data gaps, and a monitoring plan. Monitoring plans for special studies must be included in the WQIPs. I am informed and believe and therefore state that using funds contributed from the permittees, including the City, through the Implementation Agreement, the District selected candidate

studies, with the approval of the permittees, and that it is planned that a consultant or consultants will be selected to conduct the studies. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not incur costs with respect to such requirements in FY 2015-16 and that in FY 2016-17, the City's calculated share of such costs was $42.35. I am informed and believe that the City will incur future direct costs with respect to these requirements.

j. Assessment Requirements: Provision D.4 of the Permit requires the permittees, including the City, to undertake assessments of receiving waters, MS4 outfall discharges, special studies and to conduct an integrated assessment of the WQIP.

(1) With respect to the receiving waters assessment, Permit Provision D.4.a requires that permittees, including the City, assess the status and trends of receiving water quality conditions in various waterbodies, including streams under dry weather and wet weather conditions. That assessment must determine whether the waters are meeting the numeric goals established in the WQIPs; identify the most critical beneficial uses that must be protected to ensure the overall health of the receiving water and whether those uses are being protected; identify short-term and/or long-term improvements or degradation of the uses; determine whether the strategies established in the WQIP contribute towards progress in achieving the interim and final numeric goals of the WQIP; and identify data gaps in the monitoring data necessary to make these assessments. The assessment must either be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.2.b.(2) or the Report of Waste Discharge.

(2) With respect to MS4 outfall discharges, Permit Provision D.4.b requires that permittees, including the City, conduct both a non-stormwater discharges reduction assessment

and a stormwater pollutant discharges reduction assessment. With respect to the non-stormwater assessment, the Permit requires: assessment and reporting of the progress of its illicit discharge detection and elimination program through various reports, assessment and reporting on known and suspected controllable sources of transient and persistent flows within the City's jurisdiction in the WMA, those flows which have been reduced and eliminated, and modifications to field screening monitoring locations and frequencies for MS4 outfalls in its inventory to identify and eliminate sources of persistent flow non-stormwater discharges; ranking of MS4 outfalls according to the potential threat to receiving water quality; producing a prioritized list of major MS4 outfalls for followup action to update the WQIP; identifying known suspected sources that may cause or contribute to exceedance of non-stormwater action levels; in analyzing data collected pursuant to Permit Provision D.2.b, utilize a model or other method to calculate or estimate non-stormwater volumes and pollutant loads collectively discharged from all major MS4 outfalls identified as having persistent dry weather flows during the monitoring year, which must be updated annually; and, review monitoring data and the assessments to identify reductions and progress in achieving reductions in non-stormwater and illicit discharges to the City's MS4; assess the effectiveness of WQIS toward reducing or eliminating non-stormwater and pollutant loads discharging from the MS4; identify modifications necessary to increase the effectiveness of WQIS; and identify data gaps in monitoring data. With respect to stormwater discharges, the Permit requires the permittees, including the City, to make various reports assessing and reporting on the progress of WQIS toward reducing pollutants in stormwater discharges from its MS4s in various reports; analyze monitoring data and use a watershed model or other method to calculate or estimate the average stormwater runoff coefficient for each land use type within the WMA, the volume of stormwater and pollutant loads discharged from the

City's monitored MS4 outfalls for storms with measureable rainfall greater than 0.1 inch, total flow volume and pollutants loadings discharged from the City during the wet season and the percent contribution of stormwater volumes and pollutant loads discharge from each land use type within each hydrologic subarea with a major MS4 outfall or within each major MS4 outfall for storms with measureable rainfall greater than 0.1 inch; identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies; based on wet weather MS4 outfall discharge monitoring, assess and report the assessments of volumes and pollutant loadings; analyze and compare monitoring data to the analyses and assumptions used to develop the WQIP and evaluate whether the analyses and assumptions should be updated as a component for followup actions to update the WQIP, and at least once during the Permit term, to review the monitoring data and findings of these assessments to identify reductions or progress in achieving reductions in pollutant concentrations and/or loads from different land uses and/or drainage areas discharging from the MS4, assess the effectiveness of WQIS toward reducing pollutants in stormwater discharges from the MS4, identify modifications to increase the effectiveness of the WQIS toward reducing pollutants in stormwater discharges from the MS4 and identify data gaps in monitoring data necessary to make these assessments; and, evaluate all data collected pursuant to Permit Provision D.2.c and incorporate new outfall monitoring data into time series plots for each long-term monitoring constituent for the WMA and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

(3) With respect to Special Studies assessments, Permit Provision D.4.c requires the permittees, including the City, to annually evaluate the results and findings from the special studies required by Permit Provision D.3 and assess their relevance to efforts to characterize receiving water conditions, understand source of pollutants and/or stressors and control and

reduce the discharges of pollutants from MS4 outfalls to receiving waters in the WMA. These assessments must be reported in the WQIP Annual reports, along with any necessary modifications or updates to the WQIP.

(4) With respect to the integrated assessment of the WQIP, Permit Provision D.4.d requires the permittees, including the City, to integrate monitoring data, the assessments required under Provision D.4.a-c and information collected during implementation of the JRMP programs to assess the effectiveness of, and identify modifications to, the WQIP, including re-evaluation of the PWQCs and numeric goals for the WMA; re-evaluation of WQIS (including identifying pollutant loads, pollutant load reductions or other improvements in water quality conditions necessary to attain interim and final numeric goals identified in the WQIP or to demonstrate that discharges from the MS4 are not causing or contributing to exceedances of water quality limitations); and evaluating the progress of WQIS toward achieving interim and final numeric goals in the WQIP. Additionally, the permittees, including the City, are required to re-evaluate and adapt water quality monitoring and assessment programs for the WMA when new information becomes available, and to provide information on such re-evaluation and recommendations in the WQIP annual reports or Report of Waste Discharge. Such re-evaluation must be consisting with the requirements of Permit Provision D.1-D.3 and consider data gaps and results of special studies.

I am informed and believe that using funds contributed from each Copermittee, including the City, through the Implementation Agreement, the District is planning to retain consultant support for the assessment efforts required in the Permit and is currently engaged in planning and program development work, including the identification of prospective consultants. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City

incurred no costs with respect to these requirements in FY 2015-16 and that in FY 2016-17, the City's calculated share of such costs was $151.46. I am informed and believe that the City will incur future direct costs with respect to these requirements.

k. Alternative Compliance Program to Onsite Structural BMP Implementation: Permit Provision E.3.c(3) sets forth requirements for PDPs, including City PDPs, to allow the PDP to be constructed with offsite BMP implementation for stormwater and hydromodification control as an alternative to onsite BMPs. To qualify for this alternative, the permittees, including the City, must undertake a Watershed Management Area Analysis set forth in Provision B.3.b(4). Provision B.3.b(4) requires an analysis of the WMA, including GIS layers, that describes hydrologic process, existing streams, current and anticipated future land uses, potential coarse sediment yield areas and locations of existing flood control and channel structures. The permittees must use this analysis to identify a list of candidate projects that are alternatives to onsite BMPs for PDPs and areas within the WMA where it is appropriate to allow PDPs to be exempt from onsite stormwater and hydromodification BMP performance requirements. Additionally, the permittees, including the City, must submit Water Quality Equivalency calculations for acceptance by the RWQCB executive officer. For PDPs, including City PDPs, wishing to enter an alternative compliance program, they must fund, contribute funds to or implement a candidate project, provided that the permittees, including the City, have determined that implementation of the candidate project will have a greater overall water quality benefit for the WMA than full compliance with the stormwater and hydromodification requirements of Provisions E.3.c(1) and E.3.c(2)(a) ("onsite BMP requirements"). Additionally, if the PDP chooses to fund a candidate project, the permittees, including the City, are required to ensure that the funds obtained are sufficient to mitigate for impacts caused by not fully implementing onsite

structural BMPs; if the PDP choose to implement a candidate project, the permittees, including the City, are required to ensure that pollutant control and/or hydromodification management within the project are sufficient to mitigate for impacts caused by not implementing onsite BMP requirements; that the agreement to fund has "reliable" sources of funding for operation and maintenance of the candidate project; that design is conducted under appropriate professionals who are competent and proficient in the fields pertinent to the project design; and that project be constructed no later than 4 years after the certificate of occupancy is granted for the first PDP that contributed funds to the project, unless a longer period is authorized by the RWQCB executive officer; the permittees, including the City, must require temporal mitigation for pollutant loads and altered flows discharged from a PDP if the candidate project is constructed after the PDP. In addition, if a PDP wishes to construct or fund an alternative compliance project not identified by the Watershed Management Area Analysis, it may do so provided that the permittees, including the City, determine that the project will have a greater overall water quality benefit for the WMA than fully complying with onsite BMP requirements and is subject to the same mitigation, funding, design and other requirements for candidate projects. In addition, if a PDP funds a candidate or alternative compliance project, the permittees, including the City, must develop and implement an in-lieu fee structure. On information and belief, I understand and therefore state that many areas located within the WMA do not have appropriate conditions for the installation of many onsite structural BMPs. Thus, the alternative compliance program set forth in Permit Provision E.3.c(3) is required for PDPs to be constructed in such areas. I am informed and believe that using funds contributed from each permittee, including the City, through the Implementation Agreement, the District has conducted meetings, is coordinating project planning, is mapping and is planning to retain consultant support for the

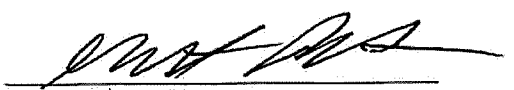
alternative compliance efforts required in the Permit. Based on my review of the spreadsheet provided by the District and attached as Exhibit A, the City did not incur costs with respect to these requirements in FY 2015-16 and that the City's calculated share of such costs for FY 2016-17 was $3,170.46. I am informed and believe that the City will incur future direct costs with respect to these requirements.

l. Dry Weather Hydromodification Monitoring Requirements: Provision D.1.c(6) of the Permit requires the permittees, including the City, to collect observations and measurements during dry weather monitoring event at each long-term receiving water monitoring station established under the Hydromodification Plan, including channel conditions, location of discharge points, habitat integrity, photo documentation of erosion and habitat impacts, measurement or estimate of dimension of any existing channel bed or bank eroded areas, including the dimensions of any incisions, and known or suspected causes of downstream erosion or habitat impact, including flow, soil, slope and vegetation conditions, as well as upstream land uses and contributing new and existing development. Based on my review of the District's spreadsheet attached as Exhibit A, the City incurred no costs for these requirements in FY 2015-16 or FY 2016-17, as these requirements require approval of the WQIP, which has not yet occurred. I am informed and believe that the City will incur costs with regard to these requirements after approval of the WQIP.

9. I am informed and believe that there are no dedicated state or federal 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. The City has access to funding obtained through County Service Area 152 "CSA 152), Lighting and Landscape Maintenance District 89-1C (LLMD 89-1C), and Community Facilities District 2013-1 (CFD 2013-1), which fund, in part, the obligations of the

City under the Permit. The City also can collect some fees during the development and business registration process. I am informed and believe that these funding sources are not sufficient to cover the cost of the programs and activities set forth in this Declaration. I am not aware of any other fee or tax that the City would have the discretion to impose under California law to recover any portion of the cost of these programs and activities. I further am informed and believe that the only other source to pay for these new programs and activities is the City's general fund.

I declare under penalty of perjury that the foregoing is true and correct. Executed January 4, 2018 at Wildomar, California.



Matt Bennett
City of Wildomar
Deputy City Engineer

EXHIBIT A

Santa Margarita 2015 Permit - Test Claim Issue A: Provisions B and F, WQIP Requirements

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.29	$962.88	
		Section Supervisor	10	$88.87	$888.74	
		SMR Permit Mgr	10	$68.46	$684.61	
		Monitoring Program Mgr	2	$59.62	$119.24	
WQIP Development	Development/Research/Revisions	Section Chief	60	$96.29	$5,777.28	
	Development/Research/Revisions	Section Supervisor	215	$88.87	$19,107.87	
	Development/Research/Revisions	Government Affairs Officer	20	$89.31	$1,786.14	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	626	$68.46	$42,856.44	
	Development/Research/Revisions	Monitoring Program Mgr	27	$59.62	$1,609.69	
	Development/Research/Revisions	Associate Civil Engineer	0	$72.99	$0.00	
	Development/Research/Revisions	Associate Engineer	356	$69.20	$24,634.84	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	12	$56.55	$678.64	
	Development/Research/Revisions	Field Staff (Sr. Tech)	103	$56.55	$5,824.97	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$25,050.37	
				Total	$129,981.71	

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)	Notes
Internal meeting/planning/program development		Section Chief	10	$96.52	$965.16	
		Section Supervisor	10	$89.08	$890.84	
		SMR Permit Mgr	10	$68.62	$686.23	
		Monitoring Program Mgr	2	$59.76	$119.52	
WQIP Development	Development/Research/Revisions	Section Chief	448	$96.52	$43,239.17	
	Development/Research/Revisions	Section Supervisor	971	$89.08	$86,500.82	
	Development/Research/Revisions	Government Affairs Officer	152	$89.52	$13,606.83	
	Development/Research/Revisions	SMR Permit Manager (Assoc. Engineer)	1418	$68.62	$97,307.74	
	Development/Research/Revisions	Monitoring Program Mgr	152	$59.76	$9,083.44	
	Development/Research/Revisions	Associate Engineer	557	$69.36	$38,635.10	
	Development/Research/Revisions	Data Mgr (Sr. Tech)	8	$56.69	$453.50	
	Development/Research/Revisions	Field Staff (Sr. Tech)	371	$70.48	$26,148.08	
	Development/Research/Revisions	Amec	---	---	$14,993.00	
	Development/Research/Revisions	Consultant (Larry Walker and Associates)	---	---	$254,534.27	
				Total	$587,163.19	

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue A Cost = $129,981.93*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue A Cost = $587,163.19*
County of Riverside	16.06%	$20,873.99	17.15%	$100,716.97
Murrieta	24.41%	$31,735.03	25.79%	$151,434.25
Temecula	26.92%	$34,995.13	28.89%	$169,658.22
Wildomar	7.58%	$9,852.61	8.33%	$48,908.03
RCFC&WCD	25.02%	$32,524.91	19.83%	$116,445.84

Santa Margarita 2015 Permit - Test Claim Issue B: Critical Sediment requirements

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
Critical Sediment Map	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
	Document Development/Revisions	Associate Civil Engineer	20	$73.13	$1,462.54
	Document Development/Revisions	Data Mgr (Sr. Tech)	20	$56.69	$1,133.74
				Total	$3,226.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue B Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue B Cost = $3,226.78*
County of Riverside	N/A	N/A	17.15%	$553.50
Murrieta			25.79%	$832.21
Temecula			28.89%	$932.37
Wildomar			8.33%	$268.78
RCFC&WCD			19.83%	$639.93

Santa Margarita 2015 Permit - Test Claim Issue C: BMP Design Manual update, Provisions E.3.d and F.2.b

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
BMP Design Manual Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
BMP Design Manual Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue C Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue C Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue D: Residential Inventory and Inspections, Provision E.5

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

Santa Margarita 2015 Permit - Test Claim Issue E: Rehabilitation of streams, Provisions E.5.e (2)

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	**$629.34**

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue E Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue E Cost = $630.83*
County of Riverside	16.06%	**$101.07**	17.15%	**$108.21**
Murrieta	24.41%	**$153.65**	25.79%	**$162.70**
Temecula	26.92%	**$169.44**	28.89%	**$182.28**
Wildomar	7.58%	**$47.70**	8.33%	**$52.55**
RCFC&WCD	25.02%	**$157.48**	19.83%	**$125.11**

Santa Margarita 2015 Permit - Test Claim Issue F: Enforcement Response Plan, Provision E.6

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	**$630.83**

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue F Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue F Cost = $630.83*
County of Riverside	N/A	N/A	17.15%	$108.21
Murrieta			25.79%	$162.70
Temecula			28.89%	$182.28
Wildomar			8.33%	$52.55
RCFC&WCD			19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue G: JURMP Update Requirements, Provision F.2.a

FY 15-16

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$88.87	$177.75
		SMR Permit Mgr	2	$68.46	$136.92
JURMP Update	Oversight	Section Supervisor	2	$88.87	$177.75
	Document Development/Revisions	SMR Permit Mgr	2	$68.46	$136.92
				Total	$629.34

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
JURMP Update	Oversight	Section Supervisor	2	$89.08	$178.17
	Document Development/Revisions	SMR Permit Mgr	2	$68.62	$137.25
				Total	$630.83

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue G Cost = $629.34*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue G Cost = $630.83*
County of Riverside	16.06%	$101.07	17.15%	$108.21
Murrieta	24.41%	$153.65	25.79%	$162.70
Temecula	26.92%	$169.44	28.89%	$182.28
Wildomar	7.58%	$47.70	8.33%	$52.55
RCFC&WCD	25.02%	$157.48	19.83%	$125.11

Santa Margarita 2015 Permit - Test Claim Issue H: Monitoring costs for additional field screening, Provision D.2.a(2).

Approximate Staff Hourly-FY 15-16

Role (Title)	Rate ($)*	Overhead ($) (60.48%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.49	$88.87	2	$177.75
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.80	$68.46	69	$4,723.79
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.47	$59.62	23	$1,371.22
Field Staff (Snr Tech)	$35.24	$21.31	$56.55	15	$848.30
Field Staff (Tech II)	$16.00	$9.68	$25.68	177	$4,544.79
				TOTAL	$11,665.85

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Staff Hourly-FY 16-17

Role (Title)	Rate ($)*	Overhead ($) (60.86%)	Sub-Total ($)	Labor (Hours)	Labor Total
Section Supervisor (Engineering Project Manager)	$55.38	$33.70	$89.08	10	$890.84
SMR Permit Manager (Assoc. Engineer)	$42.66	$25.96	$68.62	283	$19,420.27
Monitoring Program Manager (Assoc. Air/Water)	$37.15	$22.61	$59.76	56	$3,346.53
Engineering Intern	$16.00	$9.74	$25.74	75	$1,930.32
Field Staff (Snr Tech)	$35.24	$21.45	$56.69	63	$3,571.29
Field Staff (Tech II)	$16.00	$9.74	$25.74	133	$3,423.10
				TOTAL	$32,582.35

* Average hourly rate

** Rounded for conservative estimate purposes

Approximate Vehicle Usage Hourly-FY 15-16

Vehicle	Rate ($)*	Miles	Total
EQ2200 - 2002 FORD ESCAPE,SUV 1/2 TON	0.83	60	49.8
EQ2405 - VAN, 10 GMC	1.15	875	1006.25
		TOTAL	$1,056.05

Approximate Vehicle Usage Hourly-FY 16-17

Vehicle	Rate ($)*	Miles	Total
EQ2430 - 2011 FORD ESCAPE, 4X4 SUV 1/2 TON	0.83	441	366.03
EQ2405 - VAN, 10 GMC	1.15	505	580.75
		TOTAL	$946.78

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue H Cost = $11,665.85*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue H Cost = $32,582.35*
County of Riverside	16.06%	$2,043.03	17.15%	$5,751.30
Murrieta	24.41%	$3,106.05	25.79%	$8,647.44
Temecula	26.92%	$3,425.13	28.89%	$9,688.10
Wildomar	7.58%	$964.32	8.33%	$2,792.82
RCFC&WCD	25.02%	$3,183.36	19.83%	$6,649.47

Santa Margarita 2015 Permit - Test Claim Issue I: Special Studies requirement, D.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Chief	2	$96.52	$193.03
		Section Supervisor	2	$89.08	$178.17
		SMR Permit Mgr	2	$68.62	$137.25
				Total	$508.45

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue I Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue I Cost = $508.45*
County of Riverside	N/A	N/A	17.15%	$87.21
Murrieta			25.79%	$131.13
Temecula			28.89%	$146.91
Wildomar			8.33%	$42.35
RCFC&WCD			19.83%	$100.83

Santa Margarita 2015 Permit - Test Claim Issue J: Assessment requirements, Provision D.4 and associated Provision F reporting

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	6	$89.08	$534.51
		SMR Permit Mgr	10	$68.62	$686.23
		Monitoring Program Mgr (Assoc. Air/Water Engineer)	10	$59.76	$597.59
				Total	$1,818.33

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue J Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue J Cost = $1,818.33*
County of Riverside	N/A	N/A	17.15%	$311.90
Murrieta			25.79%	$468.96
Temecula			28.89%	$525.40
Wildomar			8.33%	$151.46
RCFC&WCD			19.83%	$360.61

Santa Margarita 2015 Permit - Test Claim Issue K: Alternative Compliance option for hydromod for PDPs, Provision E.3.c.3

FY 16-17

Task	Subtasks	Staff/Consultant	Hours	Labor ($)	Labor Subtotal ($)
Internal meeting/planning/program development		Section Supervisor	0.5	$89.08	$44.54
		SMR Permit Mgr	1	$68.62	$68.62
Technical Support	Oversight	Section Supervisor	0.5	$89.08	$44.54
	Santa Margarita Analysis and Technical Support	SMR Permit Mgr	1	$68.62	$68.62
	Santa Margarita Analysis and Technical Support	Consultant (Geosyntec)	----	----	$37,836.54
				Total	$38,062.87

City/County	*2015-2016 % of Adjusted Program Total*	*2015-2016 Issue K Cost = $0*	*2016-2017 % of Adjusted Program Total*	*2016-2017 Issue K Cost = $38,062.87*
County of Riverside	N/A	N/A	17.15%	$6,528.98
Murrieta			25.79%	$9,816.73
Temecula			28.89%	$10,998.10
Wildomar			8.33%	$3,170.46
RCFC&WCD			19.83%	$7,548.59

Santa Margarita 2015 Permit - Test Claim Issue L: Hydromod Monitoring

No shared costs were expended in either FY 2015-16 or 2016-17, since item requires approval in WQIP

EXHIBIT B

AGENDA

SANTA MARGARITA REGION
WATERSHED MANAGEMENT AREA WORKGROUP

10:00 a.m. – 11:00 a.m. Wednesday, April 20, 2016
City of Temecula – Great Oaks Room
41000 Main Street, Temecula, CA

I. Introductions

II. Santa Margarita Region MS4 Program

- A. HMP Monitoring Program (2010 Permit)
- B. WQIP Development Updates
- C. SMR Implementation Agreement Update
- D. Monitoring Program Update
- E. Spring Training

III. 2015 Regional Permit Petitions Update

IV. Open Discussion

- A. San Diego RWQCB
- B. Round Table

V. Next Workgroup Meeting – July 20, 2016

VI. Adjourn to Co-Permittee Staff Business Meeting

P8/203

NPDES
SANTA MARGARITA WATERSHED MANAGEMENT AREA
WORKGROUP
Meeting Notes
for
April 20, 2016

Attendees:

Scott Bruckner	Riverside County Flood Control District
Kyle Gallup	Riverside County Flood Control District
David Garcia	Riverside County Flood Control District
Stuart McKibbin	Riverside County Flood Control District
Eric Lomeli	Riverside County Flood Control District
Rebekah Guill	Riverside County Flood Control District
Wayne Chiu	San Diego Regional Water Board
Laurie Walsh	San Diego Regional Water Board
Jason Farag	City of Wildomar
Aldo Licitra	City of Temecula
James Ozouf	City of Murrieta
Tad Nakatani	D-Max Engineering, rep. City of Menifee

I. ***Introductions***

Scott Bruckner welcomed everyone to the first SMR WMA Workgroup meeting, and detailed format for future meetings:

- Meetings will continue to be held quarterly, on the third Wednesday of the month;
- General Permit implementation will be the focus; WQIP specific items to be addressed as necessary;
- Informal format, not publicly attended, minutes won't be recorded, but meeting notes will be taken and distributed.

II. ***Santa Margarita Region MS4 Program Updates***

A. **HMP Monitoring Program** – Revision of the HMP has been completed. The 2010 Permit does not explicitly specify a method for submittal. After discussion with Regional Board staff, Co-Permittees have decided to begin implementation, and submit the revised HMP with the Annual Report this October. Wayne confirmed that a letter could be issued acknowledging receipt/acceptance of the revision.

B. **WQIP Development Updates** – Kyle Gallup, Engineering Project Manager of the District's Watershed/Water Conservation Planning Section introduced himself, and provided brief updates on WQIP development. Wayne and Laurie provided some insight to the group regarding size of Water Quality Improvement Consultation Panel.

C. **SMR Implementation Agreement Update** – The Co-Permittees, including San Diego County and Menifee, are currently looking at a draft, and are looking to execute by July 1.

D. **Spring Training** – Construction training provided on April 7, Municipal and Commercial/Industrial to be provided April 21 in Temecula.

III. ***2015 Regional Permit Petitions Update***

The Regional Board requested an additional 30 days to file responses and the administrative record, which the SWRCB granted. Date for filing responses is now May 16. The SWRCB has taken up the San Francisco Regional Permit petitions as well; the two Permit petitions have anti-backsliding and anti-degradation arguments from the NGOs in common - a possibility exists that the SWRCB could decide to address both petitions together.

IV. ***Open Discussion***

A. **San Diego RWQCB** – Orange County submitted WQIP Deliverable #1, public comment period is currently open.

B. **Permittee** – No updates.

V. ***Next Workgroup Meeting*** –July 20, 2016 at 10 am.

VI. ***Adjourn to Co-Permittee Staff Meeting***

ATTACHMENT 1 TO SECTION 5 NARRATIVE STATEMENT

IN SUPPORT OF JOINT TEST CLAIM OF RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ET AL. TO SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER NO. R9-2015-0100
NPDES NO. CAS 0109266

EXCERPTS OF ORDER NO. R9-2013-0001 AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER NO. R9-2015-0100 RELEVANT TO ITEM V.A IN SECTION 5 NARRATIVE STATEMENT

THEREFORE, IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in division 7 of the CWC (commencing with section 13000) and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the requirements of this Order. This action in no way prevents the San Diego Water Board from taking enforcement action for past violations of the previous Order applicable to the Copermittees. If any part of this Order is subject to a temporary stay of enforcement, unless otherwise specified, the Copermittees must comply with the analogous portions of the previous Order, which will remain in effect for all purposes during the pendency of the stay.

II. PROVISIONS

A. PROHIBITIONS AND LIMITATIONS

The purpose of this provision is to describe the conditions under which storm water and non-storm water discharges into and from MS4s are prohibited or limited. The goal of the prohibitions and limitations is to protect the water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges. This goal will be accomplished through the implementation of water quality improvement strategies and runoff management programs that effectively prohibit non-storm water discharges into the Copermittees' MS4s, and reduce pollutants in storm water discharges from the Copermittees' MS4s to the MEP.

1. Discharge Prohibitions

a. Discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state are prohibited.

b. Non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision E.2, unless such discharges are authorized by a separate NPDES permit.

c. Discharges from MS4s are subject to all waste discharge prohibitions in the Basin Plan, included in Attachment A to this Order.

d. Storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's MS4 to the Heisler Park ASBS are authorized under this Order subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012, as amended by State Water Board Resolution No. 2012-0031, applicable to these discharges, included in Attachment A to this Order. All other discharges from the Copermittees' MS4s to ASBS are prohibited.

2. Receiving Water Limitations

a. Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in:

(1) The San Diego Water Board's Basin Plan, including beneficial uses, water quality objectives, and implementation plans;

(2) State Water Board plans for water quality control including the following:

(a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and

(b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;

(3) State Water Board policies for water and sediment quality control including the following:

(a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,

(b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:

(i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and

(ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,

(c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California;[2]

(4) Priority pollutant criteria promulgated by the USEPA through the following:

(a) National Toxics Rule (NTR)[3] (promulgated on December 22, 1992 and amended on May 4, 1995), and

(b) California Toxics Rule (CTR).[4,5]

b. Discharges from MS4s composed of storm water runoff must not alter natural ocean water quality in an ASBS.

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[2] State Water Board Resolution No. 68-16
[3] 40 CFR 131.36
[4] 65 Federal Register 31682-31719 (May 18, 2000), adding Section 131.38 to 40 CFR
[5] If a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies.

3. Effluent Limitations

a. Technology Based Effluent Limitations

Pollutants in storm water discharges from MS4s must be reduced to the MEP.[6]

b. Water Quality Based Effluent Limitations

Each Copermittee must comply with applicable WQBELs established for the TMDLs in Attachment E to this Order, pursuant to the applicable TMDL compliance schedules.

4. Compliance with Discharge Prohibitions and Receiving Water Limitations

Each Copermittee must achieve compliance with Provisions A.1.a, A.1.c and A.2.a of this Order through timely implementation of control measures and other actions as specified in Provisions B and E of this Order, including any modifications. The Water Quality Improvement Plans required under Provision B must be designed and adapted to ultimately achieve compliance with Provisions A.1.a, A.1.c and A.2.a.

a. If exceedance(s) of water quality standards persist in receiving waters notwithstanding implementation of this Order, the Copermittees must comply with the following procedures:

(1) For exceedance(s) of a water quality standard in the process of being addressed by the Water Quality Improvement Plan, the Copermittee(s) must implement the Water Quality Improvement Plan as accepted by the San Diego Water Board, and update the Water Quality Improvement Plan, as necessary, pursuant to Provision F.2.c;

(2) Upon a determination by either the Copermittees or the San Diego Water Board that discharges from the MS4 are causing or contributing to a new exceedance of an applicable water quality standard not addressed by the Water Quality Improvement Plan, the Copermittees must submit the following updates to the Water Quality Improvement Plan pursuant to Provision F.2.c or as part of the Water Quality Improvement Plan Annual Report required under Provision F.3.b, unless the San Diego Water Board directs an earlier submittal:

(a) The water quality improvement strategies being implemented that are effective and will continue to be implemented,

[6] This does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment must occur prior to the discharge of runoff into receiving waters per Finding 7.

(b) Water quality improvement strategies (i.e. BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs, etc.) that will be implemented to reduce or eliminate any pollutants or conditions that are causing or contributing to the exceedance of water quality standards,

(c) Updates to the schedule for implementation of the existing and additional water quality improvement strategies, and

(d) Updates to the monitoring and assessment program to track progress toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a of this Order;

(3) The San Diego Water Board may require the incorporation of additional modifications to the Water Quality Improvement Plan required under Provision B. The applicable Copermittees must submit any modifications to the update to the Water Quality Improvement Plan within 90 days of notification that additional modifications are required by the San Diego Water Board, or as otherwise directed;

(4) Within 90 days of the San Diego Water Board determination that the modifications to the Water Quality Improvement Plan required under Provision A.4.a.(3) meet the requirements of this Order, the applicable Copermittees must revise the jurisdictional runoff management program documents to incorporate the modified water quality improvement strategies that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(5) Each Copermittee must implement the updated Water Quality Improvement Plan.

b. The procedure set forth above to achieve compliance with Provisions A.1.a, A.1.c and A.2.a of this Order do not have to be repeated for continuing or recurring exceedances of the same water quality standard(s) following implementation of scheduled actions unless directed to do otherwise by the San Diego Water Board.

c. Nothing in Provisions A.4.a and A.4.b prevents the San Diego Water Board from enforcing any provision of this Order while the applicable Copermittees prepare and implement the above update to the Water Quality Improvement Plan and jurisdictional runoff management programs.

2. Priority Water Quality Conditions

The Copermittees must identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan. Where appropriate, Watershed Management Areas may be separated into subwatersheds to focus water quality prioritization and jurisdictional runoff management program implementation efforts by receiving water.

a. Assessment of Receiving Water Conditions

The Copermittees must consider the following, at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses:

(1) Receiving waters listed as impaired on the CWA Section 303(d) List of Water Quality Limited Segments (303(d) List);

(2) TMDLs adopted and under development by the San Diego Water Board;

(3) Receiving waters recognized as sensitive or highly valued by the Copermittees, including estuaries designated under the National Estuary Program under CWA section 320, marine protected areas, wetlands defined by the State or U.S. Fish and Wildlife Service's National Wetlands Inventory as wetlands, waters having the Preservation of Biological Habitats of Special Significance (BIOL) beneficial use designation, and receiving waters identified as ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(4) The receiving water limitations of Provision A.2;

(5) Known historical versus current physical, chemical, and biological water quality conditions;

(6) Available, relevant, and appropriately collected and analyzed physical, chemical, and biological receiving water monitoring data, including, but not limited to, data describing:

(a) Chemical constituents,

(b) Water quality parameters (i.e. pH, temperature, conductivity, etc.),

(c) Toxicity Identification Evaluations for both receiving water column and sediment,

(d) Trash impacts,

(e) Bioassessments, and

(f) Physical habitat;

(7) Available evidence of erosional impacts in receiving waters due to accelerated flows (i.e. hydromodification);

(8) Available evidence of adverse impacts to the chemical, physical, and biological integrity of receiving waters; and

(9) The potential improvements in the overall condition of the Watershed Management Area that can be achieved.

b. ASSESSMENT OF IMPACTS FROM MS4 DISCHARGES

The Copermittees must consider the following, at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s:

(1) The discharge prohibitions of Provision A.1 and effluent limitations of Provision A.3; and

(2) Available, relevant, and appropriately collected and analyzed storm water and non-storm water monitoring data from the Copermittees' MS4 outfalls;

(3) Locations of each Copermittee's MS4 outfalls that discharge to receiving waters;

(4) Locations of MS4 outfalls that are known to persistently discharge non-storm water to receiving waters likely causing or contributing to impacts on receiving water beneficial uses;

(5) Locations of MS4 outfalls that are known to discharge pollutants in storm water causing or contributing to impacts on receiving water beneficial uses; and

(6) The potential improvements in the quality of discharges from the MS4 that can be achieved.

c. IDENTIFICATION OF PRIORITY WATER QUALITY CONDITIONS

(1) The Copermittees must use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include the following information for each priority water quality condition:

(a) The beneficial use(s) associated with the priority water quality condition;

(b) The geographic extent of the priority water quality condition within the Watershed Management Area, if known;

(c) The temporal extent of the priority water quality condition (e.g., dry weather and/or wet weather);

(d) The Copermittees with MS4s discharges that may cause or contribute to the priority water quality condition; and

(e) An assessment of the adequacy of and data gaps in the monitoring data to characterize the conditions causing or contributing to the priority water quality condition, including a consideration of spatial and temporal variation.

(2) The Copermittees must identify the highest priority water quality conditions to be addressed by the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the highest priorities.

d. IDENTIFICATION OF MS4 SOURCES OF POLLUTANTS AND/OR STRESSORS

The Copermittees must identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider the following:

(1) Pollutant generating facilities, areas, and/or activities within the Watershed Management Area, including:

(a) Each Copermittee's inventory of construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas,

(b) Publicly owned parks and/or recreational areas,

(c) Open space areas,

(d) All currently operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, and

(e) Areas not within the Copermittees' jurisdictions (e.g., Phase II MS4s, tribal lands, state lands, federal lands) that are known or suspected to be discharging to the Copermittees' MS4s;

(2) Locations of the Copermittees' MS4s, including the following:

(a) All MS4 outfalls that discharge to receiving waters, and

(b) Locations of major structural controls for storm water and non-storm water (e.g., retention basins, detention basins, major infiltration devices, etc.);

(3) Other known and suspected sources of non-storm water or pollutants in storm water discharges to receiving waters within the Watershed Management Area, including the following:

(a) Other MS4 outfalls (e.g., Phase II Municipal and Caltrans),

(b) Other NPDES permitted discharges,

(c) Any other discharges that may be considered point sources (e.g., private outfalls), and

(d) Any other discharges that may be considered non-point sources (e.g., agriculture, wildlife or other natural sources);

(4) Review of available data, including but not limited to:

(a) Findings from the Copermittees' illicit discharge detection and elimination programs,

(b) Findings from the Copermittees' MS4 outfall discharge monitoring,

(c) Findings from the Copermittees' receiving water monitoring,

(d) Findings from the Copermittees' MS4 outfall discharge and receiving water assessments, and

(e) Other available, relevant, and appropriately collected data, information, or studies related to pollutant sources and/or stressors that contribute to the highest priority water quality conditions as identified for Provision B.2.c.

(5) The adequacy of the available data to identify and prioritize sources and/or stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c.

e. Identification of Potential Water Quality Improvement Strategies

The Copermittees must evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include the following:

(1) Structural BMPs, non-structural BMPs, incentives, or programs that can potentially be implemented to address the highest priority water quality conditions identified under Provision B.2.c, or MS4 sources of pollutants or stressors identified under Provision B.2.d,

(2) Retrofitting projects in areas of existing development within the Watershed Management Area that can potentially be implemented to reduce MS4 sources of pollutants or stressors identified under Provision B.2.d causing or contributing to the highest priority water quality conditions identified under Provision B.2.c, and

(3) Stream, channel, and/or habitat rehabilitation projects within the Watershed Management Area that can potentially be implemented to protect and/or improve conditions in receiving waters from MS4 pollutants and/or stressors identified under Provision B.2.d causing or contributing to the highest priority water quality conditions identified under Provision B.2.c.

3. Water Quality Improvement Goals, Strategies and Schedules

The Copermittees must identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.

a. Water Quality Improvement Goals and Schedules

(1) Numeric Goals

The Copermittees must develop and incorporate numeric goals[7] into the Water Quality Improvement Plan. Numeric goals must be used to support

[7] Interim and final numeric goals may take a variety of forms such as TMDL established WQBELs, action levels, pollutant concentration, load reductions, number of impaired water bodies delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, or other appropriate metrics. Interim and final numeric goals are not necessarily limited to one criterion or indicator, but may include multiple criteria and/or indicators. Except for TMDL established WQBELs, interim and final numeric goals and corresponding schedules may be revised through the adaptive management process under Provision B.5.

Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate the following numeric goals in the Water Quality Improvement Plan:

(a) Final numeric goals must be based on measureable criteria or indicators capable of demonstrating one or more of the following:

(i) Discharges from the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters, AND/OR

(ii) The conditions of receiving waters and associated habitat are protected from MS4 discharges, AND/OR

(iii) Beneficial uses of receiving waters are protected from MS4 discharges and will be supported.

(b) Interim numeric goals must be based on measureable criteria or indicators capable of demonstrating reasonable incremental progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges as follows:

(i) One or more interim numeric goals may be established to demonstrate progress toward achieving each final numeric goal,

(ii) For each final numeric goal, at least one interim numeric goal must be expressed as a reasonable increment toward achievement of the final numeric goal,

(iii) For each final numeric goal, reasonable interim numeric goals must be established to be accomplished during each 5 year period between the acceptance of the Water Quality Improvement Plan and the achievement of the final numeric goals.

(2) Schedules for Achieving Numeric Goals

The Copermittees must develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Copermittees must incorporate the schedules for achieving the numeric goals into the Water Quality Improvement Plan based on the following considerations:

(a) Final dates for achieving all final numeric goals must be established considering the following:

(i) Final compliance dates for any applicable TMDLs in Attachment E to this Order;

(ii) Compliance schedules for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(iii) Achievement of the final numeric goals for the highest water quality priorities must be as soon as possible;

(iv) Final dates for achieving the final numeric goals must reflect a realistic assessment of the shortest practicable time required based on the temporal and spatial extent and factors associated with the highest priority water quality conditions identified under Provision B.2.c, and taking into account the time reasonably required to implement the water quality improvement strategies required pursuant to Provision B.3.b.

(b) Interim dates for achieving all interim numeric goals must be established considering the following:

(i) Interim compliance dates for any applicable TMDLs in Attachment E to this Order;

(ii) Compliance schedules for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(iii) Interim dates for achieving the interim numeric goals must reflect a realistic assessment of the shortest practicable time reasonably required, taking into account the time needed to implement new or significantly expanded programs and securing financing, if necessary; and

(iv) For each final numeric goal, at least one interim numeric goal must be established that the Copermittees will work toward achieving within the term of this Order.

b. WATER QUALITY IMPROVEMENT STRATEGIES AND SCHEDULES

Based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision B.2.e to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a, the Copermittees must identify the strategies that will be implemented in each Watershed Management Area as follows:

(1) Jurisdictional Strategies

(a) Each Copermittee in the Watershed Management Area must identify the strategies that will be implemented within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions E.2 through E.7, including descriptions of the following:

(i) For each of the inventories developed for its jurisdiction, as required under Provisions D.2.a.(1), E.3.e.(2), E.4.b, and E.5.a, each Copermittee must identify the known and suspected areas or sources causing or contributing to the highest priority water quality conditions in the Watershed Management Area that the Copermittee will focus on in its efforts to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, and achieve the interim and final numeric goals identified under Provision B.3.a;

(ii) BMPs that each Copermittee will implement, or require to be implemented, as applicable, for those areas or sources within its jurisdiction;

(iii) Education programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction;

(iv) Frequencies that each Copermittee will conduct inspections on those areas or sources within its jurisdiction;

(v) Incentive and enforcement programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction; and

(vi) Any other BMPs, incentives, or programs that each Copermittee will implement for those areas or sources within its jurisdiction.

(b) Identify the optional jurisdictional strategies that each Copermittee will implement within its jurisdiction, as necessary, to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a. Descriptions of the optional jurisdictional strategies must include:

(i) BMPs, incentives, or programs that may be implemented by the Copermittee within its jurisdiction in addition to the requirements of Provisions B.3.b.(1)(a);

(ii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects to retrofit areas of existing development within its jurisdiction;

(iii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects that will rehabilitate the conditions of channels or habitats within its jurisdiction;

(iv) The funds and/or resources that must be secured by the Copermittee to implement the optional strategies described for Provisions B.3.b.(1)(b)(i)-(iii) within its jurisdiction; and

(v) The circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provision B.3.b.(1)(a), to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.

(c) Identify the strategies that will be implemented by the Copermittee in coordination with or with the cooperation of other agencies (e.g. Caltrans, water districts, school districts) and/or entities (e.g. non-governmental organizations) within its jurisdiction.

(2) Watershed Management Area Strategies

The Copermittees must identify the optional regional or multi-jurisdictional strategies that will be implemented in the Watershed Management Area, as necessary, to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a. Descriptions of the optional regional or multi-jurisdictional strategies must include:

(a) Regional or multi-jurisdictional BMPs, incentives, or programs that may be implemented by the Copermittees in the Watershed Management Area;

(b) Incentives or programs that may be implemented by the Copermittees in the Watershed Management Area to encourage or implement regional or multi-jurisdictional projects to retrofit areas of existing development;

(c) Incentives or programs that may be implemented by the Copermittees to encourage or implement regional or multi-jurisdictional projects that will rehabilitate the conditions of channels, streams, or habitats within the Watershed Management Area;

(d) The funds and/or resources that must be secured by the Copermittees to implement the optional strategies described for Provisions B.3.b.(2)(a)-(c) within the Watershed Management Area; and

(e) The circumstances necessary to trigger implementation of the optional regional or multi-jurisdictional strategies to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.

(3) Schedules for Implementing Strategies

The Copermittees must develop reasonable schedules for implementing the water quality improvement strategies identified under Provisions B.3.b.(1) and B.3.b.(2) to achieve the interim and final numeric goals identified and schedules established under Provision B.3.a. The Copermittees must incorporate the schedules to implement the water quality improvement strategies into the Water Quality Improvement Plan as follows:

(a) Each Copermittee must develop schedules for the jurisdictional strategies identified pursuant to Provisions B.3.b.(1)(a)-(b). Each schedule must specify:

(i) If each jurisdictional strategy identified pursuant to Provision B.3.b.(1)(a) will or will not be initiated upon acceptance of the Water Quality Improvement Plan;

(ii) For each jurisdictional strategy identified pursuant to Provision B.3.b.(1)(a) that will not be initiated upon acceptance of the Water Quality Improvement Plan, the shortest practicable time in which each jurisdictional strategy will be initiated after acceptance of the Water Quality Improvement Plan;

(iii) For each optional jurisdictional strategy identified pursuant to Provision B.3.b.(1)(b), a realistic assessment of the shortest practicable time required to:

[a] Secure the resources needed to fund the optional jurisdictional strategy, and
[b] Procure the resources, materials, labor, and applicable permits necessary to initiate implementation of the optional jurisdictional strategy;

(iv) If each jurisdictional strategy identified pursuant to Provisions B.3.b.(1)(a)-(b) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and

(v) If a jurisdictional strategy identified pursuant to Provisions B.3.b.(1)(a)-(b) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

(b) The Copermittees in the Watershed Management Area must develop schedules for the regional or multi-jurisdictional strategies identified pursuant to Provision B.3.b.(2). Each schedule must specify:

(i) A realistic assessment of the shortest practicable time to:

[a] Secure the resources needed to fund the optional regional or multi-jurisdictional strategy, and
[b] Procure the resources, materials, labor, and permits necessary to initiate the implementation of the optional regional or multi-jurisdictional strategy;

(ii) If each regional or multi-jurisdictional strategy identified pursuant to Provision B.3.b.(2) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and

(iii) If a regional or multi-jurisdictional strategy and/or activity identified pursuant to Provisions B.3.b.(2) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

~~(4) Optional Watershed Management Area Analysis~~

(a) For each Watershed Management Area, the Copermittees have the option to perform a Watershed Management Area Analysis for the purpose of developing watershed-specific requirements for structural BMP implementation, as described in Provision E.3.c.(3). The Watershed Management Area Analysis must include GIS layers (maps) as output. The analysis must include the following information, to the extent it is available, in order to characterize the Watershed Management Areas:

(i) A description of dominant hydrologic processes, such as areas where infiltration or overland flow likely dominates;

(ii) A description of existing streams in the watershed, including bed material and composition, and if they are perennial or ephemeral;

(iii) Current and anticipated future land uses;

(iv) Potential coarse sediment yield areas; and

(v) Locations of existing flood control structures and channel structures, such as stream armoring, constrictions, grade control structures, and hydromodification or flood management basins.

(b) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision B.3.b.(4)(a) to identify and compile a list of candidate projects that could potentially be used as

compliance with the schedules for implementing the strategies established pursuant to Provisions B.3.b.(3)(a) and B.3.c.(1)(a)(vii); AND

(b) The Copermittee is performing the monitoring and assessments developed pursuant to Provision B.3.c.(1)(c); AND

(c) The Copermittee's assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermittee is in compliance with the annual milestones and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND

(d) Any proposed modifications to the numeric goals, strategies, schedules, and/or annual milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c;[10] AND

(e) The Copermittee is implementing the requirements of Provision A.4.a.

4. Water Quality Improvement Monitoring and Assessment Program

a. The Copermittees in each Watershed Management Area must develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan that assesses: 1) the progress toward achieving the numeric goals and schedules, 2) the progress toward addressing the highest priority water quality conditions for each Watershed Management Area, and 3) each Copermittee's overall efforts to implement the Water Quality Improvement Plan.

b. The monitoring and assessment program must incorporate the monitoring and assessment requirements of Provision D, which may allow the Copermittees to modify the program to be consistent with and focus on the highest priority water quality conditions for each Watershed Management Area.

c. For Watershed Management Areas with applicable TMDLs, the monitoring and assessment program must incorporate the specific monitoring and assessment requirements of Attachment E.

[10] A request for proposed changes to the Water Quality Improvement Plan does not stay any permit condition.

d. For Watershed Management Areas with any ASBS, the water quality monitoring and assessment program must incorporate the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A).

5. Iterative Approach and Adaptive Management Process

The Copermittees in each Watershed Management Area must implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following:

a. Re-Evaluation of Priority Water Quality Conditions

The priority water quality conditions and potential water quality improvement strategies included in the Water Quality Improvement Plan pursuant to Provisions B.2.c and B.2.e may be re-evaluated by the Copermittees as needed during the term of this Order as part of the Water Quality Improvement Plan Annual Report. Re-evaluation and recommendations for modifications to the priority water quality conditions and potential water quality improvement strategies must be provided in the Report of Waste Discharge, and must consider the following:

(1) Achieving the outcome of improved water quality in MS4 discharges and receiving waters through implementation of the water quality improvement strategies identified in the Water Quality Improvement Plan;

(2) New information developed when the requirements of Provisions B.2.a-c have been re-evaluated;

(3) Spatial and temporal accuracy of monitoring data collected to inform prioritization of water quality conditions and implementation strategies to address the highest priority water quality conditions;

(4) Availability of new information and data from sources other than the jurisdictional runoff management programs within the Watershed Management Area that informs the effectiveness of the actions implemented by the Copermittees;

(5) San Diego Water Board recommendations; and

(6) Recommendations for modifications solicited through a public participation process.

b. ADAPTATION OF GOALS, STRATEGIES AND SCHEDULES

The water quality improvement goals, strategies and schedules, included in the Water Quality Improvement Plan pursuant to Provisions B.3, must be re-evaluated and adapted as new information becomes available to result in more effective and efficient measures to address the highest priority water quality conditions identified pursuant to Provision B.2.c. Re-evaluation of and modifications to the water quality improvement goals, strategies and schedules must be provided in the Water Quality Improvement Plan Annual Report, and must consider the following:

(1) Modifications to the priority water quality conditions based on Provision B.5.a;

(2) Progress toward achieving interim and final numeric goals in receiving waters and MS4 discharges for the highest priority water quality conditions in the Watershed Management Area,

(3) Progress toward achieving outcomes according to established schedules;

(4) New policies or regulations that may affect identified numeric goals;

(5) Measurable or demonstrable reductions of non-storm water discharges to and from each Copermittee's MS4;

(6) Measurable or demonstrable reductions of pollutants in storm water discharges from each Copermittee's MS4 to the MEP;

(7) New information developed when the requirements of Provisions B.2.b and B.2.d have been re-evaluated;

(8) Efficiency in implementing the Water Quality Improvement Plan;

(9) San Diego Water Board recommendations; and

(10) Recommendations for modifications solicited through a public participation process.

c. ADAPTATION OF MONITORING AND ASSESSMENT PROGRAM

The water quality improvement monitoring and assessment program, included in the Water Quality Improvement Plan pursuant to Provision B.4, must be re-evaluated and adapted when new information becomes available. Re-evaluation and recommendations for modifications to the monitoring and assessment program, pursuant to the requirements of Provision D, may be provided in the Water Quality Improvement Plan Annual Report, but must be provided in the Report of Waste Discharge.

~~d. Adaptation of Prohibitions and Limitations Compliance Option~~

~~If a Copermittee has implemented the Prohibitions and Limitations Compliance Option allowed to be included in the Water Quality Improvement Plan pursuant to Provision B.3.c, the Copermittee must re-evaluate and adapt the numeric goals, water quality improvement strategies, schedules, and annual milestones required under Provision B.3.c.(1) when significant new information becomes available, or with the Report of Waste Discharge required pursuant to Provision F.5. Significant changes in the numeric goals, water quality improvement strategies, schedules, or annual milestones requires an update to the analysis required under Provision B.3.c.(2).~~

6. Water Quality Improvement Plan Submittal, Updates, and Implementation

a. The Copermittees must submit and commence implementation of the Water Quality Improvement Plans in accordance with the requirements of Provision F.1.

b. The Copermittees must submit proposed updates to the Water Quality Improvement Plan for acceptance by the San Diego Water Board Executive Officer in accordance with the requirements of Provision F.2.c.

F. REPORTING

The purpose of this provision is to determine and document compliance with the requirements set forth in this Order. The goal of reporting is to communicate to the San Diego Water Board and the people of the State of California the implementation status of each jurisdictional runoff management program and compliance with the requirements of this Order. This goal is to be accomplished through the submittal of specific deliverables to the San Diego Water Board by the Copermittees.

1. Water Quality Improvement Plans

The Copermittees for each Watershed Management Area must develop and submit the Water Quality Improvement Plan in accordance with the following requirements:

a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT

Each Water Quality Improvement Plan must be developed in accordance with the following process:

(1) Public Participation Process

The Copermittees must implement a public participation process to solicit data, information, and recommendations to be utilized in the development of the Water Quality Improvement Plan. The public participation process must include the following:

(a) The Copermittees must develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. The schedule may be adjusted as necessary by the Copermittees, provided the public is provided timely notification of the changes to the schedule.

(b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:

(i) A representative of the San Diego Water Board;

(ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and

(iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs,

retrofitting projects, and stream, channel or habitat rehabilitation projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

(c) The Copermittees must coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

(2) Priority Water Quality Conditions

(a) The Copermittees must solicit data, information and recommendations from the public to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area.

(b) The Copermittees must review the priority water quality conditions the Copermittees plan on including in the Water Quality Improvement Plan with the Water Quality Improvement Consultation Panel to receive recommendations or concurrence.

(c) The Copermittees must consider revisions to the priority water quality conditions based on recommendations from the Water Quality Improvement Consultation Panel.

(d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the submittal of the priority water quality conditions to the San Diego Water Board.

(e) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.2 to the San Diego Water Board as early as 6 months and no later than 12 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed priority water quality conditions and potential water quality improvement strategies for public review and comment for a minimum of 30 days.

(f) The Copermittees must consider revisions to the priority water quality conditions and potential water quality improvement strategies developed pursuant to Provision B.2 based on public comments received by the close of the comment period.

(3) Water Quality Improvement Goals, Strategies and Schedules

(a) The Copermittees must solicit recommendations from the public on potential numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and recommendations on the strategies that should be implemented to achieve the potential numeric goals.

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel and consider revisions to the following items based on the Panel's recommendations:

(i) The numeric goals and schedules the Copermittees propose to include in the Water Quality Improvement Plan;

(ii) The water quality improvement strategies and schedules the Copermittees propose to implement in the Watershed Management Area and include in the Water Quality Improvement Plan; and

(iii) If the Copermittees choose to implement Provision B.3.b.(4), the results of the Watershed Management Area Analysis the Copermittees proposed to incorporate into the Water Quality Improvement Plan.

(c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.3 to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.

(d) The Copermittees must consider revisions to the water quality improvement goals, strategies and schedules developed pursuant to Provision B.3 based on public comments received by the close of the comment period.

b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION

(1) Within 24 months after the commencement of coverage under this Order, the Copermittees for each Watershed Management Area must submit a complete Water Quality Improvement Plan in accordance with the requirements of Provision B of this Order to the San Diego Water Board. The San Diego Water Board will issue a public notice and release the Water Quality Improvement Plan for public review and comment for a minimum of 30 days.

(2) The Copermittees must consider revisions to the Water Quality Improvement Plan based on written comments received by the close of the public comment period.

(3) The Copermittees must promptly submit any revisions to the Water Quality Improvement Plan to the San Diego Water Board no later than 60 days after the close of the public comment period.

(4) If issues concerning the Water Quality Improvement Plan are resolved informally through discussions among the Copermittees, the San Diego Water Board and interested parties, the San Diego Water Board Executive Officer may provide written notification of acceptance to the Copermittees that the Water Quality Improvement Plan meets the requirements of Provision B. However, if the Executive Officer determines that significant issues with the Water Quality Improvement Plan remain, the matter will be scheduled for San Diego Water Board consideration at a public meeting.

(5) The Copermittees must commence with implementation of the Water Quality Improvement Plan, in accordance with the water quality improvement strategies and schedules therein, upon written notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

(6) During implementation of the Water Quality Improvement Plan the Copermittees must correct any deficiencies in the Plan identified by the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report following a request by the Board to do so.

(7) The Water Quality Improvement Plan must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of receiving notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

2. Updates

a. Jurisdictional Runoff Management Program Document Updates

Each Copermittee must update its jurisdictional runoff management program document in accordance with the following requirements:

(1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;

incorporate the amended Provision E.3.a-d requirements as soon as possible but not later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer. Under these circumstances, the effective date of the BMP Design Manual is no later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer.

c. WATER QUALITY IMPROVEMENT PLAN UPDATES

(1) The Water Quality Improvement Plans must be updated in accordance with the following process:

(a) The Copermittees must develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel on proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;

(c) The Copermittees for each Watershed Management Area must submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The updates submitted will be deemed accepted for inclusion in the Water Quality Improvement Plan ninety (90) days after submission unless otherwise directed in writing by the San Diego Water Board Executive Officer;

(d) The Copermittees must revise the requested updates as directed by the San Diego Water Board Executive Officer; and

(e) Updated Water Quality Improvement Plans must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the San Diego Water Board.

(2) No later than six months following Office of Administrative Law and USEPA approval of any TMDL Basin Plan amendment with wasteload allocations (WLAs) assigned to the Copermittees during the term of this Order, the

Copermittees must initiate an update to the applicable Water Quality Improvement Plans in accordance with Provision F.1 or Provision F.2.c.(1) to incorporate the requirements of the TMDL WLAs.

3. Progress Reporting

a. Progress Report Presentations

The Copermittees for each Watershed Management Area must periodically appear before the San Diego Water Board, as requested by the Board, to provide progress reports on the implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs.

b. Annual Reports

~~(1) Transitional Jurisdictional Runoff Management Program Annual Reports~~

(a) Each Copermittee must complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted.

(b) Each Copermittee must submit the information on the Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) specific to the area within its jurisdiction in each Watershed Management Area.

(c) In addition to submitting the Jurisdictional Runoff Management Program Annual Report Form during the transitional reporting period, each Copermittee may continue to utilize and submit the jurisdictional runoff management program annual reporting format of its previous NPDES permit until the first Water Quality Improvement Plan Annual Report is required to be submitted.

(2) Transitional Monitoring and Assessment Program Annual Reports

The Copermittees for each Watershed Management Area must submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted under this Order. The Transitional

~~Monitoring and Assessment Program Annual Reports must include:~~

(a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1.a and D.2.a, summarized and presented in tabular and graphical form; and

(b) The findings from the assessments required pursuant to Provisions D.4.a.(1)(a), D.4.b.(1)(a)(i), D.4.b.(2)(a)(i).

(3) Water Quality Improvement Plan Annual Reports

The Copermittees for each Watershed Management Area must submit a Water Quality Improvement Plan Annual Report for each reporting period no later than January 31 of the following year. The annual reporting period consists of two different periods: 1) July 1 to June 30 of the following year for the jurisdictional runoff management programs, 2) October 1 to September 30 of the following year for the monitoring and assessment programs. The Water Quality Improvement Plan Annual Reports must be made available on the Regional Clearinghouse required pursuant to Provision F.4. Each Annual Report must include the following:

(a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;

(b) The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;

(c) The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;

(d) The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:

(i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;

(ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;

(iii) The water quality improvement strategies planned for implementation during the next reporting period;

(iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the

proposed modifications;

(v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

(vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;

(e) A completed Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and

(f) Each Copermittee must provide any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).[35] Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

c. Regional Monitoring and Assessment Report

(1) The Copermittees must submit a Regional Monitoring and Assessment Report no later than 180 days prior to the expiration date of this Order. The Regional Monitoring and Assessment Report may be submitted as part of the Report of Waste Discharge required pursuant to Provision F.5.b. In preparing the report the Copermittees must consider the receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, and the findings, interpretations, and conclusions from the assessments required pursuant to Provision D.4. Based on these considerations the report must assess the following:

[35] Data must be uploaded to CEDEN Southern California Regional Data Center (http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx) using the templates provided on the CEDEN website.

(a) The beneficial uses of the receiving waters within the San Diego Region that are supported and not adversely affected by the Copermittees' MS4 discharges;

(b) The beneficial uses of the receiving waters within the San Diego Region that are adversely impacted by the Copermittees' MS4 discharges;

(c) The progress toward protecting the beneficial uses in the receiving waters within the San Diego Region from the Copermittees' discharges; and

(d) Pollutants or conditions of emerging concern that may impact beneficial uses in the receiving waters within the San Diego Region.

(2) The Regional Monitoring and Assessment Report must include recommendations for improving the implementation and assessment of the Water Quality Improvement Plans and jurisdictional runoff management programs.

(3) Each Copermittee must provide any data or documentation utilized in developing the Regional Monitoring and Assessment Report upon request by the San Diego Water Board. Any Copermittee monitoring and assessment data utilized in developing the Regional Monitoring and Assessment Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

4. Regional Clearinghouse

The Copermittees must develop, update, and maintain an internet-based Regional Clearinghouse that is made available to the public no later than 18 months after the effective date of this Order.[36]

a. The Copermittees, through the Regional Clearinghouse, must make the following documents and data available for access, and organized by Watershed Management Area. The documents and data may be linked to other internet-based data portals and databases where the original documents are stored:

(1) Water Quality Improvement Plan for the Watershed Management Area, and all updated versions with date of update;

(2) Annual Reports for the Watershed Management Area;

(3) Jurisdictional Runoff Management Program document for each Copermittee within the Watershed Management Area, and all updated versions with date of update;

[36] The Copermittees may develop, update and maintain the clearinghouse(s) of other Copermittees or agencies.

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(f) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and

(g) Resolution of problems noted and date problems fixed.

e. CONSTRUCTION SITE ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all its inventoried construction sites, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

5. Existing Development Management

Each Copermittee must implement an existing development management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. EXISTING DEVELOPMENT INVENTORY AND TRACKING

Each Copermittee must maintain, and update at least annually, a watershed-based inventory of the existing development within its jurisdiction that may discharge a pollutant load to and from the MS4. The use of an automated database system, such as GIS, is highly recommended. The inventory must, at a minimum, include:

(1) Name, location (hydrological subarea and address, if applicable) of the following types of existing development with its jurisdiction:

(a) Commercial facilities or areas;

(b) Industrial facilities;

(c) Municipal facilities, including:

(i) MS4 and related structures;[33]

(ii) Roads, streets, and highways;

(iii) Parking facilities;

(iv) Municipal airfields;

(v) Parks and recreation facilities;

[33] The inventory may refer to the MS4 map required to be maintained pursuant to Provision E.2.b.(1).

(vi) Flood management facilities, flood control devices and structures;

(vii) Operating or closed municipal landfills;

(viii) Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewer collection systems;

(ix) Corporate yards, including maintenance and storage yards for materials, waste, equipment, and vehicles;

(x) Hazardous waste collection facilities;

(xi) Other treatment, storage or disposal facilities for municipal waste; and

(xii) Other municipal facilities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(d) Residential areas, which may be designated by one or more of the following:

(i) Residential management area;

(ii) Drainage basin or area;

(iii) Land use (e.g., single family, multi-family, rural);

(iv) Neighborhood;

(v) Common Interest Area;

(vi) Home Owner Association;

(vii) Mobile home park; and/or

(viii) Other designations accepted by the San Diego Water Board Executive Officer.

(2) A description of the facility or area, including the following information:

(a) Classification as commercial, industrial, municipal, or residential;

(b) Status of facility or area as active or inactive;

(c) Identification if a business is a mobile business;

(d) SIC Code or NAICS Code, if applicable;

(e) Industrial General Permit NOI and/or WDID number, if applicable;

(f) Identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park;

(g) Identification of pollutants generated and potentially generated by the facility or area;

(h) Whether the facility or area is adjacent to an ESA;

(i) Whether the facility or area is tributary to and within the same hydrologic subarea as a water body segment listed as impaired on the CWA section 303(d) List and generates pollutants for which the water body segment is impaired; and

(3) An annually updated map showing the location of inventoried existing development, watershed boundaries, and water bodies.

b. Existing Development BMP Implementation and Maintenance

Each Copermittee must designate a minimum set of BMPs required for all inventoried existing development, including special event venues. The designated minimum BMPs must be specific to facility or area types and pollutant generating activities, as appropriate.

(1) Commercial, Industrial, and Municipal Facilities and Areas

(a) Pollution Prevention

Each Copermittee must require the use of pollution prevention methods by the commercial, industrial, and municipal facilities and areas in its inventoried existing development to address the priorities and strategies in the Water Quality Improvement Plan.

(b) BMP Implementation

Each Copermittee must require the implementation of designated BMPs at commercial facilities and areas, industrial facilities, and implement designated BMPs at municipal facilities in its inventoried existing development.

(c) BMP Operation and Maintenance

(i) Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development.

(ii) Each Copermittee must implement a schedule of operation and maintenance activities for its MS4 and related structures (including

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(g) Classification of whether the MS4 outfall is known to have persistent dry weather flows, transient dry weather flows, no dry weather flows, or unknown dry weather flows.

(2) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Until the monitoring requirements and schedules of Provision D.2.b are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, each Copermittee must perform dry weather MS4 outfall field screening monitoring to identify non-storm water and illicit discharges within its jurisdiction in accordance with Provision E.2.c, to determine which discharges are transient flows and which are persistent flows, and prioritize the dry weather MS4 discharges that will be investigated and eliminated in accordance with Provision E.2.d.

(a) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Frequency

Each Copermittee must field screen the MS4 outfalls in its inventory developed pursuant to Provision D.2.a.(1) as follows:

(i) For Copermittees with less than 125 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 80 percent of the outfalls must be visually inspected two times per year during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).

(ii) For Copermittees with 125 major MS4 outfalls or more, but less than or equal to 500 that discharge to receiving waters within a Watershed Management Area, all the outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).

(iii) For Copermittees with more than 500 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 500 outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv). Copermittees with more than 500 major MS4 outfalls within a Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

[a] Assessment of connectivity of the discharge to a flowing receiving water;

[b] Reported exceedances of NALs in water quality monitoring data;
[c] Surrounding land uses;
[d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
[e] Flow rate.

(iv) For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major MS4 outfalls within its jurisdiction, at least 500 major MS4 outfalls within its inventory must be visually inspected at least annually during dry weather conditions. Copermittees with more than 500 major MS4 outfalls in more than one Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

[a] Assessment of connectivity of the discharge to a flowing receiving water;
[b] Reported exceedances of NALs in water quality monitoring data;
[c] Surrounding land uses;
[d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
[e] Flow rate.

(v) Inspections of major MS4 outfalls conducted in response to public reports and staff or contractor reports and notifications may count toward the required visual inspections of MS4 outfall discharge monitoring stations.

(b) Transitional Dry Weather MS4 Outfall Discharge Field Screening Visual Observations

(i) An antecedent dry period of at least 72 hours following any storm event producing measurable rainfall greater than 0.1 inch is required prior to conducting field screening visual observations during a field screening monitoring event.

(ii) During the field screening monitoring event, each Copermittee must record visual observations consistent with Table D-5 at each MS4 outfall discharge monitoring station inspected.

Table D-5. Field Screening Visual Observations for MS4 Outfall Discharge Monitoring Stations

Field Observations
• Station identification and location • Presence of flow, or pooled or ponded water • If flow is present: - Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate) - Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color) - Flow source(s) suspected or identified from non-storm water source investigation - Flow source(s) eliminated during non-storm water source identification • If pooled or ponded water is present: - Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color) - Known or suspected source(s) of pooled or ponded water • Station description (i.e. deposits or stains, vegetation condition, structural condition, observable biology) • Presence and assessment of trash in and around station • Evidence or signs of illicit connections or illegal dumping

(iii) Each Copermittee must implement the requirements of Provisions E.2.d.(2)(c)-(e) based on the field observations required pursuant to Provision D.2.a.(2)(b)(ii).

(iv) Each Copermittee must evaluate field observations together with existing information available from prior reports, inspections and monitoring results to determine whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow.[22]

(c) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Records

Based upon the results of the transitional dry weather MS4 outfall discharge field screening monitoring conducted pursuant to Provisions D.2.a.(2)(a)-(b), each Copermittee must update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow.

(3) Transitional Wet Weather MS4 Outfall Discharge Monitoring

Until the monitoring requirements and schedules of Provision D.2.c are incorporated into a Water Quality Improvement Plan that is accepted by the

[22] Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

EXCERPTS OF ORDER NO. R9-2013-0001 AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER NO. R9-2015-0100 RELEVANT TO ITEM V.I & J IN SECTION 5 NARRATIVE STATEMENT

3. Special Studies

a. Within the term of this Order, the Copermittees must initiate the following special studies:

(1) At least two special studies in each Watershed Management Area to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that cause or contribute to highest priority water quality conditions identified in the Water Quality Improvement Plan.

(2) At least one special study for the San Diego Region to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that are impacting receiving waters on a regional basis in the San Diego Region.

(3) One of the two special studies in each Watershed Management Area required pursuant to Provision D.3.a.(1) may be replaced by a special study implemented pursuant to Provision D.3.a.(2).

b. The special studies must, at a minimum, be in conformance with the following criteria:

(1) The special studies must be related to the highest priority water quality conditions identified by the Copermittees in the Watershed Management Area and/or for the entire San Diego Region;

(2) The special studies developed pursuant to Provision D.3.a.(1) must:

(a) Be implemented within the applicable Watershed Management Area, and

(b) Require some form of participation by all the Copermittees within the Watershed Management Area;

(3) The special studies developed pursuant to Provision D.3.a.(2) must:

(a) Be implemented within the San Diego Region, and

(b) Require some form of participation by all Copermittees covered under the requirements of this Order.

(4) The Copermittees are encouraged to partner with environmental groups or third parties knowledgeable of watershed conditions to complete the required special studies.

c. Special studies developed to identify sources of pollutants and/or stressors should be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to Provisions D.1 and D.2. Development of source identification special studies should include the following:

(1) A compilation of known information on the specific pollutant and/or stressor, including data on potential sources and movement of the pollutant and/or stressor within the watershed. Data generated by the Copermittees and others, as well as information available from a literature research on the pollutant and/or stressor should be compiled and analyzed as appropriate.

(2) An identification of data gaps, based on the compiled information generated on the specific pollutant and/or stressor identified in Provision D.3.c.(1). Source identification special studies should be developed to fill identified data gaps.

(3) A monitoring plan that will collect and provide data the Copermittees can utilize to do the following:

(a) Quantify the relative loading or impact of a pollutant and/or stressor from a particular source or pollutant generating activity;

(b) Improve understanding of the fate of a pollutant and/or stressor in the environment;

(c) Develop an inventory of known and suspected sources of a pollutant and/or stressor in the Watershed Management Area; and/or

(d) Prioritize known and suspected sources of a pollutant and/or stressor based on relative magnitude in discharges, geographical distribution (i.e., regional or localized), frequency of occurrence in discharges, human health risk, and controllability.

d. Special studies initiated prior to the effective date of this Order that meet the requirements of Provision D.3.b and are implemented during the term of this Order as part of the Water Quality Improvement Plan may be utilized to fulfill the special study requirements of Provision D.3.a. Special studies completed before the effective date of this Order cannot be utilized to fulfill the special study requirements of Provision D.3.a.

e. The Copermittees must submit the monitoring plans for the special studies in the Water Quality Improvement Plans required pursuant to Provision F.1.

f. The Copermittees are encouraged to share the results of the special studies regionally among the Copermittees to provide information useful in improving and adapting the management of non-storm water and storm water runoff through the implementation of the Water Quality Improvement Plans.

4. Assessment Requirements

Each Copermittee must evaluate the data collected pursuant to Provisions D.1, D.2 and D.3, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E, to assess the progress of the water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a. Assessments must be performed as described in the following provisions:

a. Receiving Waters Assessments

(1) The Copermittees must assess and report the conditions of the receiving waters in the Watershed Management Area as follows:

(a) Based on data collected pursuant to Provision D.1.a, the assessments under Provision D.4.a.(2) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(b) Based on the data collected pursuant to Provisions D.1.a-e, the assessments required under Provision D.4.a.(2) must be included in the Report of Waste Discharge required pursuant to Provision F.5.b.

(2) The Copermittees must assess the status and trends of receiving water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under dry weather and wet weather conditions. For each of the three types of receiving waters in each Watershed Management Area the Copermittees must:

(a) Determine whether or not the conditions of the receiving waters are meeting the numeric goals established pursuant to Provision B.3.a;

(b) Identify the most critical beneficial uses that must be protected to ensure overall health of the receiving water;

(c) Determine whether or not those critical beneficial uses are being protected;

(d) Identify short-term and/or long-term improvements or degradation of those critical beneficial uses;

(e) Determine whether or not the strategies established in the Water Quality Improvement Plan contribute towards progress in achieving the interim and final numeric goals of the Water Quality Improvement Plan; and

(f) Identify data gaps in the monitoring data necessary to assess Provisions D.4.a.(2)(a)-(e).

b. MS4 Outfall Discharges Assessments

(1) Non-Storm Water Discharges Reduction Assessments

(a) Each Copermittee must assess and report the progress of its illicit discharge detection and elimination program, required to be implemented pursuant to Provision E.2, toward effectively prohibiting non-storm water and illicit discharges into the MS4 within its jurisdiction as follows:

(i) Based on data collected pursuant to Provisions D.2.a.(2), the assessments under Provision D.4.b.(1)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(ii) Based on the data collected pursuant to Provisions D.2.b, the assessments required under Provision D.4.b.(1)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

(iii) Based on the data collected pursuant to Provisions D.2.b, the assessment required under Provision D.4.b.(1)(c) must be included in the Report of Waste Discharge required pursuant to F.5.b.

(b) Based on the transitional dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.a.(2), each Copermittee must assess and report the following:

(i) Identify the known and suspected controllable sources (e.g. facilities, areas, land uses, pollutant generating activities) of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area;

(ii) Identify sources of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area that have been reduced or eliminated; and

(iii) Identify modifications to the field screening monitoring locations and frequencies for the MS4 outfalls in its inventory necessary to identify and eliminate sources of persistent flow non-storm water discharges pursuant to Provision D.2.b.

(c) Based on the dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.b.(1), each Copermittee must assess and report the following:

(i) The assessments required pursuant to Provision D.4.b.(1)(b);

(ii) Based on the data collected and applicable NALs in the Water Quality Improvement Plan, rank the MS4 outfalls in the Copermittee's jurisdiction according to potential threat to receiving water quality, and produce a prioritized list of major MS4 outfalls for follow-up action to update the Water Quality Improvement Plan, with the goal of eliminating persistent flow non-storm water discharges and/or pollutant loads in order of the ranked priority list through targeted programmatic actions and source investigations;

(iii) For the highest priority major MS4 outfalls with persistent flows that are in exceedance of NALs, identify the known and suspected sources within the Copermittee's jurisdiction in the Watershed Management Area that may cause or contribute to the NAL exceedances;

(iv) Each Copermittee must analyze the data collected pursuant to Provision D.2.b, and utilize a model or other method, to calculate or estimate the non-storm water volumes and pollutant loads collectively discharged from all the major MS4s outfalls in its jurisdiction identified as having persistent dry weather flows during the monitoring year. These calculations or estimates must be updated annually.

[a] Each Copermittee must calculate or estimate the annual non-storm water volumes and pollutant loads collectively discharged from the Copermittee's major MS4 outfalls to receiving waters within the Copermittee's jurisdiction, with an estimate of the percent contribution from each known source for each MS4 outfall;

[b] Each Copermittee must annually identify and quantify (i.e. volume and pollutant loads) sources of non-storm water not subject to the Copermittee's legal authority that are discharged from the Copermittee's major MS4 outfalls to downstream receiving waters.

(v) Each Copermittee must review the data collected pursuant to Provision D.2.b and findings from the assessments required pursuant to Provision D.4.b.(1)(c)(i)-(iv) at least once during the term of this Order to:

[a] Identify reductions and progress in achieving reductions in non-storm water and illicit discharges to the Copermittee's MS4 in the Watershed Management Area;

[b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction, with an estimate, if possible, of the non-storm water volume and/or pollutant load reductions attributable to specific water quality strategies implemented by the Copermittee; and

[c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittee in the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction.

(vi) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(1)(c)(i)-(v).

(2) Storm Water Pollutant Discharges Reduction Assessments

(a) The Copermittees must assess and report the progress of the water quality improvement strategies, required to be implemented pursuant to Provisions B and E, toward reducing pollutants in storm water discharges from the MS4s within the Watershed Management Area as follows:

(i) Based on data collected pursuant to Provisions D.2.a.(3), the assessments under Provision D.4.b.(2)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(ii) Based on the data collected pursuant to Provisions D.2.c, the assessments required under Provision D.4.b.(2)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

(iii) Based on the data collected pursuant to Provisions D.2.c, the assessment required under Provisions D.4.b.(2)(c)-(d) must be included in the Report of Waste Discharge required pursuant to F.5.b.

(b) Based on the transitional wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.a.(3) the Copermittees must assess and report the following:

(i) The Copermittees must analyze the monitoring data collected pursuant to Provision D.2.a.(3), and utilize a watershed model or other method, to calculate or estimate the following for each monitoring year:

[a] The average storm water runoff coefficient for each land use type within the Watershed Management Area;
[b] The volume of storm water and pollutant loads discharged from each of the Copermittee's monitored MS4 outfalls in its jurisdiction to receiving waters within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch;
[c] The total flow volume and pollutant loadings discharged from the Copermittee's jurisdiction within the Watershed Management Area over the course of the wet season, extrapolated from the data produced from the monitored MS4 outfalls; and
[d] The percent contribution of storm water volumes and pollutant loads discharged from each land use type within each hydrologic subarea with a major MS4 outfall to receiving waters or within each major MS4 outfall to receiving waters in the Copermittee's jurisdiction within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch.

(ii) Identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify pollutants in storm water discharges from the MS4s in the Watershed Management Area pursuant to Provision D.2.c.(1).

(c) Based on the wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.c the Copermittees must assess and report the following:

(i) The assessments required pursuant to Provision D.4.b.(2)(b);

(ii) Based on the data collected and applicable SALs in the Water Quality Improvement Plan, analyze and compare the monitoring data to the analyses and assumptions used to develop the Water Quality Improvement Plans, including strategies developed pursuant to Provision B.3, and evaluate whether those analyses and assumptions should be updated as a component of the adaptive management efforts pursuant to Provision B.5 for follow-up action to update the Water Quality Improvement Plan;

(iii) The Copermittees must review the data collected pursuant to Provision D.2.c and findings from the assessments required pursuant to Provisions D.4.b.(2)(c)(i)-(ii) at least once during the term of this Order to:

[a] Identify reductions or progress in achieving reductions in pollutant concentrations and/or pollutant loads from different land uses and/or drainage areas discharging from the Copermittees' MS4s in the Watershed Management Area;

[b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters within the Watershed Management Area to the MEP, with an estimate, if possible, of the pollutant load reductions attributable to specific water quality strategies implemented by the Copermittees; and

[c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittees in the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters in the Watershed Management Area to the MEP.

(iv) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(2)(c)(i)-(iii).

(d) The Copermittees must evaluate all the data collected pursuant to Provision D.2.c, and incorporate new outfall monitoring data into time series plots for each long-term monitoring constituent for the Watershed Management Area, and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

c. Special Studies Assessments

The Copermittees must annually evaluate the results and findings from the special studies developed and implemented pursuant to Provision D.3, and assess their relevance to the Copermittees' efforts to characterize receiving water conditions, understand sources of pollutants and/or stressors, and control and reduce the discharges of pollutants from the MS4 outfalls to receiving waters in the Watershed Management Area. The Copermittees must report the results of the special studies assessments applicable to the Watershed Management Area, and identify any necessary modifications or updates to the Water Quality Improvement Plan based on the results in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

d. Integrated Assessment of Water Quality Improvement Plan

As part of the iterative approach and adaptive management process required for the Water Quality Improvement Plan pursuant to Provision B.5, the Copermittees in each Watershed Management Area must integrate the data collected pursuant to Provisions D.1-D.3, the findings from the assessments required pursuant to

Provisions D.4.a-c, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to assess the effectiveness of, and identify necessary modifications to, the Water Quality Improvement Plan as follows:

(1) The Copermittees must re-evaluate the priority water quality conditions and numeric goals for the Watershed Management Area, as needed, during the term of this Order pursuant to Provision B.5.a. The re-evaluation and recommendations for modifications to the priority water quality conditions, and/or numeric goals and corresponding schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The priority water quality conditions and numeric goals for the Watershed Management Area must be re-evaluated as follows:

(a) Re-evaluate the receiving water conditions in the Watershed Management Area in accordance with Provision B.2.a;

(b) Re-evaluate the impacts on receiving waters in the Watershed Management Area from MS4 discharges in accordance with Provision B.2.b;

(c) Re-evaluate the identification of MS4 sources of pollutants and/or stressors in accordance with Provision B.2.d;

(d) Identify beneficial uses of the receiving waters that are protected in accordance with Provision D.4.a;

(e) Evaluate the progress toward achieving the interim and final numeric goals for protecting impacted beneficial uses in the receiving waters.

(2) The Copermittees must re-evaluate the water quality improvement strategies for the Watershed Management Area during the term of this Order pursuant to Provision B.5.b. The re-evaluation and recommendations for modifications to the water quality improvement strategies and schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The water quality improvement strategies for the Watershed Management Area must be re-evaluated as follows:

(a) Identify the non-storm water and storm water pollutant loads from the Copermittees' MS4 outfalls in the Watershed Management Area, calculated or estimated pursuant to Provisions D.4.b;

(b) Identify the non-storm water and storm water pollutant load reductions, or other improvements to receiving water or water quality conditions, that are necessary to attain the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters;

(c) Identify the non-storm water and storm water pollutant load reductions, or other improvements to the quality of MS4 discharges, that are necessary for the Copermittees to demonstrate that non-storm water and storm water discharges from their MS4s are not causing or contributing to exceedances of receiving water limitations;

(d) Evaluate the progress of the water quality improvement strategies toward achieving the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters.

(3) The Copermittees must re-evaluate and adapt the water quality monitoring and assessment program for the Watershed Management Area when new information becomes available to improve the monitoring and assessment program pursuant to Provision B.5.c. The re-evaluation and recommendations for modifications to the monitoring and assessment program may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. Modifications to the water quality monitoring and assessment program must be consistent with the requirements of Provision D.1-D.3. The re-evaluation of the water quality monitoring and assessment program for the Watershed Management Area must consider the data gaps identified by the assessments required pursuant to Provisions D.4.a-b, and results of the special studies implemented pursuant to Provision D.4.c.

5. Monitoring Provisions

Each Copermittee must comply with all the monitoring, reporting, and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

SECTION 7 DOCUMENTATION

IN SUPPORT OF JOINT TEST CLAIM OF RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ET AL. TO SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001 AND ORDER NO. R9-2015-0100
NPDES NO. CAS 0109266

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TAB 1

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

ORDER NO. R9-2013-0001,
AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100
NPDES NO. CAS0109266

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION

The San Diego County Copermittees in Table 1a are subject to waste discharge requirements set forth in this Order.

Table 1a. San Diego County Copermittees

City of Carlsbad	City of Oceanside
City of Chula Vista	City of Poway
City of Coronado	City of San Diego
City of Del Mar	City of San Marcos
City of El Cajon	City of Santee
City of Encinitas	City of Solana Beach
City of Escondido	City of Vista
City of Imperial Beach	County of San Diego
City of La Mesa	San Diego County Regional Airport Authority
City of Lemon Grove	San Diego Unified Port District
City of National City	

The Orange County Copermittees in Table 1b are subject to waste discharge requirements set forth in this Order.

Table 1b. Orange County Copermittees[1]

City of Aliso Viejo	City of Rancho Santa Margarita
City of Dana Point	City of San Clemente
City of Laguna Beach	City of San Juan Capistrano
City of Laguna Hills	City of Laguna Woods
City of Laguna Niguel	County of Orange
City of Mission Viejo	Orange County Flood Control District

[1] While not listed in Table 1b., the City of Lake Forest remains a Copermittee under this Order until the later effective date of this Order or the effective date of Santa Ana Water Board Tentative Order No. R8-2015-0001. Thereafter, the City of Lake Forest will no longer be considered a Copermittee under this Order because its Phase I MS4 discharges will be regulated by the Santa Ana Water Board pursuant to Water Code section 13228 designation. The requirements of this Order that apply to the City of Lake Forest for the duration of this Order, however, are described in Finding 29 and Footnote 2 to Table B-1.

The Riverside County Copermittees in Table 1c are subject to waste discharge requirements set forth in this Order.

Table 1c. Riverside County Copermittees

City of Murrieta	County of Riverside
City of Temecula	Riverside County Flood Control and Water Conservation District
City of Wildomar	

The term Copermittee in this Order refers to any San Diego County, Orange County, or Riverside County Copermittee covered under this Order, unless specified otherwise.

This Order provides permit coverage for the Copermittee discharges described in Table 2.

Table 2. Discharge Locations and Receiving Waters

Discharge Points	Locations throughout San Diego Region
Discharge Description	Municipal Separate Storm Sewer System (MS4) Discharges
Receiving Waters	Inland Surface Waters, Enclosed Bays and Estuaries, and Coastal Ocean Waters of the San Diego Region

Table 3. Administrative Information

This Order was adopted by the San Diego Water Board on:	**May 8, 2013**
Order No. R9-2013-0001 became effective on:	**June 27, 2013**
This Order as amended by R9-2015-0001 became effective on:	**April 1, 2015**
This Order as amended by R9-2015-0100 became effective on:	**January 7, 2016**
This Order will expire on:	**June 27, 2018**
The Copermittees must file a Report of Waste Discharge in accordance with Title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than 180 days in advance of the Order expiration date.	

I, David W. Gibson, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on May 8, 2013, as amended by adoption of Order No. R9-2015-0001 on February 11, 2015, and as amended by adoption of Order No. R9-2015-0100 on November 18, 2015.

David W. Gibson
Executive Officer

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I. FINDINGS

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), finds that:

JURISDICTION

1. **MS4 Ownership or Operation.** Each of the Copermittees owns or operates an MS4, through which it discharges storm water and non-storm water into waters of the U.S. within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 which contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the U.S.

2. **Legal and Regulatory Authority.** This Order is issued pursuant to section 402 of the federal Clean Water Act (CWA) and implementing regulations (Code of Federal Regulations [CFR] Title 40, Part 122 [40 CFR 122]) adopted by the United States Environmental Protection Agency (USEPA), and chapter 5.5, division 7 of the California Water Code (CWC) (commencing with section 13370). This Order serves as an NPDES permit for discharges from MS4s to surface waters. This Order also serves as waste discharge requirements (WDRs) pursuant to article 4, chapter 4, division 7 of the CWC (commencing with section 13260).

   The San Diego Water Board has the legal authority to issue a regional MS4 permit pursuant to its authority under CWA section 402(p)(3)(B) and 40 CFR 122.26(a)(1)(v). The USEPA also made it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide permits (55 Federal Register [FR] 47990, 48039-48042). The regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall cost savings for the Copermittees and San Diego Water Board.

   The federal regulations make it clear that the Copermittees need only comply with permit conditions relating to discharges from the MS4s for which they are operators (40 CFR 122.26(a)(3)(vi)). This Order does not require the Copermittees to manage storm water outside of their jurisdictional boundaries, but rather to work collectively to improve storm water management within watersheds.

3. **CWA NPDES Permit Conditions.** Pursuant to CWA section 402(p)(3)(B), NPDES permits for storm water discharges from MS4s must include requirements to effectively prohibit non-storm water discharges into MS4s, and require controls to reduce the discharge of pollutants in storm water to the maximum extent practicable (MEP), and to require other provisions as the San Diego Water Board determines are appropriate to control such pollutants. This Order prescribes conditions to assure compliance with the CWA requirements for owners and operators of MS4s to effectively prohibit non-storm water discharges into the MS4s, and require controls to reduce the discharge of pollutants in storm water from the MS4s to the MEP.

4. **CWA and CWC Monitoring Requirements.** CWA section 308(a) and 40 CFR 122.41(h),(j)-(l) and 122.48 require that NPDES permits must specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s also specify additional monitoring and reporting requirements in 40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c). CWC section 13383 authorizes the San Diego Water Board to establish monitoring, inspection, entry, reporting and recordkeeping requirements. This Order establishes monitoring and reporting requirements to implement federal and State requirements. This Order also includes requirements for the Orange County Copermittees to participate in, and together with South Orange County Wastewater Authority and Orange County Health Care Agency, share responsibility for implementing the unified approach to beach water quality monitoring and assessment program set forth in the October 2014 report, *Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County*, issued pursuant to CWC section 13383 in the San Diego Water Board December 5, 2014 Letter Directive.

5. **Total Maximum Daily Loads.** CWA section 303(d)(1)(A) requires that "[e]ach state shall identify those waters within its boundaries for which the effluent limitations are not stringent enough to implement any water quality standard applicable to such waters." The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Clean Water Act Section 303(d) List of Water Quality Limited Segments, commonly referred to as the 303(d) List. The CWA requires the 303(d) List to be updated every two years.

   TMDLs are numerical calculations of the maximum amount of a pollutant that a water body can assimilate and still meet water quality standards. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point sources (waste load allocations or WLAs) and non-point sources (load allocations or LAs), background contribution, plus a margin of safety. Discharges from MS4s are point source discharges. The federal regulations (40 CFR 122.44(d)(1)(vii)(B)) require that NPDES permits incorporate water quality based effluent limitations (WQBELs) developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, consistent with the assumptions and requirements of any available WLA for the discharge. Requirements of this Order implement the TMDLs established by the San Diego Water Board or USEPA as of the date this Order was amended in 2015. This Order establishes WQBELs consistent with the assumptions and requirements of all available TMDL WLAs assigned to discharges from the Copermittees' MS4s.

6. **Non-Storm Water Discharges.** Pursuant to CWA section 402(p)(3)(B)(ii), this Order requires each Copermittee to effectively prohibit discharges of non-storm water into its MS4. Nevertheless, non-storm water discharges into and from the

MS4s continue to be reported to the San Diego Water Board by the Copermittees and other persons. Monitoring conducted by the Copermittees, as well as the 303(d) List, have identified dry weather, non-storm water discharges from the MS4s as a source of pollutants causing or contributing to receiving water quality impairments in the San Diego Region. The federal regulations (40 CFR 122.26(d)(2)(iv)(B)(1)) require the Copermittees to have a program to prevent illicit discharges to the MS4. The federal regulations, however, allow for specific categories of non-storm water discharges or flows to be addressed as illicit discharges only where such discharges are identified as sources of pollutants to waters of the U.S.

7. **In-Stream Treatment Systems.** Pursuant to federal regulations (40 CFR 131.10(a)), in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of a runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Runoff treatment must occur prior to the discharge of runoff into receiving waters. Treatment control best management practices (BMPs) must not be constructed in waters of the U.S. Construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body.

DISCHARGE CHARACTERISTICS AND RUNOFF MANAGEMENT

8. **Point Source Discharges of Pollutants.** Discharges from the MS4s contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the state. A discharge from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA. Storm water and non-storm water discharges from the MS4s contain pollutants that cause or threaten to cause a violation of surface water quality standards, as outlined in the Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges from the MS4s are subject to the conditions and requirements established in the Basin Plan for point source discharges.

9. **Potential Beneficial Use Impairment.** The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and impair or threaten to impair designated beneficial uses resulting in a condition of pollution, contamination, or nuisance.

10. **Pollutants Generated by Land Development.** Land development has created and continues to create new sources of non-storm water discharges and pollutants in storm water discharges as human population density increases. This brings higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, and trash. Pollutants from these sources are dumped or washed off the surface by non-storm water or storm water flows into

and from the MS4s. When development converts natural vegetated pervious ground cover to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area without BMPs that can maintain pre-development runoff conditions will contain greater pollutant loads and have significantly greater runoff volume, velocity, and peak flow rate than pre-development runoff conditions from the same area.

11. **Runoff Discharges to Receiving Waters.** The MS4s discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within the eleven hydrologic units comprising the San Diego Region. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Rivers, streams and creeks in developed areas used in this manner are part of the Copermittees' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Copermittees' jurisdictions are both an MS4 and receiving water. Numerous receiving water bodies and water body segments have been designated as impaired by the San Diego Water Board pursuant to CWA section 303(d).

12. **Pollutants in Runoff.** The most common pollutants in runoff discharged from the MS4s include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., cadmium, copper, lead, and zinc), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus), oxygen-demanding substances (e.g., decaying vegetation, animal waste), detergents, and trash. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of pollution or a violation of water quality standards.

13. **Human Health and Aquatic Life Impairment.** Pollutants in runoff discharged from the MS4s can threaten and adversely affect human health and aquatic organisms. Adverse responses of organisms to chemicals or physical agents in runoff range from physiological responses such as impaired reproduction or growth anomalies to mortality. Increased volume, velocity, rate, and duration of storm water runoff greatly accelerate the erosion of downstream natural channels. This alters stream channels and habitats and can adversely affect aquatic and terrestrial organisms.

14. **Water Quality Effects.** The Copermittees' water quality monitoring data submitted to date documents persistent exceedances of Basin Plan water quality objectives for runoff-related pollutants at various watershed monitoring stations. Persistent toxicity has also been observed at several watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have

Poor to Very Poor Index of Biological Integrity (IBI) ratings. These findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in the San Diego Region. Non-storm water discharges from the MS4s have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds, and contribute significantly to exceedances of applicable receiving water quality objectives.

15. **Non-Storm Water and Storm Water Discharges.** Non-storm water discharges from the MS4s are not considered storm water discharges and therefore are not subject to the MEP standard of CWA section 402(p)(3)(B)(iii), which is explicitly for "Municipal ... *Stormwater Discharges* (emphasis added)" from the MS4s. Pursuant to CWA 402(p)(3)(B)(ii), non-storm water discharges into the MS4s must be effectively prohibited.

16. **Best Management Practices.** Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutants in storm water discharges from the MS4s can be and must be effectively reduced in runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and runoff, therefore keeping pollutants onsite and out of receiving waters. Treatment control BMPs remove pollutants that have been mobilized by storm water or non-storm water flows.

17. **BMP Implementation.** Runoff needs to be addressed during the three major phases of development (planning, construction, and use) in order to reduce the discharge of storm water pollutants to the MEP, effectively prohibit non-storm water discharges, and protect receiving waters. Development which is not guided by water quality planning policies and principles can result in increased pollutant load discharges, flow rates, and flow durations which can negatively affect receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development can generate substantial pollutant loads which are discharged in runoff to receiving waters. Retrofitting areas of existing development with storm water pollutant control and hydromodification management BMPs is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards.

18. **Water Quality Improvements.** Since 1990, the Copermittees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water

discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermittees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the CWA.

19. **Long Term Planning and Implementation.** Federal regulations require municipal storm water permits to expire 5 years from adoption, after which the permit must be renewed and reissued. The San Diego Water Board recognizes that the degradation of water quality and impacts to beneficial uses of the waters in the San Diego Region occurred over several decades. The San Diego Water Board further recognizes that a decade or more may be necessary to realize demonstrable improvement to the quality of waters in the San Diego Region. This Order includes a long term planning and implementation approach that will require more than a single permit term to complete.

WATER QUALITY STANDARDS

20. **Basin Plan.** The San Diego Water Board adopted the Water Quality Control Plan for the San Diego Basin (Basin Plan) on September 8, 1994, that designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for receiving waters addressed through the plan. The Basin Plan was subsequently approved by the State Water Resources Control Board (State Water Board) on December 13, 1994. Subsequent revisions to the Basin Plan have also been adopted by the San Diego Water Board and approved by the State Water Board. Requirements of this Order implement the Basin Plan.

    The Basin Plan identifies the following existing and potential beneficial uses for inland surface waters in the San Diego Region: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional existing and potential beneficial uses are identified for coastal waters of the San Diego Region: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).

21. **Ocean Plan.** The State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan) in 1972 and amended it in 1978, 1983, 1988, 1990, 1997, 2000, and 2005. The State Water Board adopted the latest amendment on October 16, 2012 and it became effective on August 19, 2013. The Ocean Plan is applicable, in its entirety, to point source discharges to the ocean. Requirements of this Order implement the Ocean Plan.

    The Ocean Plan identifies the following beneficial uses of ocean waters of the state to be protected: Industrial water supply; water contact and non-contact recreation, including aesthetic enjoyment; navigation; commercial and sport fishing; mariculture; preservation and enhancement of designated Areas of Special Biological Significance; rare and endangered species; marine habitat; fish spawning and shellfish harvesting.

22. **Sediment Quality Control Plan**. On September 16, 2008, the State Water Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (Sediment Quality Control Plan). The Sediment Quality Control Plan became effective on August 25, 2009. The Sediment Quality Control Plan establishes: 1) narrative sediment quality objectives for benthic community protection from exposure to contaminants in sediment and to protect human health, and 2) a program of implementation using a multiple lines of evidence approach to interpret the narrative sediment quality objectives. Requirements of this Order implement the Sediment Quality Control Plan.

23. **National Toxics Rule and California Toxics Rule.** USEPA adopted the National Toxics Rule (NTR) on December 22, 1992, and later amended it on May 4, 1995 and November 9, 1999. About forty criteria in the NTR applied in California. On May 18, 2000, USEPA adopted the California Toxics Rule (CTR). The CTR promulgated new toxics criteria for California and, in addition, incorporated the previously adopted NTR criteria that were applicable in the state. The CTR was amended on February 13, 2001. These rules contain water quality criteria for priority pollutants.

24. **Antidegradation Policy.** This Order is in conformance with the federal Antidegradation Policy described in 40 CFR 131.12, and State Water Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*. Federal regulations at 40 CFR 131.12 require that the State water quality standards include an antidegradation policy consistent with the federal policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16. State Water Board Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. State Water Board Resolution No. 68-16 requires that existing quality of waters be maintained unless degradation is justified based on specific findings. The Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. The Fact Sheet of this Order contains additional discussion about antidegradation.

25. **Anti-Backsliding Requirements.** Section 402(o)(2) of the CWA and federal regulations at 40 CFR 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as effluent limitations in the previous permits. The Fact Sheet of this Order contains additional discussion about anti-backsliding.

CONSIDERATIONS UNDER FEDERAL AND STATE LAW

26. **Coastal Zone Act Reauthorization Amendments.** Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point source pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point source pollution: agriculture, silviculture, urban, marinas, and hydromodification. This Order addresses the management measures required for the urban category, with the exception of septic systems. The runoff management programs developed pursuant to this Order fulfills the need for coastal cities to develop a runoff non-point source plan identified in the Non-Point Source Program Strategy and Implementation Plan. The San Diego Water Board addresses septic systems through the administration of other programs.

27. **Endangered Species Act.** This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the Federal Endangered Species Act (16 USC sections 1531 to 1544). This Order requires compliance with receiving water limits, and other requirements to protect the beneficial uses of waters of the State. The Copermittees are responsible for meeting all requirements of the applicable Endangered Species Act.

28. **Report of Waste Discharge Process.** The waste discharge requirements set forth in this Order are based upon the Report of Waste Discharge submitted by the San Diego County Copermittees prior to the expiration of Order No. R9-2007-0001 (NPDES No. CAS0109266), the Report of Waste Discharge submitted by the Orange County Copermittees prior to the expiration of Order No. R9-2009-0002 (CAS0108740), and the Report of Waste Discharge submitted by the Riverside County Copermittees prior to the expiration of Order No. R9-2010-0016 (CAS0108766).

    The federal regulations (40 CFR 122.21(d)(2)) and CWC section 13376 impose a duty on the Copermittees to reapply for continued coverage through submittal of a Report of Waste Discharge no later than 180 days prior to expiration of a currently effective permit. The expiration date of this Order as shown in Table 3, and requirement to file a Report of Waste Discharge no later than 180 days prior to the

expiration date of the Order, applies jointly to the San Diego County, Orange County, and Riverside County Copermittees.

29. **Regional Water Board Designation.** The Cities of Laguna Hills, Laguna Woods, Lake Forest, Menifee, Murrieta, and Wildomar are located partially within the jurisdictions of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the San Diego Water Board and their discharges are subject to regulation by both Regional Water Boards. CWC section 13228 provides a way to streamline the regulation of entities whose jurisdictions straddle the border of two or more Regions. CWC section 13228 is implemented in this Order at the request of these six cities and to ease the regulatory burden of municipalities that lie in both the San Diego Water Board's and the adjacent Santa Ana Water Board's jurisdiction. MS4 discharges from these municipalities are regulated by the San Diego Water Board and Santa Ana Water Board as follows:

    a. Pursuant to CWC section 13228, the Cities of Laguna Hills, Laguna Woods, and Lake Forest submitted written requests that one Regional Water Board be designated to regulate Phase I MS4 discharges for each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement dated February 10, 2015, whereby the Cities of Laguna Woods and Laguna Hills are largely regulated by the San Diego Water Board under this Order, including those portions of the Cities of Laguna Woods and Laguna Hills not within the San Diego Water Board's jurisdiction, upon the effective date of this Order or Santa Ana Water Board Order No. R8-2015-0001, whichever is later. Similarly, the City of Lake Forest, including those portions of the City of Lake Forest within the San Diego Water Board's jurisdiction, is largely regulated by the Santa Ana Water Board under Order No. R8-2015-0001 (NPDES No. CAS618030) upon the later effective date of this Order or Order No. R8-2015-0001. The agreement provides that the City of Lake Forest is required to retain, and continue implementation of, its over-irrigation discharge prohibition in Title 15, Chapter 14.030, List (b) of the City Municipal Code for regulating storm water quality throughout its jurisdiction. The agreement also requires the City of Lake Forest to actively participate during development and implementation of the Aliso Creek Watershed Management Area Water Quality Improvement Plan required pursuant to this Order. Each Regional Water Board retains the authority to enforce provisions of its Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee under the terms of the agreement (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Laguna Woods, Laguna Hills or Lake Forest as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San

Diego Creek/Newport Bay TMDL and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL. The San Diego Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate the agreement with Santa Ana Water Board or otherwise modify the agreement subject to the approval of the Santa Ana Water Board.

b. Pursuant to CWC section 13228, the Cities of Murrieta, Wildomar, and Menifee submitted written requests that one Regional Water Board be designated to regulate Phase I MS4 discharges for each of the Cities. The Santa Ana Water Board and the San Diego Water Board have entered into an agreement dated October 26, 2015, whereby the Cities of Murrieta and Wildomar are largely regulated by the San Diego Water Board under this Order, including those portions of the Cities of Murrieta and Wildomar not within the San Diego Water Board's jurisdiction, upon the effective date of this Order. Similarly, the City of Menifee is largely regulated by the Santa Ana Water Board under Order No. R8-2010-0033 as it may be amended or reissued, including those portions of the City of Menifee within the San Diego Water Board's jurisdiction, upon the effective date of this Order. The agreement also requires the City of Menifee to actively participate during development and implementation of the Santa Margarita River Watershed Management Area Water Quality Improvement Plan required pursuant to this Order. Each Regional Water Board retains the authority to enforce provisions of its Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee under the terms of the agreement (Water Code section 13228 (b)). Under the terms of the agreement, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Menifee, Murrieta, or Wildomar as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL will remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's Lake Elsinore/Canyon Lake Nutrient TMDLs. The San Diego Water Board will periodically review the effectiveness of the agreement during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate the agreement with Santa Ana Water Board or otherwise modify the agreement subject to the approval of the Santa Ana Water Board.

30. Integrated Report and Clean Water Act Section 303(d) List. The San Diego Water Board and State Water Board submit an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region. USEPA issued its *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act* on July 29, 2005, which advocates the use of a five category approach for

classifying the attainment status of water quality standards for water bodies in the Integrated Report. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 in the Integrated Report are placed on the 303(d) List.

Water bodies with available data and/or information that indicate at least one beneficial use is not being supported or is threatened, but a TMDL is not required, are included in Category 4 in the Integrated Report. Impaired surface water bodies may be included in Category 4 if a TMDL has been adopted and approved (Category 4a); if other pollution control requirements required by a local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time (Category 4b); or, if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution (Category 4c).

Implementation of the requirements of this Order may allow the San Diego Water Board to include surface waters impaired by discharges from the Copermittees' MS4s in Category 4 in the Integrated Report for consideration during the next 303(d) List submittal by the State to USEPA.

31. **Economic Considerations.** The California Supreme Court has ruled that although CWC section 13263 requires the State and Regional Water Boards (collectively Water Boards) to consider factors set forth in CWC section 13241 when issuing an NPDES permit, the Water Board may not consider the factors to justify imposing pollutant restrictions that are less stringent than the applicable federal regulations require. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 618, 626-627.) However, when pollutant restrictions in an NPDES permit are more stringent than federal law requires, CWC section 13263 requires that the Water Boards consider the factors described in CWC section 13241 as they apply to those specific restrictions.

    As noted in the following finding, the San Diego Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. Therefore, a CWC section 13241 analysis is not required for permit requirements that implement the effective prohibition on the discharge of non-storm water into the MS4 or for controls to reduce the discharge of pollutants in storm water to the MEP, or other provisions that the San Diego Water Board has determined appropriate to control such pollutants, as those requirements are mandated by federal law. Notwithstanding the above, the San Diego Water Board has developed an economic analysis of the requirements in this Order. The economic analysis is provided in the Fact Sheet.

32. **Unfunded Mandates.** This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following:

a. This Order implements federally mandated requirements under CWA section 402 (33 USC section 1342(p)(3)(B)).

b. The local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges.

c. The local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order.

d. The Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)) and in lieu of numeric restrictions on their MS4 discharges (i.e. effluent limitations).

e. The local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

f. The provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state develops a TMDL, federal law requires that permits must contain water quality based effluent limitations consistent with the assumptions and requirements of any applicable wasteload allocation (40 CFR 122.44(d)(1)(vii)(B)).

See the Fact Sheet for further discussion of unfunded mandates.

33. **California Environmental Quality Act.** The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with CWC section 13389.

STATE WATER BOARD DECISIONS

34. **Compliance with Prohibitions and Limitations.** The receiving water limitation language specified in this Order is consistent with language recommended by the USEPA and established in State Water Board Order WQ 99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Water Board on June 17, 1999. The receiving water limitation language in this Order requires storm water discharges from MS4s to not cause or contribute to a violation of water quality standards, which is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Implementation of the iterative approach to comply with receiving water

limitations based on applicable water quality standards is necessary to ensure that storm water discharges from the MS4 will not ultimately cause or contribute to violations of water quality standards and will not create conditions of pollution, contamination, or nuisance.

The San Diego, Orange County, and Riverside County Copermittees have asserted that the prohibitions and limitations may result in many years of noncompliance because years of technical efforts may ultimately be required to achieve compliance with the prohibitions and limitations, especially for wet weather discharges. To address this concern, this Order includes an option that allows a Copermittee to be deemed in compliance with the prohibitions and limitations where more than one permit term may be necessary to achieve full compliance with the prohibitions and limitations. One or more Copermittees within a Watershed Management Area can choose to implement this option.

An alternative compliance pathway option has been included in this Order consistent with the approach described in Order WQ 2015-0075, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4,* adopted by the State Water Board on June 16, 2015. State Water Board Order WQ 2015-0075 directs the Regional Water Boards to consider a watershed-based planning and implementation approach to compliance with receiving water limitations when issuing Phase I MS4 permits going forward. Order WQ 2015-0075 included seven principles that the Regional Water Boards are expected to follow when incorporating an alternative compliance pathway into an MS4 permit. The Fact Sheet discusses the incorporation of the seven principles stipulated in State Water Board Order WQ 2015-0075 into the alternative compliance pathway option in this Order.

35. **Special Conditions for Areas of Special Biological Significance.** On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving a general exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges (General Exception). On June 19, 2012, the State Water Board adopted Order No. 2012-0031, amending the General Exception to require pollutant reductions to be achieved within six years in accordance with ASBS Compliance Plans and ASBS Pollution Prevention Plans. The General Exception requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject to the terms and conditions of the General Exception as amended. The Special Protections contained in Attachment B to the General Exception as amended are

applicable to these discharges, and are hereby incorporated into Attachment A of this Order.

ADMINISTRATIVE FINDINGS

36. **Executive Officer Delegation of Authority.** The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC section 13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order unless such delegation is unlawful under CWC section 13223 or this Order explicitly states otherwise.

37. **Standard Provisions.** Standard Provisions, which apply to all NPDES permits in accordance with 40 CFR 122.41, and additional conditions applicable to specified categories of permits in accordance with 40 CFR 122.42, are provided in Attachment B to this Order.

38. **Fact Sheet.** The Fact Sheet for this Order contains background information, regulatory and legal citations, references and additional explanatory information and data in support of the requirements of this Order. The Fact Sheet is hereby incorporated into this Order and constitutes part of the Findings of this Order.

39. **Public Notice.** In accordance with State and federal laws and regulations, the San Diego Water Board notified the Copermittees, and interested agencies and persons of its intent to prescribe waste discharge requirements for the control of discharges into and from the MS4s to waters of the U.S. and has provided them with an opportunity to submit their written comments and recommendations. Details of notification are provided in the Fact Sheet.

40. **Public Hearings.** The San Diego Water Board held a public hearing on April 10 and 11, 2013, that was continued to May 8, 2013 and heard and considered all comments pertaining to the terms and conditions of this Order. The San Diego Water Board also held a public workshop on October 8, 2015, and a public hearing on February 11, 2015, and heard and considered all comments pertaining to the amendment of this Order through Order No. R9-2015-0001. The San Diego Water Board also held a public hearing on November 18, 2015, and heard and considered all comments pertaining to the amendment of this Order through Order No. R9-2015-0100. Details of these public hearings are provided in the Fact Sheet.

41. **Effective Date.** This Order serves as an NPDES permit pursuant to CWA section 402 or amendments thereto, and as to the San Diego County Copermittees listed in Table 1a, became effective fifty (50) days after the date of its adoption, and as to the Orange County Copermittees listed in Table 1b, became effective on April 1, 2015, after Order No. R9-2015-0001 was adopted, and as to the Riverside County Copermittees listed in Table 1c, became effective on January 7, 2016, after Order No. R9-2015-0100 was adopted, provided that the Regional Administrator, USEPA, Region IX, does not object to this Order.

42. **Review by the State Water Board.** Any person aggrieved by this action of the San Diego Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050, and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday or State holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

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THEREFORE, IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in division 7 of the CWC (commencing with section 13000) and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the requirements of this Order. This action in no way prevents the San Diego Water Board from taking enforcement action for past violations of the previous Order applicable to the Copermittees. If any part of this Order is subject to a temporary stay of enforcement, unless otherwise specified, the Copermittees must comply with the analogous portions of the previous Order, which will remain in effect for all purposes during the pendency of the stay.

II. PROVISIONS

A. PROHIBITIONS AND LIMITATIONS

The purpose of this provision is to describe the conditions under which storm water and non-storm water discharges into and from MS4s are prohibited or limited. The goal of the prohibitions and limitations is to protect the water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges. This goal will be accomplished through the implementation of water quality improvement strategies and runoff management programs that effectively prohibit non-storm water discharges into the Copermittees' MS4s, and reduce pollutants in storm water discharges from the Copermittees' MS4s to the MEP.

1. Discharge Prohibitions

a. Discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state are prohibited.

b. Non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision E.2, unless such discharges are authorized by a separate NPDES permit.

c. Discharges from MS4s are subject to all waste discharge prohibitions in the Basin Plan, included in Attachment A to this Order.

d. Storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's MS4 to the Heisler Park ASBS are authorized under this Order subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012, as amended by State Water Board Resolution No. 2012-0031, applicable to these discharges, included in Attachment A to this Order. All other discharges from the Copermittees' MS4s to ASBS are prohibited.

2. Receiving Water Limitations

a. Discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters, including but not limited to all applicable provisions contained in:

(1) The San Diego Water Board's Basin Plan, including beneficial uses, water quality objectives, and implementation plans;

(2) State Water Board plans for water quality control including the following:

(a) Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries (Thermal Plan), and

(b) The Ocean Plan, including beneficial uses, water quality objectives, and implementation plans;

(3) State Water Board policies for water and sediment quality control including the following:

(a) Water Quality Control Policy for the Enclosed Bays and Estuaries of California,

(b) Sediment Quality Control Plan which includes the following narrative objectives for bays and estuaries:

(i) Pollutants in sediments shall not be present in quantities that, alone or in combination, are toxic to benthic communities, and

(ii) Pollutants shall not be present in sediments at levels that will bioaccumulate in aquatic life to levels that are harmful to human health,

(c) The Statement of Policy with Respect to Maintaining High Quality of Waters in California;[2]

(4) Priority pollutant criteria promulgated by the USEPA through the following:

(a) National Toxics Rule (NTR)[3] (promulgated on December 22, 1992 and amended on May 4, 1995), and

(b) California Toxics Rule (CTR).[4,5]

b. Discharges from MS4s composed of storm water runoff must not alter natural ocean water quality in an ASBS.

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[2] State Water Board Resolution No. 68-16
[3] 40 CFR 131.36
[4] 65 Federal Register 31682-31719 (May 18, 2000), adding Section 131.38 to 40 CFR
[5] If a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies.

3. Effluent Limitations

a. Technology Based Effluent Limitations

Pollutants in storm water discharges from MS4s must be reduced to the MEP.[6]

b. Water Quality Based Effluent Limitations

Each Copermittee must comply with applicable WQBELs established for the TMDLs in Attachment E to this Order, pursuant to the applicable TMDL compliance schedules.

4. Compliance with Discharge Prohibitions and Receiving Water Limitations

Each Copermittee must achieve compliance with Provisions A.1.a, A.1.c and A.2.a of this Order through timely implementation of control measures and other actions as specified in Provisions B and E of this Order, including any modifications. The Water Quality Improvement Plans required under Provision B must be designed and adapted to ultimately achieve compliance with Provisions A.1.a, A.1.c and A.2.a.

a. If exceedance(s) of water quality standards persist in receiving waters notwithstanding implementation of this Order, the Copermittees must comply with the following procedures:

(1) For exceedance(s) of a water quality standard in the process of being addressed by the Water Quality Improvement Plan, the Copermittee(s) must implement the Water Quality Improvement Plan as accepted by the San Diego Water Board, and update the Water Quality Improvement Plan, as necessary, pursuant to Provision F.2.c;

(2) Upon a determination by either the Copermittees or the San Diego Water Board that discharges from the MS4 are causing or contributing to a new exceedance of an applicable water quality standard not addressed by the Water Quality Improvement Plan, the Copermittees must submit the following updates to the Water Quality Improvement Plan pursuant to Provision F.2.c or as part of the Water Quality Improvement Plan Annual Report required under Provision F.3.b, unless the San Diego Water Board directs an earlier submittal:

(a) The water quality improvement strategies being implemented that are effective and will continue to be implemented,

[6] This does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment must occur prior to the discharge of runoff into receiving waters per Finding 7.

(b) Water quality improvement strategies (i.e. BMPs, retrofitting projects, stream and/or habitat rehabilitation projects, adjustments to jurisdictional runoff management programs, etc.) that will be implemented to reduce or eliminate any pollutants or conditions that are causing or contributing to the exceedance of water quality standards,

(c) Updates to the schedule for implementation of the existing and additional water quality improvement strategies, and

(d) Updates to the monitoring and assessment program to track progress toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a of this Order;

(3) The San Diego Water Board may require the incorporation of additional modifications to the Water Quality Improvement Plan required under Provision B. The applicable Copermittees must submit any modifications to the update to the Water Quality Improvement Plan within 90 days of notification that additional modifications are required by the San Diego Water Board, or as otherwise directed;

(4) Within 90 days of the San Diego Water Board determination that the modifications to the Water Quality Improvement Plan required under Provision A.4.a.(3) meet the requirements of this Order, the applicable Copermittees must revise the jurisdictional runoff management program documents to incorporate the modified water quality improvement strategies that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(5) Each Copermittee must implement the updated Water Quality Improvement Plan.

b. The procedure set forth above to achieve compliance with Provisions A.1.a, A.1.c and A.2.a of this Order do not have to be repeated for continuing or recurring exceedances of the same water quality standard(s) following implementation of scheduled actions unless directed to do otherwise by the San Diego Water Board.

c. Nothing in Provisions A.4.a and A.4.b prevents the San Diego Water Board from enforcing any provision of this Order while the applicable Copermittees prepare and implement the above update to the Water Quality Improvement Plan and jurisdictional runoff management programs.

B. WATER QUALITY IMPROVEMENT PLANS

The purpose of this provision is to develop Water Quality Improvement Plans that guide the Copermittees' jurisdictional runoff management programs towards achieving the outcome of improved water quality in MS4 discharges and receiving waters. The goal of the Water Quality Improvement Plans is to further the Clean Water Act's objective to protect, preserve, enhance, and restore the water quality and designated beneficial uses of waters of the state. This goal will be accomplished through an adaptive planning and management process that identifies the highest priority water quality conditions within a watershed and implements strategies through the jurisdictional runoff management programs to achieve improvements in the quality of discharges from the MS4s and receiving waters.

1. Watershed Management Areas

The Copermittees must develop a Water Quality Improvement Plan for each of the Watershed Management Areas in Table B-1. A total of ten Water Quality Improvement Plans must be developed for the San Diego Region.

Table B-1. Watershed Management Areas

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible Copermittees
San Juan (901.00)	South Orange County	- Aliso Creek - San Juan Creek - San Mateo Creek - Pacific Ocean - Heisler Park ASBS	- City of Aliso Viejo - City of Dana Point - City of Laguna Beach - City of Laguna Hills[1] - City of Laguna Niguel - City of Laguna Woods[1] - City of Lake Forest[2] - City of Mission Viejo - City of Rancho Santa Margarita - City of San Clemente - City of San Juan Capistrano - County of Orange - Orange County Flood Control District
Santa Margarita (902.00)	Santa Margarita River	- Murrieta Creek - Temecula Creek - Santa Margarita River - Santa Margarita Lagoon - Pacific Ocean	- City of Menifee[3] - City of Murrieta[4] - City of Temecula - City of Wildomar[4] - County of Riverside - County of San Diego - Riverside County Flood Control and Water Conservation District
San Luis Rey (903.00)	San Luis Rey River	- San Luis Rey River - San Luis Rey Estuary - Pacific Ocean	- City of Oceanside - City of Vista - County of San Diego

Table B-1. Watershed Management Areas

Hydrologic Unit(s)	Watershed Management Area	Major Surface Water Bodies	Responsible Copermittees
Carlsbad (904.00)	Carlsbad	- Loma Alta Slough - Buena Vista Lagoon - Agua Hedionda Lagoon - Batiquitos Lagoon - San Elijo Lagoon - Pacific Ocean	- City of Carlsbad - City of Encinitas - City of Escondido - City of Oceanside - City of San Marcos - City of Solana Beach - City of Vista - County of San Diego
San Dieguito (905.00)	San Dieguito River	- San Dieguito River - San Dieguito Lagoon - Pacific Ocean	- City of Del Mar - City of Escondido - City of Poway - City of San Diego - City of Solana Beach - County of San Diego
Penasquitos (906.00)	Penasquitos	- Los Penasquitos Lagoon - Pacific Ocean	- City of Del Mar - City of Poway - City of San Diego - County of San Diego
	Mission Bay	- Mission Bay - Pacific Ocean - San Diego Marine Life Refuge ASBS	- City of San Diego
San Diego (907.00)	San Diego River	- San Diego River - Pacific Ocean	- City of El Cajon - City of La Mesa - City of San Diego - City of Santee - County of San Diego
Pueblo San Diego (908.00) Sweetwater (909.00) Otay (910.00)	San Diego Bay	- Sweetwater River - Otay River - San Diego Bay - Pacific Ocean	- City of Chula Vista - City of Coronado - City of Imperial Beach - City of La Mesa - City of Lemon Grove - City of National City - City of San Diego - County of San Diego - San Diego County Regional Airport Authority - San Diego Unified Port District
Tijuana (911.00)	Tijuana River	- Tijuana River - Tijuana Estuary - Pacific Ocean	- City of Imperial Beach - City of San Diego - County of San Diego

Notes:

1. By agreement dated February 10, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Laguna Hills and the City of Laguna Woods located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, upon the later effective date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The City of Laguna Hills and Laguna Woods must also comply with the requirements of the San Diego Creek/Newport Bay TMDL in section XVIII of Santa Ana Water Board Order No. R8-2015-0001.
2. By agreement dated February 10, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Lake Forest located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2015-0001 (NPDES No. CAS618030) upon the later effective date of this Order or Santa Ana Water Board Tentative Order No. R8-2015-0001. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Lake Forest must implement the requirements of the Bacteria TMDL in Attachment E of this Order, participate in preparation and implementation of the Water Quality Improvement Plan for the Aliso Creek Watershed Management Area as described in Provision B of this Order and continue implementation of its over-irrigation discharge prohibition in its City Ordinance, Title 15, Chapter 15, section 14.030, List (b).
3. By agreement dated October 26, 2015, pursuant to Water Code section 13228, Phase I MS4 discharges within the City of Menifee located within the San Diego Water Board Region are regulated by the Santa Ana Water Board Order No. R8-2010-0033 as it may be amended or reissued (NPDES No. CAS618033) upon the later effective date of this Order. In accordance with the terms of the agreement between the San Diego Water Board and the Santa Ana Water Board, the City of Menifee must participate in preparation and implementation of the Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area as described in Provision B of this Order.
4. By agreement dated October 26, 2015, pursuant to Water Code section 13228, the Phase I MS4 discharges within the jurisdiction of the City of Murrieta and the City of Wildomar located in the Santa Ana Region are regulated by San Diego Water Board Order No. R9-2013-0001 as amended by Orders No. R9-2015-0001 and R9-2015-0100. The City of Murrieta and City of Wildomar must also comply with the requirements of the Lake Elsinore/Canyon Lake Nutrient TMDLs in section VI.D.2 of Santa Ana Water Board Order No. R8-2010-0033, or corresponding section as it may be amended or reissued.

2. Priority Water Quality Conditions

The Copermittees must identify the water quality priorities within each Watershed Management Area that will be addressed by the Water Quality Improvement Plan. Where appropriate, Watershed Management Areas may be separated into subwatersheds to focus water quality prioritization and jurisdictional runoff management program implementation efforts by receiving water.

a. Assessment of Receiving Water Conditions

The Copermittees must consider the following, at a minimum, to identify water quality priorities based on impacts of MS4 discharges on receiving water beneficial uses:

(1) Receiving waters listed as impaired on the CWA Section 303(d) List of Water Quality Limited Segments (303(d) List);

(2) TMDLs adopted and under development by the San Diego Water Board;

(3) Receiving waters recognized as sensitive or highly valued by the Copermittees, including estuaries designated under the National Estuary Program under CWA section 320, marine protected areas, wetlands defined by the State or U.S. Fish and Wildlife Service's National Wetlands Inventory as wetlands, waters having the Preservation of Biological Habitats of Special Significance (BIOL) beneficial use designation, and receiving waters identified as ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(4) The receiving water limitations of Provision A.2;

(5) Known historical versus current physical, chemical, and biological water quality conditions;

(6) Available, relevant, and appropriately collected and analyzed physical, chemical, and biological receiving water monitoring data, including, but not limited to, data describing:

(a) Chemical constituents,

(b) Water quality parameters (i.e. pH, temperature, conductivity, etc.),

(c) Toxicity Identification Evaluations for both receiving water column and sediment,

(d) Trash impacts,

(e) Bioassessments, and

(f) Physical habitat;

(7) Available evidence of erosional impacts in receiving waters due to accelerated flows (i.e. hydromodification);

(8) Available evidence of adverse impacts to the chemical, physical, and biological integrity of receiving waters; and

(9) The potential improvements in the overall condition of the Watershed Management Area that can be achieved.

b. ASSESSMENT OF IMPACTS FROM MS4 DISCHARGES

The Copermittees must consider the following, at a minimum, to identify the potential impacts to receiving waters that may be caused or contributed to by discharges from the Copermittees' MS4s:

(1) The discharge prohibitions of Provision A.1 and effluent limitations of Provision A.3; and

(2) Available, relevant, and appropriately collected and analyzed storm water and non-storm water monitoring data from the Copermittees' MS4 outfalls;

(3) Locations of each Copermittee's MS4 outfalls that discharge to receiving waters;

(4) Locations of MS4 outfalls that are known to persistently discharge non-storm water to receiving waters likely causing or contributing to impacts on receiving water beneficial uses;

(5) Locations of MS4 outfalls that are known to discharge pollutants in storm water causing or contributing to impacts on receiving water beneficial uses; and

(6) The potential improvements in the quality of discharges from the MS4 that can be achieved.

c. IDENTIFICATION OF PRIORITY WATER QUALITY CONDITIONS

(1) The Copermittees must use the information gathered for Provisions B.2.a and B.2.b to develop a list of priority water quality conditions as pollutants, stressors and/or receiving water conditions that are the highest threat to receiving water quality or that most adversely affect the quality of receiving waters. The list must include the following information for each priority water quality condition:

(a) The beneficial use(s) associated with the priority water quality condition;

(b) The geographic extent of the priority water quality condition within the Watershed Management Area, if known;

(c) The temporal extent of the priority water quality condition (e.g., dry weather and/or wet weather);

(d) The Copermittees with MS4s discharges that may cause or contribute to the priority water quality condition; and

(e) An assessment of the adequacy of and data gaps in the monitoring data to characterize the conditions causing or contributing to the priority water quality condition, including a consideration of spatial and temporal variation.

(2) The Copermittees must identify the highest priority water quality conditions to be addressed by the Water Quality Improvement Plan, and provide a rationale for selecting a subset of the water quality conditions identified pursuant to Provision B.2.c.(1) as the highest priorities.

d. IDENTIFICATION OF MS4 SOURCES OF POLLUTANTS AND/OR STRESSORS

The Copermittees must identify and prioritize known and suspected sources of storm water and non-storm water pollutants and/or other stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c. The identification of known and suspected sources of pollutants and/or stressors that cause or contribute to the highest priority water quality conditions as identified for Provision B.2.c must consider the following:

(1) Pollutant generating facilities, areas, and/or activities within the Watershed Management Area, including:

(a) Each Copermittee's inventory of construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas,

(b) Publicly owned parks and/or recreational areas,

(c) Open space areas,

(d) All currently operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, and

(e) Areas not within the Copermittees' jurisdictions (e.g., Phase II MS4s, tribal lands, state lands, federal lands) that are known or suspected to be discharging to the Copermittees' MS4s;

(2) Locations of the Copermittees' MS4s, including the following:

(a) All MS4 outfalls that discharge to receiving waters, and

(b) Locations of major structural controls for storm water and non-storm water (e.g., retention basins, detention basins, major infiltration devices, etc.);

(3) Other known and suspected sources of non-storm water or pollutants in storm water discharges to receiving waters within the Watershed Management Area, including the following:

(a) Other MS4 outfalls (e.g., Phase II Municipal and Caltrans),

(b) Other NPDES permitted discharges,

(c) Any other discharges that may be considered point sources (e.g., private outfalls), and

(d) Any other discharges that may be considered non-point sources (e.g., agriculture, wildlife or other natural sources);

(4) Review of available data, including but not limited to:

(a) Findings from the Copermittees' illicit discharge detection and elimination programs,

(b) Findings from the Copermittees' MS4 outfall discharge monitoring,

(c) Findings from the Copermittees' receiving water monitoring,

(d) Findings from the Copermittees' MS4 outfall discharge and receiving water assessments, and

(e) Other available, relevant, and appropriately collected data, information, or studies related to pollutant sources and/or stressors that contribute to the highest priority water quality conditions as identified for Provision B.2.c.

(5) The adequacy of the available data to identify and prioritize sources and/or stressors associated with MS4 discharges that cause or contribute to the highest priority water quality conditions identified under Provision B.2.c.

e. Identification of Potential Water Quality Improvement Strategies

The Copermittees must evaluate the findings identified under Provisions B.2.a-d, and identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies that may be implemented within the Watershed Management Area must include the following:

(1) Structural BMPs, non-structural BMPs, incentives, or programs that can potentially be implemented to address the highest priority water quality conditions identified under Provision B.2.c, or MS4 sources of pollutants or stressors identified under Provision B.2.d,

(2) Retrofitting projects in areas of existing development within the Watershed Management Area that can potentially be implemented to reduce MS4 sources of pollutants or stressors identified under Provision B.2.d causing or contributing to the highest priority water quality conditions identified under Provision B.2.c, and

(3) Stream, channel, and/or habitat rehabilitation projects within the Watershed Management Area that can potentially be implemented to protect and/or improve conditions in receiving waters from MS4 pollutants and/or stressors identified under Provision B.2.d causing or contributing to the highest priority water quality conditions identified under Provision B.2.c.

3. Water Quality Improvement Goals, Strategies and Schedules

The Copermittees must identify and develop specific water quality improvement goals and strategies to address the highest priority water quality conditions identified within a Watershed Management Area. The water quality improvement goals and strategies must address the highest priority water quality conditions by effectively prohibiting non-storm water discharges to the MS4, reducing pollutants in storm water discharges from the MS4 to the MEP, and protecting the water quality standards of receiving waters.

a. Water Quality Improvement Goals and Schedules

(1) Numeric Goals

The Copermittees must develop and incorporate numeric goals[7] into the Water Quality Improvement Plan. Numeric goals must be used to support

[7] Interim and final numeric goals may take a variety of forms such as TMDL established WQBELs, action levels, pollutant concentration, load reductions, number of impaired water bodies delisted from the List of Water Quality Impaired Segments, Index of Biotic Integrity (IBI) scores, or other appropriate metrics. Interim and final numeric goals are not necessarily limited to one criterion or indicator, but may include multiple criteria and/or indicators. Except for TMDL established WQBELs, interim and final numeric goals and corresponding schedules may be revised through the adaptive management process under Provision B.5.

Water Quality Improvement Plan implementation and measure reasonable progress towards addressing the highest priority water quality conditions identified under Provision B.2.c. The Copermittees must establish and incorporate the following numeric goals in the Water Quality Improvement Plan:

(a) Final numeric goals must be based on measureable criteria or indicators capable of demonstrating one or more of the following:

(i) Discharges from the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters, AND/OR

(ii) The conditions of receiving waters and associated habitat are protected from MS4 discharges, AND/OR

(iii) Beneficial uses of receiving waters are protected from MS4 discharges and will be supported.

(b) Interim numeric goals must be based on measureable criteria or indicators capable of demonstrating reasonable incremental progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges as follows:

(i) One or more interim numeric goals may be established to demonstrate progress toward achieving each final numeric goal,

(ii) For each final numeric goal, at least one interim numeric goal must be expressed as a reasonable increment toward achievement of the final numeric goal,

(iii) For each final numeric goal, reasonable interim numeric goals must be established to be accomplished during each 5 year period between the acceptance of the Water Quality Improvement Plan and the achievement of the final numeric goals.

(2) Schedules for Achieving Numeric Goals

The Copermittees must develop and incorporate schedules for achieving the numeric goals into the Water Quality Improvement Plan. The schedules must demonstrate reasonable progress toward achieving the final numeric goals required for Provision B.3.a.(1). The Copermittees must incorporate the schedules for achieving the numeric goals into the Water Quality Improvement Plan based on the following considerations:

(a) Final dates for achieving all final numeric goals must be established considering the following:

(i) Final compliance dates for any applicable TMDLs in Attachment E to this Order;

(ii) Compliance schedules for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(iii) Achievement of the final numeric goals for the highest water quality priorities must be as soon as possible;

(iv) Final dates for achieving the final numeric goals must reflect a realistic assessment of the shortest practicable time required based on the temporal and spatial extent and factors associated with the highest priority water quality conditions identified under Provision B.2.c, and taking into account the time reasonably required to implement the water quality improvement strategies required pursuant to Provision B.3.b.

(b) Interim dates for achieving all interim numeric goals must be established considering the following:

(i) Interim compliance dates for any applicable TMDLs in Attachment E to this Order;

(ii) Compliance schedules for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A);

(iii) Interim dates for achieving the interim numeric goals must reflect a realistic assessment of the shortest practicable time reasonably required, taking into account the time needed to implement new or significantly expanded programs and securing financing, if necessary; and

(iv) For each final numeric goal, at least one interim numeric goal must be established that the Copermittees will work toward achieving within the term of this Order.

b. WATER QUALITY IMPROVEMENT STRATEGIES AND SCHEDULES

Based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision B.2.e to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a, the Copermittees must identify the strategies that will be implemented in each Watershed Management Area as follows:

(1) Jurisdictional Strategies

(a) Each Copermittee in the Watershed Management Area must identify the strategies that will be implemented within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions E.2 through E.7, including descriptions of the following:

(i) For each of the inventories developed for its jurisdiction, as required under Provisions D.2.a.(1), E.3.e.(2), E.4.b, and E.5.a, each Copermittee must identify the known and suspected areas or sources causing or contributing to the highest priority water quality conditions in the Watershed Management Area that the Copermittee will focus on in its efforts to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, and achieve the interim and final numeric goals identified under Provision B.3.a;

(ii) BMPs that each Copermittee will implement, or require to be implemented, as applicable, for those areas or sources within its jurisdiction;

(iii) Education programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction;

(iv) Frequencies that each Copermittee will conduct inspections on those areas or sources within its jurisdiction;

(v) Incentive and enforcement programs that each Copermittee will implement, as applicable, for those areas or sources within its jurisdiction; and

(vi) Any other BMPs, incentives, or programs that each Copermittee will implement for those areas or sources within its jurisdiction.

(b) Identify the optional jurisdictional strategies that each Copermittee will implement within its jurisdiction, as necessary, to effectively prohibit non-storm water discharges to its MS4, reduce pollutants in storm water discharges from its MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a. Descriptions of the optional jurisdictional strategies must include:

(i) BMPs, incentives, or programs that may be implemented by the Copermittee within its jurisdiction in addition to the requirements of Provisions B.3.b.(1)(a);

(ii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects to retrofit areas of existing development within its jurisdiction;

(iii) Incentives or programs that may be implemented by the Copermittee to encourage or implement projects that will rehabilitate the conditions of channels or habitats within its jurisdiction;

(iv) The funds and/or resources that must be secured by the Copermittee to implement the optional strategies described for Provisions B.3.b.(1)(b)(i)-(iii) within its jurisdiction; and

(v) The circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provision B.3.b.(1)(a), to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.

(c) Identify the strategies that will be implemented by the Copermittee in coordination with or with the cooperation of other agencies (e.g. Caltrans, water districts, school districts) and/or entities (e.g. non-governmental organizations) within its jurisdiction.

(2) Watershed Management Area Strategies

The Copermittees must identify the optional regional or multi-jurisdictional strategies that will be implemented in the Watershed Management Area, as necessary, to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, protect the beneficial uses of receiving waters from MS4 discharges, and/or achieve the interim and final numeric goals identified under Provision B.3.a. Descriptions of the optional regional or multi-jurisdictional strategies must include:

(a) Regional or multi-jurisdictional BMPs, incentives, or programs that may be implemented by the Copermittees in the Watershed Management Area;

(b) Incentives or programs that may be implemented by the Copermittees in the Watershed Management Area to encourage or implement regional or multi-jurisdictional projects to retrofit areas of existing development;

(c) Incentives or programs that may be implemented by the Copermittees to encourage or implement regional or multi-jurisdictional projects that will rehabilitate the conditions of channels, streams, or habitats within the Watershed Management Area;

(d) The funds and/or resources that must be secured by the Copermittees to implement the optional strategies described for Provisions B.3.b.(2)(a)-(c) within the Watershed Management Area; and

(e) The circumstances necessary to trigger implementation of the optional regional or multi-jurisdictional strategies to achieve the interim and final numeric goals within the schedules established under Provision B.3.a.

(3) Schedules for Implementing Strategies

The Copermittees must develop reasonable schedules for implementing the water quality improvement strategies identified under Provisions B.3.b.(1) and B.3.b.(2) to achieve the interim and final numeric goals identified and schedules established under Provision B.3.a. The Copermittees must incorporate the schedules to implement the water quality improvement strategies into the Water Quality Improvement Plan as follows:

(a) Each Copermittee must develop schedules for the jurisdictional strategies identified pursuant to Provisions B.3.b.(1)(a)-(b). Each schedule must specify:

(i) If each jurisdictional strategy identified pursuant to Provision B.3.b.(1)(a) will or will not be initiated upon acceptance of the Water Quality Improvement Plan;

(ii) For each jurisdictional strategy identified pursuant to Provision B.3.b.(1)(a) that will not be initiated upon acceptance of the Water Quality Improvement Plan, the shortest practicable time in which each jurisdictional strategy will be initiated after acceptance of the Water Quality Improvement Plan;

(iii) For each optional jurisdictional strategy identified pursuant to Provision B.3.b.(1)(b), a realistic assessment of the shortest practicable time required to:

[a] Secure the resources needed to fund the optional jurisdictional strategy, and
[b] Procure the resources, materials, labor, and applicable permits necessary to initiate implementation of the optional jurisdictional strategy;

(iv) If each jurisdictional strategy identified pursuant to Provisions B.3.b.(1)(a)-(b) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and

(v) If a jurisdictional strategy identified pursuant to Provisions B.3.b.(1)(a)-(b) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

(b) The Copermittees in the Watershed Management Area must develop schedules for the regional or multi-jurisdictional strategies identified pursuant to Provision B.3.b.(2). Each schedule must specify:

(i) A realistic assessment of the shortest practicable time to:

[a] Secure the resources needed to fund the optional regional or multi-jurisdictional strategy, and
[b] Procure the resources, materials, labor, and permits necessary to initiate the implementation of the optional regional or multi-jurisdictional strategy;

(ii) If each regional or multi-jurisdictional strategy identified pursuant to Provision B.3.b.(2) is expected to be continuously implemented (e.g. inspections) or completed within a schedule (e.g. construction of structural BMP); and

(iii) If a regional or multi-jurisdictional strategy and/or activity identified pursuant to Provisions B.3.b.(2) is expected to be completed within a schedule, the anticipated time to complete based on a realistic assessment of the shortest practicable time required.

(4) Optional Watershed Management Area Analysis

(a) For each Watershed Management Area, the Copermittees have the option to perform a Watershed Management Area Analysis for the purpose of developing watershed-specific requirements for structural BMP implementation, as described in Provision E.3.c.(3). The Watershed Management Area Analysis must include GIS layers (maps) as output. The analysis must include the following information, to the extent it is available, in order to characterize the Watershed Management Areas:

(i) A description of dominant hydrologic processes, such as areas where infiltration or overland flow likely dominates;

(ii) A description of existing streams in the watershed, including bed material and composition, and if they are perennial or ephemeral;

(iii) Current and anticipated future land uses;

(iv) Potential coarse sediment yield areas; and

(v) Locations of existing flood control structures and channel structures, such as stream armoring, constrictions, grade control structures, and hydromodification or flood management basins.

(b) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision B.3.b.(4)(a) to identify and compile a list of candidate projects that could potentially be used as

alternative compliance options for Priority Development Projects, to be implemented in lieu of onsite structural BMP performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a). Specifically, the Copermittees must identify opportunities to be included in the list of candidate projects in each Watershed Management Area, such as:

(i) Stream or riparian area rehabilitation;

(ii) Retrofitting existing infrastructure to incorporate storm water retention or treatment;

(iii) Regional BMPs;

(iv) Groundwater recharge projects;

(v) Water supply augmentation projects; and

(vi) Land purchases to preserve floodplain functions.

(c) The Copermittees must use the results of the Watershed Management Area Analysis performed pursuant to Provision B.3.b.(4)(a) to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements described in Provision E.3.c.(2), including supporting rationale.

c. PROHIBITIONS AND LIMITATIONS COMPLIANCE OPTION

Each Copermittee has the option to utilize the implementation of the Water Quality Improvement Plan to demonstrate compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area subject to the following conditions:

(1) A Copermittee is eligible to be deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b within a Watershed Management Area when the Water Quality Improvement Plan for a Watershed Management Area incorporates the following:

(a) Numeric goals, water quality improvement strategies, and schedules developed pursuant to Provisions B.3.a and B.3.b that include the following:

(i) Interim and final WQBELs established by the TMDLs in Attachment E to this Order applicable to the Copermittee's jurisdiction within the Watershed Management Area; AND

(ii) Interim and final numeric goals for any ASBS subject to the provisions of Attachment B to State Water Board Resolution No. 2012-0012

(included as Attachment A to this Order) applicable to the Copermittee's jurisdiction within the Watershed Management Area; AND

(iii) Interim and final numeric goals applicable to the Copermittee's MS4 discharges within the Watershed Management Area expressed as numeric concentration-based or load-based goals for all pollutants and conditions listed on the Clean Water Act Section 303(d) List of Water Quality Impaired Segments[8] for the receiving waters in the Watershed Management Area that do not have a TMDL incorporated into Attachment E to this Order; AND/OR

(iv) Interim and final numeric goals for pollutants and conditions identified as receiving water priorities in the Water Quality Improvement Plan that will result in chemical, physical, and biological conditions protective of the beneficial uses of the receiving waters impacted by the Copermittee's MS4 discharges within the Watershed Management Area; AND

(v) The Copermittee has the option to include interim and final numeric goals applicable to the Copermittee's MS4 discharges and/or receiving waters within the Watershed Management Area for any pollutants or conditions in addition to those described in Provisions B.3.c.(1)(a)(i)-(iv); AND

(vi) Schedules for achieving each final numeric goal that reflect a realistic assessment of the shortest practicable time needed for achievement; AND

(vii) For each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), annual milestones[9] and the dates for their achievement must be included within each of the next five (5) Water Quality Improvement Plan Annual Report reporting periods, or until the final numeric goal is achieved. Annual milestones and the dates for their achievement for the 5 Water Quality Improvement Plan Annual Report reporting periods of the next permit term, or until the final numeric goal is achieved, must be provided as part of the Report of Waste Discharge required pursuant to Provision F.5.

(b) An analysis that meets all of the following conditions:

(i) The analysis, with clearly stated assumptions included in the analysis, must quantitatively demonstrate that the implementation of

[8] 2010 and subsequent 303(d) Lists

[9] Annual milestones for each final numeric goal must be clearly and directly linked to, or demonstrate progress is being made toward the achievement of the final numeric goal. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics. The annual milestones may address multiple numeric goals and/or multiple water bodies, as applicable and appropriate.

the water quality improvement strategies required under Provision B.3.b will achieve the final numeric goals within the schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a).

(ii) The development of the analysis must include a public participation process which allows the public to review and provide comments on the analysis methodology utilized and the assumptions included in the analysis. Public comments and responses must be included as part of the analysis documentation included in the Water Quality Improvement Plan.

(iii) The analysis may be performed by an individual Copermittee or jointly by two or more Copermittees choosing to utilize this compliance option for their jurisdictions within the Watershed Management Area.

(iv) The analysis must be updated as part of the iterative approach and adaptive management process required under Provisions B.5.a-b.

(c) Specific monitoring and assessments required pursuant to Provision B.4.a that will be performed by the Copermittee capable of 1) demonstrating whether the implementation of the water quality improvement strategies are making progress toward achieving the numeric goals in accordance with the established schedules developed pursuant to Provisions B.3.a and B.3.c.(1)(a), and 2) determining whether interim and final numeric goals have been achieved. The specific monitoring and assessments must be updated as part of the iterative approach and adaptive management process required under Provision B.5.c.

(d) Documentation showing that the numeric goals, schedules, and annual milestones proposed pursuant to Provision B.3.c.(1)(a), the analysis performed pursuant to Provision B.3.c.(1)(b), and the specific monitoring and assessments proposed pursuant to Provision B.3.c.(1)(c) have been reviewed by the Water Quality Improvement Consultation Panel (see Provision F.1.a.(1)(b)). Updates must be reviewed by the Water Quality Improvement Consultation Panel for any recommendations.

(2) Each Copermittee that voluntarily completes the requirements of Provision B.3.c.(1) is deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b for the pollutants and conditions for which numeric goals are developed when the Water Quality Improvement Plan, incorporating the requirements of Provision B.3.c.(1), is accepted by the San Diego Water Board pursuant to Provision F.1.b or F.2.c. The Copermittee is deemed in compliance during the term of this Order as long as:

(a) The Copermittee is implementing the water quality improvement strategies within its jurisdiction developed pursuant to Provision B.3.b.(1) and in

compliance with the schedules for implementing the strategies established pursuant to Provisions B.3.b.(3)(a) and B.3.c.(1)(a)(vii); AND

(b) The Copermittee is performing the monitoring and assessments developed pursuant to Provision B.3.c.(1)(c); AND

(c) The Copermittee's assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermittee is in compliance with the annual milestones and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND

(d) Any proposed modifications to the numeric goals, strategies, schedules, and/or annual milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c;[10] AND

(e) The Copermittee is implementing the requirements of Provision A.4.a.

4. Water Quality Improvement Monitoring and Assessment Program

a. The Copermittees in each Watershed Management Area must develop and incorporate an integrated monitoring and assessment program into the Water Quality Improvement Plan that assesses: 1) the progress toward achieving the numeric goals and schedules, 2) the progress toward addressing the highest priority water quality conditions for each Watershed Management Area, and 3) each Copermittee's overall efforts to implement the Water Quality Improvement Plan.

b. The monitoring and assessment program must incorporate the monitoring and assessment requirements of Provision D, which may allow the Copermittees to modify the program to be consistent with and focus on the highest priority water quality conditions for each Watershed Management Area.

c. For Watershed Management Areas with applicable TMDLs, the monitoring and assessment program must incorporate the specific monitoring and assessment requirements of Attachment E.

[10] A request for proposed changes to the Water Quality Improvement Plan does not stay any permit condition.

d. For Watershed Management Areas with any ASBS, the water quality monitoring and assessment program must incorporate the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 (see Attachment A).

5. Iterative Approach and Adaptive Management Process

The Copermittees in each Watershed Management Area must implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a, and must include the following:

a. Re-Evaluation of Priority Water Quality Conditions

The priority water quality conditions and potential water quality improvement strategies included in the Water Quality Improvement Plan pursuant to Provisions B.2.c and B.2.e may be re-evaluated by the Copermittees as needed during the term of this Order as part of the Water Quality Improvement Plan Annual Report. Re-evaluation and recommendations for modifications to the priority water quality conditions and potential water quality improvement strategies must be provided in the Report of Waste Discharge, and must consider the following:

(1) Achieving the outcome of improved water quality in MS4 discharges and receiving waters through implementation of the water quality improvement strategies identified in the Water Quality Improvement Plan;

(2) New information developed when the requirements of Provisions B.2.a-c have been re-evaluated;

(3) Spatial and temporal accuracy of monitoring data collected to inform prioritization of water quality conditions and implementation strategies to address the highest priority water quality conditions;

(4) Availability of new information and data from sources other than the jurisdictional runoff management programs within the Watershed Management Area that informs the effectiveness of the actions implemented by the Copermittees;

(5) San Diego Water Board recommendations; and

(6) Recommendations for modifications solicited through a public participation process.

b. ADAPTATION OF GOALS, STRATEGIES AND SCHEDULES

The water quality improvement goals, strategies and schedules, included in the Water Quality Improvement Plan pursuant to Provisions B.3, must be re-evaluated and adapted as new information becomes available to result in more effective and efficient measures to address the highest priority water quality conditions identified pursuant to Provision B.2.c. Re-evaluation of and modifications to the water quality improvement goals, strategies and schedules must be provided in the Water Quality Improvement Plan Annual Report, and must consider the following:

(1) Modifications to the priority water quality conditions based on Provision B.5.a;

(2) Progress toward achieving interim and final numeric goals in receiving waters and MS4 discharges for the highest priority water quality conditions in the Watershed Management Area,

(3) Progress toward achieving outcomes according to established schedules;

(4) New policies or regulations that may affect identified numeric goals;

(5) Measurable or demonstrable reductions of non-storm water discharges to and from each Copermittee's MS4;

(6) Measurable or demonstrable reductions of pollutants in storm water discharges from each Copermittee's MS4 to the MEP;

(7) New information developed when the requirements of Provisions B.2.b and B.2.d have been re-evaluated;

(8) Efficiency in implementing the Water Quality Improvement Plan;

(9) San Diego Water Board recommendations; and

(10) Recommendations for modifications solicited through a public participation process.

c. ADAPTATION OF MONITORING AND ASSESSMENT PROGRAM

The water quality improvement monitoring and assessment program, included in the Water Quality Improvement Plan pursuant to Provision B.4, must be re-evaluated and adapted when new information becomes available. Re-evaluation and recommendations for modifications to the monitoring and assessment program, pursuant to the requirements of Provision D, may be provided in the Water Quality Improvement Plan Annual Report, but must be provided in the Report of Waste Discharge.

d. ADAPTATION OF PROHIBITIONS AND LIMITATIONS COMPLIANCE OPTION

If a Copermittee has implemented the Prohibitions and Limitations Compliance Option allowed to be included in the Water Quality Improvement Plan pursuant to Provision B.3.c, the Copermittee must re-evaluate and adapt the numeric goals, water quality improvement strategies, schedules, and annual milestones required under Provision B.3.c.(1) when significant new information becomes available, or with the Report of Waste Discharge required pursuant to Provision F.5. Significant changes in the numeric goals, water quality improvement strategies, schedules, or annual milestones requires an update to the analysis required under Provision B.3.c.(2).

6. Water Quality Improvement Plan Submittal, Updates, and Implementation

a. The Copermittees must submit and commence implementation of the Water Quality Improvement Plans in accordance with the requirements of Provision F.1.

b. The Copermittees must submit proposed updates to the Water Quality Improvement Plan for acceptance by the San Diego Water Board Executive Officer in accordance with the requirements of Provision F.2.c.

C. ACTION LEVELS

The purpose of this provision is for the Copermittees to incorporate numeric action levels in the Water Quality Improvement Plans. The goal of the action levels is to guide Water Quality Improvement Plan implementation efforts and measure progress towards the protection of water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges. This goal will be accomplished through monitoring and assessing the quality of the MS4 discharges during the implementation of the Water Quality Improvement Plans.

1. Non-Storm Water Action Levels[11]

The Copermittees must develop and incorporate numeric non-storm water action levels (NALs) into the Water Quality Improvement Plan to: 1) support the development and prioritization of water quality improvement strategies for effectively prohibiting non-storm water discharges to the MS4s, 2) assess the effectiveness of the water quality improvement strategies toward addressing MS4 non-storm water discharges, required pursuant to Provision D.4.b.(1), and 3) support the detection and elimination of non-storm water and illicit discharges to the MS4, required pursuant to Provision E.2.[12]

a. The following NALs must be incorporated:

(1) Non-Storm Water Discharges from MS4s to Ocean Surf Zone

Table C-1. Non-Storm Water Action Levels for Discharges from MS4s to Ocean Surf Zone

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Total Coliform	MPN/100 ml	1,000	-	10,000/1,000[1]	OP
Fecal Coliform	MPN/100 ml	200[2]	-	400	OP
Enterococci	MPN/100 ml	35	-	104[3]	OP

Abbreviations/Acronyms
AMAL – average monthly action level
MDAL – maximum daily action level
OP – Ocean Plan water quality objective
MPN/100 ml – most probable number per 100 milliliters

Notes:
1. Total coliform density NAL is 1,000 MPN/100 ml when the fecal/total coliform ratio exceeds 0.1.
2. Fecal coliform density NAL is 200 MPN per 100 ml during any 30 day period.
3. This value has been set to the Basin Plan water quality objective for saltwater "designated beach areas."

[11] NALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the NAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in Attachment E and the interim or final compliance date has passed.

[12] The Copermittees may utilize NALs or other benchmarks currently established by the Copermittees as interim NALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

(2) Non-Storm Water Discharges from MS4s to Bays, Harbors, and Lagoons/Estuaries

Table C-2. Non-Storm Water Action Levels for Discharges from MS4s to Bays, Harbors, and Lagoons/Estuaries

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Turbidity	NTU	75	-	225	OP
pH	Units	Within limit of 6.0 to 9.0 at all times			OP
Fecal Coliform	MPN/100 ml	200[1]	-	400[2]	BP
Enterococci	MPN/100 ml	35	-	104[3]	BP
Priority Pollutants	µg/L	See Table C-3			

Abbreviations/Acronyms:
AMAL – average monthly action level
OP – Ocean Plan water quality objective
NTU – Nephelometric Turbidity Units
µg/L – micrograms per liter
MDAL – maximum daily action level
BP – Basin Plan water quality objective
MPN/100 ml – most probable number per 100 milliliters

Notes:
1. Based on a minimum of not less than five samples for any 30-day period.
2. The NAL is reached if more than 10 percent of total samples exceed 400 MPN per 100 ml during any 30 day period.
3. This value has been set to the Basin Plan water quality objective for saltwater "designated beach areas" and is not applicable to water bodies that are not designated with the water contact recreation (REC-1) beneficial use.

Table C-3. Non-Storm Water Action Levels for Priority Pollutants

Parameter	Units	Freshwater (CTR)		Saltwater (CTR)	
		MDAL	AMAL	MDAL	AMAL
Cadmium	µg/L	**	**	16	8
Copper	µg/L	*	*	5.8	2.9
Chromium III	µg/L	**	**	-	-
Chromium VI	µg/L	16	8.1	83	41
Lead	µg/L	*	*	14	2.9
Nickel	µg/L	**	**	14	6.8
Silver	µg/L	*	*	2.2	1.1
Zinc	µg/L	*	*	95	47

Abbreviations/Acronyms:
CTR – California Toxic Rule
AMAL – average monthly action level
µg/L – micrograms per liter
MDAL – maximum daily action level

Notes:
* Action levels developed on a case-by-case basis (see below)
** Action levels developed on a case-by-case basis (see below), but calculated criteria are not to exceed Maximum Contaminant Levels (MCLs) under the California Code of Regulations, Title 22, Division 4, Chapter 15, Article 4, Section 64431

The Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc NALs for MS4 discharges to freshwater receiving waters will be developed on a case-by-case basis based on site-specific water quality data (receiving water hardness). For these priority pollutants, refer to 40 CFR 131.38(b)(2).

(3) Non-Storm Water Discharges from MS4s to Inland Surface Waters

Table C-4. Non-Storm Water Action Levels for Discharges from MS4s to Inland Surface Waters

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BP
Turbidity	NTU	-	20	See MDAL	BP
pH	Units	Within limit of 6.5 to 8.5 at all times			BP
Fecal Coliform	MPN/100 ml	200[1]	-	400[2]	BP
Enterococci	MPN/100 ml	33	-	61[3]	BP
Total Nitrogen	mg/L	-	1.0	See MDAL	BP
Total Phosphorus	mg/L	-	0.1	See MDAL	BP
MBAS	mg/L	-	0.5	See MDAL	BP
Iron	mg/L	-	0.3	See MDAL	BP
Manganese	mg/L	-	0.05	See MDAL	BP
Priority Pollutants	µg/L	See Table C-3			

Abbreviations/Acronyms:
AMAL – average monthly action level
BP – Basin Plan water quality objective
COLD – cold freshwater habitat beneficial use
NTU – Nephelometric Turbidity Units
mg/L – milligrams per liter
MDAL – maximum daily action level
WARM – warm freshwater habitat beneficial use
MBAS – Methylene Blue Active Substances
MPN/100 ml – most probable number per 100 milliliters
µg/L – micrograms per liter

Notes:
1. Based on a minimum of not less than five samples for any 30-day period.
2. The NAL is reached if more than 10 percent of total samples exceed 400 MPN per 100 ml during any 30 day period.
3. This value has been set to the Basin Plan water quality objective for freshwater "designated beach areas" and is not applicable to water bodies that are not designated with the water contact recreation (REC-1) beneficial use.

b. If not identified in Provision C.1.a, NALs must be identified, developed and incorporated in the Water Quality Improvement Plan for any pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance in receiving waters associated with the highest priority water quality conditions related to non-storm water discharges from the MS4s. NALs must be based on:

(1) Applicable water quality standards which may be dependent upon site-specific or receiving water-specific conditions or assumptions to be identified by the Copermittees; or

(2) Applicable numeric WQBELs required to meet the WLAs established for the TMDLs in Attachment E to this Order.

c. For the NALs incorporated into the Water Quality Improvement Plan, the Copermittees may develop and incorporate secondary NALs specific to the Watershed Management Area at levels greater than the NALs required by Provisions C.1.a and C.1.b which can be utilized to further refine the prioritization and assessment of water quality improvement strategies for effectively prohibiting non-storm water discharges to the MS4s, as well as the detection and

elimination of non-storm water and illicit discharges to and from the MS4. The secondary NALs may be developed using an approach acceptable to the San Diego Water Board.

d. Dry weather monitoring data from MS4 outfalls collected in accordance with Provision D.2.b may be utilized to develop or revise NALs based on watershed-specific data, subject to San Diego Water Board Executive Officer approval.

2. Storm Water Action Levels[13]

The Copermittees must develop and incorporate numeric storm water action levels (SALs) in the Water Quality Improvement Plans to: 1) support the development and prioritization of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s, and 2) assess the effectiveness of the water quality improvement strategies toward reducing pollutants in storm water discharges, required pursuant to Provision D.4.b.(2).[14]

a. The following SALs for discharges of storm water from the MS4 must be incorporated:

Table C-5. Storm Water Action Levels for Discharges from MS4s to Receiving Waters

Parameter	Units	Action Level
Turbidity	NTU	126
Nitrate & Nitrite (Total)	mg/L	2.6
Phosphorus (Total P)	mg/L	1.46
Cadmium (Total Cd)*	µg/L	3.0
Copper (Total Cu)*	µg/L	127
Lead (Total Pb)*	µg/L	250
Zinc (Total Zn)*	µg/L	976

Abbreviations/Acronyms:
NTU – Nephelometric Turbidity Units
mg/L – milligrams per liter
µg/L – micrograms per liter

Notes:
* The sampling must include a measure of receiving water hardness at each MS4 outfall. If a total metal concentration exceeds the corresponding metals SAL in Table C-5, that concentration must be compared to the California Toxics Rule criteria and the USEPA 1-hour maximum concentration for the detected level of receiving water hardness associated with that sample. If it is determined that the sample's total metal concentration for that specific metal exceeds that SAL, but does not exceed the applicable USEPA 1-hour maximum concentration criterion for the measured level of hardness, then the sample result will not be considered above the SAL for that measurement.

[13] SALs incorporated into the Water Quality Improvement Plans are not considered by the San Diego Water Board to be enforceable effluent limitations, unless the SAL is based on a WQBEL expressed as an interim or final effluent limitation for a TMDL in Attachment E and the interim or final compliance date has passed.

[14] The Copermittees may utilize SALs or other benchmarks currently established by the Copermittees as interim SALs until the Water Quality Improvement Plans are accepted by the San Diego Water Board Executive Officer.

b. If not identified in Provision C.2.a, SALs must be identified, developed and incorporated in the Water Quality Improvement Plan for pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance in receiving waters associated with the highest priority water quality conditions related to storm water discharges from the MS4s. SALs must be based on:

(1) Federal and State water quality guidance and/or water quality standards; and

(2) Site-specific or receiving water-specific conditions; or

(3) Applicable numeric WQBELs required to meet the WLAs established for the TMDLs in Attachment E to this Order.

c. For the SALs incorporated into the Water Quality Improvement Plan, the Copermittees may develop and incorporate secondary SALs specific to the Watershed Management Area at levels greater than the SALs required by Provisions C.2.a and C.2.b which can be utilized to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s. The secondary SALs may be developed based on the approaches recommended by the State Water Board's Storm Water Panel[15] or using an approach acceptable to the San Diego Water Board.

d. Wet weather monitoring data from MS4 outfalls collected in accordance with Provision D.2.c may be used to develop or revise SALs based upon watershed-specific data, subject to San Diego Water Board Executive Officer approval.

[15] Storm Water Panel Recommendations to the California State Water Resources Control Board: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006)

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D. MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS

The purpose of this provision is for the Copermittees to monitor and assess the impact on the conditions of receiving waters caused by discharges from the Copermittees' MS4s under wet weather and dry weather conditions. The goal of the monitoring and assessment program is to inform the Copermittees about the nexus between the health of receiving waters and the water quality condition of the discharges from their MS4s. This goal will be accomplished through monitoring and assessing the conditions of the receiving waters, discharges from the MS4s, pollutant sources and/or stressors, and effectiveness of the water quality improvement strategies implemented as part of the Water Quality Improvement Plans.

1. Receiving Water Monitoring Requirements

The Copermittees must develop and conduct a program to monitor the condition of the receiving waters in each Watershed Management Area during dry weather and wet weather. Following San Diego Water Board acceptance of the Water Quality Improvement Plans for each Watershed Management Area, the Copermittees must conduct long-term receiving water monitoring during implementation of the Water Quality Improvement Plan to assess the long term trends and determine if conditions in receiving waters are improving. Any available monitoring data not collected specifically for this Order that meet the quality assurance criteria of the Copermittees and the monitoring requirements of this Order may be utilized by the Copermittees. The Copermittees must conduct the following receiving water monitoring procedures:

a. Transitional Receiving Water Monitoring

Until the monitoring requirements and schedules of Provisions D.1.b-e are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, the Copermittees must conduct the following receiving water monitoring in the Watershed Management Area:

(1) Continue the receiving water monitoring programs required in Order Nos. R9-2007-0001 (Monitoring and Reporting Program No. R9-2007-0001 Sections II.A.1-A.5), R9-2009-0002, and R9-2010-0016, unless the Executive Officer provides conditional approval for Copermittees to proceed with implementation of the proposed monitoring and assessment program developed in accordance with Provision B.4;

(2) Continue the monitoring in the Hydromodification Management Plans approved by the San Diego Water Board;

(3) Participate in the following regional receiving water monitoring programs, as applicable to the Watershed Management Area:

(a) Storm Water Monitoring Coalition Regional Monitoring,

(b) Southern California Bight Regional Monitoring, and

(c) Sediment Quality Monitoring;

(4) Implement the monitoring programs developed as part of any implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) for the TMDLs in Attachment E to this Order; and

(5) For Watershed Management Areas with ASBS, implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in Attachment A to this Order.

b. Long-Term Receiving Water Monitoring Stations

The Copermittees must select at least one long-term receiving water monitoring station from among the existing mass loading stations, temporary watershed assessment stations, bioassessment stations, and stream assessment stations previously established by the Copermittees to be representative of the receiving water quality in the Watershed Management Area. Additional long-term receiving water monitoring stations must be selected where necessary to support the implementation and adaptation of the Water Quality Improvement Plan.

c. Dry Weather Receiving Water Monitoring

During the term of the Order, the Copermittees must perform monitoring during at least three dry weather monitoring events at each of the long-term receiving water monitoring stations. At least one monitoring event must be conducted during the dry season (May 1 – September 30) and at least one monitoring event must be conducted during a dry weather period during the wet season (October 1 – April 30), after the first wet weather event of the season, with an antecedent dry period of at least 72 hours following a storm event producing measureable rainfall of greater than 0.1 inch.

(1) Dry Weather Receiving Water Field Observations

For each dry weather monitoring event, the Copermittees must record field observations consistent with Table D-1 at each long-term receiving water monitoring station.

Table D-1. Field Observations for Receiving Water Monitoring Stations

Field Observations
• Station identification and location • Presence of flow, or pooled or ponded water • If flow is present: - Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate) - Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color) • If pooled or ponded water is present: - Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color) • Station description (i.e. deposits or stains, vegetation condition, structural condition, and observable biology) • Presence and assessment of trash in and around station

(2) Dry Weather Receiving Water Field Monitoring

For each dry weather monitoring event, if conditions allow the collection of the data, the Copermittees must monitor and record the parameters in Table D-2 at each long-term receiving water monitoring station.

Table D-2. Field Monitoring Parameters for Receiving Water Monitoring Stations

Parameters
• pH • Temperature • Specific conductivity • Dissolved oxygen • Turbidity

(3) Dry Weather Receiving Water Analytical Monitoring

For each dry weather monitoring event, the Copermittees must collect and analyze samples from each long-term receiving water monitoring station as follows:

(a) Analytes that are field measured are not required to be analyzed by a laboratory;

(b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;

(c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;

(d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:

(i) Time-weighted composites composed of 24 discrete hourly samples, which may be collected through the use of automated equipment, or

(ii) Flow-weighted composites collected over a typical 24-hour period, which may be collected through the use of automated equipment;

(e) Only one analysis of the composite of aliquots is required;

(f) Analysis for the following constituents is required:

(i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,

(ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,

(iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,

(iv) Applicable NAL constituents, and

(v) Constituents listed in Table D-3.

Table D-3. Analytical Monitoring Constituents for Receiving Water Monitoring Stations

Conventionals, Nutrients	Metals (Total and Dissolved)	Pesticides	Indicator Bacteria
• Total Dissolved Solids • Total Suspended Solids • Turbidity • Total Hardness • Total Organic Carbon • Dissolved Organic Carbon • Sulfate • Methylene Blue Active Substances (MBAS) • Total Phosphorus • Orthophosphate • Nitrite[1] • Nitrate[1] • Total Kjeldhal Nitrogen • Ammonia	• Arsenic • Cadmium • Chromium • Copper • Iron • Lead • Mercury • Nickel • Selenium • Thallium • Zinc	• Organophosphate Pesticides • Pyrethroid Pesticides	• Total Coliform • Fecal Coliform[2] • *Enterococcus*

Notes:
1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
2. *E. Coli* may be substituted for Fecal Coliform.

(4) Dry Weather Receiving Water Toxicity Monitoring

For each dry weather monitoring event, the Copermittees must collect grab or composite samples from each long-term receiving water monitoring station to be analyzed for aquatic toxicity in accordance with Table D-4. When the State Water Board's Policy for Toxicity Assessment and Control (Toxicity Policy) is approved and in effect, the San Diego Water Board Executive Officer may direct the Copermittees to replace current toxicity program elements with standardized procedures in the Toxicity Policy.

Table D-4. Dry Weather Chronic[1] Toxicity Testing for Receiving Water Monitoring Stations

Organism	Units	Test	USEPA Protocol
Freshwater			
Pimephales promelas (Fathead Minnow)	Pass / Fail	Larval Survival and Growth	EPA-821-R-02-013
Ceriodaphnia dubia (Daphnid)	Pass / Fail	Survival and Production	EPA-821-R-02-013
Selenastrum capricornutum (Green Algae)	Pass / Fail	Growth	EPA-821-R-02-013
Marine and Estuarine			
Strongylocentrotus purpuratus (Purple Sea Urchin)	Pass / Fail	Embryo-Larval Development	EPA-600-R-95-136

Notes:
1. Chronic toxicity testing is not required at receiving water monitoring stations located at mass loading stations if the channel flows are diverted year-round during dry weather conditions to the sanitary sewer for treatment.

(a) Freshwater Test Species and Methods: If samples are collected in receiving waters with salinity less than 1 ppt, the Copermittees must follow the methods for chronic toxicity tests as established in 40 CFR 136.3 using a single-concentration test design for routine monitoring, or a five-concentration test design for additional toxicity testing if the limitation is exceeded. The Copermittees must estimate the critical life stage chronic toxicity on undiluted samples in accordance with species and short term test methods in Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms (EPA-821-R-02-013; Table IA, 40 CFR 136). Additional test species may be used by the Copermittees if approved by the San Diego Water Board Executive Officer. The Copermittees must conduct:

(i) A static renewal toxicity test with the fathead minnow, *Pimephales promelas* (Larval Survival and Growth Test Method 1000.0);

(ii) A static renewal toxicity test with the daphnid, *Ceriodaphnia dubia* (Survival and Reproduction Test Method 1002.0); and

(iii) A static renewal toxicity test with the green alga, *Selenastrum capricornutum* (also named *Raphidocelis subcapitata*) (Growth Test Method 1003.0).

(b) Marine and Estuarine Test Species and Methods: If samples are collected in receiving waters with salinity greater or equal to 1 ppt, the Copermittees must follow the methods for chronic toxicity tests as established in 40 CFR 136.3 using a single-concentration test design for routine monitoring, or a five-concentration test design for additional toxicity testing if the limitation is exceeded. The Copermittees must conduct the following critical life state chronic toxicity tests on undiluted samples in accordance with species and short term test methods in Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to West Coast Marine and Estuarine Organisms (EPA-600-R-95-136; 1995). Artificial sea salts must be used to increase sample salinity. The Copermittees must conduct a static non-renewal toxicity test with the purple sea urchin, *Strongylocentrotus purpuratus* (Embryo-larval Development Test Method). Additional species may be used by the Copermittees if approved by the San Diego Water Board Executive Officer.

(c) Holding Times: All toxicity tests must be conducted as soon as possible following sample collection. The 36-hour sample holding time for test initiation shall be targeted. However, no more than 72 hours shall elapse before the conclusion of sample collection and test initiation.

(d) Test Species Sensitivity Screening: To determine the most sensitive test species for freshwater, the Copermittees must screen 2 wet weather and 2 dry weather toxicity tests with a vertebrate, an invertebrate, and a plant species. After this screening period, subsequent monitoring must be conducted using the most sensitive test species. Alternatively, if a sensitive test species has already been determined, or if there is prior knowledge of potential toxicant(s) and a test species is sensitive to such toxicant(s), then monitoring must be conducted using only that test species. Sensitive test species determinations must also consider the most sensitive test species used for proximal receiving water monitoring. Rescreening must occur once each permit term.

(e) Chronic toxicity test biological endpoint data must be analyzed using the Test of Significant Toxicity t-test approach specified in *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document* (USEPA, Office of Wastewater Management, Washington, D.C., EPA-833-R-10-003, 2010). For this monitoring program, the critical chronic instream waste concentration (IWC) is set at 100 percent receiving water (i.e. no dilution) for receiving water samples. A 100 percent receiving water and a control must be tested.

(f) Toxicity Identification Evaluation (TIE) / Toxicity Reduction Evaluation (TRE): If chronic toxicity is detected in receiving waters, the Copermittees must discuss the need for conducting a TIE/TRE in the assessments

required under Provision D.4.a.(2), and develop a plan for implementing the TIE/TRE to be incorporated in the Water Quality Improvement Plan.

(5) Dry Weather Receiving Water Bioassessment Monitoring

Bioassessment monitoring for each long-term receiving water monitoring station is required at least once during the term of this Order. The Copermittees must conduct bioassessment monitoring during at least one dry weather monitoring event at each long-term receiving water monitoring station as follows:

(a) The following bioassessment samples and measurements must be collected:

(i) Macroinvertebrate samples must be collected in accordance with the "Reachwide Benthos (Multihabitat) Procedure" in the most current Surface Water Ambient Monitoring Program (SWAMP) Bioassessment Standard Operating Procedures (SOP), and amendments, as applicable;[16]

(ii) The "Full" suite of physical habitat characterization measurements must be collected in accordance with the most current SWAMP Bioassessment SOP, and as summarized in the SWAMP Stream Habitat Characterization Form – Full Version;[17] and

(iii) Freshwater algae samples must be collected in accordance with the SWAMP Standard Operating Procedures for Collecting Algae Samples.[18] Analysis of samples must include algal taxonomic composition (diatoms and soft algae) and algal biomass.

(b) The bioassessment samples, measurements, and appropriate water chemistry data must be used to calculate the following:

(i) An Index of Biological Integrity (IBI) for macroinvertebrates for each monitoring station where bioassessment monitoring was conducted, based on the most current calculation method;[19] and

[16] Ode, P.R.. 2007. Standard operating procedures for collecting macroinvertebrate samples and associated physical and chemical data for ambient bioassessments in California. California State Water Resources Control Board Surface Water Ambient Monitoring Program (SWAMP) Bioassessment SOP 001. http://www.swrcb.ca.gov/water_issues/programs/swamp/tools.shtml#monitoring

[17] Available at: http://www.waterboards.ca.gov/water_issues/programs/swamp/docs/reports/fieldforms_fullversion052908.pdf

[18] Fetscher et al. 2009. Standard Operating Procedures for Collecting Stream Algae Samples and Associated Physical Habitat and Chemical Data for Ambient Bioassessments in California.

[19] The most current calculation method at the time the Order was adopted is outlined in "A Quantitative Tool for Assessing the Integrity of Southern California Coastal Streams" (Ode, et al. 2005. Environmental Management. Vol. 35, No. 1, pp. 1-13). If an updated or new calculation method is developed, either both

(ii) An IBI for algae for each monitoring station where bioassessment monitoring was conducted, when a calculation method is developed.[20]

(c) In lieu of the requirements of Provision D.1.c.(5)(a), the Copermittees may conduct the bioassessment monitoring in accordance with the "Triad" assessment approach[21] to calculate the IBIs required for Provision D.1.c.(5)(b). The Copermittees must conduct sampling, analysis, and reporting of specified in-stream biological and habitat data according to the protocols specified in the SCCWRP Technical Report No. 539, or subsequent protocols, if developed.

(6) Dry Weather Receiving Water Hydromodification Monitoring

In addition to the hydromodification monitoring conducted as part of the Copermittees' Hydromodification Management Plans, hydromodification monitoring for each long-term receiving water monitoring station is required at least once during the term of this Order. The Copermittees must collect the following hydromodification monitoring observations and measurements within an appropriate domain of analysis during at least one dry weather monitoring event for each long-term receiving water monitoring station:

(a) Channel conditions, including:

(i) Channel dimensions,

(ii) Hydrologic and geomorphic conditions, and

(iii) Presence and condition of vegetation and habitat;

(b) Location of discharge points;

(c) Habitat integrity;

(d) Photo documentation of existing erosion and habitat impacts, with location (i.e. latitude and longitude coordinates) where photos were taken;

(e) Measurement or estimate of dimensions of any existing channel bed or bank eroded areas, including length, width, and depth of any incisions; and

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(i.e. current and updated/new) methods must be used, or historical IBIs must be recalculated with the updated or new calculation method.

[20] When a calculation method is developed, IBIs must be calculated for all available and appropriate historical data.

[21] Stormwater Monitoring Coalition Model Monitoring Technical Committee, 2004. Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. Technical Report #419. August 2004.

(f) Known or suspected cause(s) of existing downstream erosion or habitat impact, including flow, soil, slope, and vegetation conditions, as well as upstream land uses and contributing new and existing development.

d. WET WEATHER RECEIVING WATER MONITORING

During the term of the Order, the Copermittees must perform monitoring during at least three wet weather monitoring events at each long-term receiving water monitoring station. At least one wet weather monitoring event must be conducted during the first wet weather event of the wet season (October 1 – April 30), and at least one wet weather monitoring event during a wet weather event that occurs after February 1.

(1) Wet Weather Receiving Water Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each long-term receiving water monitoring station:

(a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);

(c) Station condition (i.e. deposits or stains, vegetation condition, structural condition, observable biology); and

(d) Presence and assessment of trash in and around station.

(2) Wet Weather Receiving Water Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in Table D-2 at each long-term receiving water monitoring station.

(3) Wet Weather Receiving Water Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each long-term receiving water monitoring station as follows:

(a) Analytes that are field measured are not required to be analyzed by a laboratory;

(b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;

(c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;

(d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:

(i) Time-weighted composites composed of 24 discrete hourly samples, which may be collected through the use of automated equipment, or

(ii) Flow-weighted composites collected over the length of the storm event or a typical 24-hour period, which may be collected through the use of automated equipment;

(e) Only one analysis of the composite of aliquots is required;

(f) Analysis for the following constituents is required:

(i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,

(ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,

(iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,

(iv) Applicable SAL constituents, and

(v) Constituents listed in Table D-3.

(4) Wet Weather Receiving Water Toxicity Monitoring

For each wet weather monitoring event, the Copermittees must collect grab or composite samples from each long-term receiving water monitoring station to be analyzed for chronic aquatic toxicity in accordance with Provisions D.1.c.(4)(a)-(f).

e. OTHER RECEIVING WATER MONITORING REQUIREMENTS

(1) Regional Monitoring

The Copermittees must participate in the following regional receiving waters monitoring programs, as applicable to the Watershed Management Area:

(a) Storm Water Monitoring Coalition Regional Monitoring; and

(b) Southern California Bight Regional Monitoring and

(c) Unified Beach Water Quality Monitoring and Assessment Program. The Orange County Copermittees shall participate in and, together with South Orange County Wastewater Authority and Orange County Health Care Agency, shall share responsibility for implementation of a unified regional beach water quality monitoring and assessment program in south Orange County, as set forth in the October 2014 report, *Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County* , issued pursuant to CWC section 13383 and subject to future revision in the San Diego Water Board December 5, 2014 Letter Directive.

(2) Sediment Quality Monitoring

The Copermittees must perform sediment monitoring to assess compliance with sediment quality receiving water limits applicable to MS4 discharges to enclosed bays and estuaries. The monitoring may be performed either by individual or multiple Copermittees to assess compliance with receiving water limits, or through participation in a water body monitoring coalition. A Sediment Monitoring Plan which satisfies the requirements of the State Water Board's Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality (Sediment Control Plan) must be submitted as part of the monitoring and assessment program in the Water Quality Improvement Plan.

(a) The Sediment Monitoring Plan design must include the following:

(i) The elements required under Section VII.D (Receiving Water Limits Monitoring Frequency) and Section VII.E (Sediment Monitoring) of the Sediment Control Plan;

(ii) A Quality Assurance Project Plan (QAPP) describing the project objectives and organization, functional activities, and quality assurance/quality control protocols for the water and sediment monitoring; and

(iii) A schedule for completion of all sample collection and analysis activities and submission of Sediment Monitoring Reports.

(b) The Copermittees must implement the Sediment Monitoring Plan in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer.

(c) The Copermittees must incorporate a Sediment Monitoring Report as part of the Water Quality Improvement Plan Annual Report in accordance with the schedule contained in the Sediment Monitoring Plan, unless otherwise directed in writing by the San Diego Water Board Executive Officer. The Sediment Monitoring Report must contain the following information:

(i) Analysis: An evaluation, interpretation and tabulation of the water and sediment monitoring data, including interpretations and conclusions as to whether applicable Receiving Water Limitations in this Order have been attained at each sample station;

(ii) Sample Location Map: The locations, type, and number of samples must be identified and shown on a site map; and

(iii) California Environmental Data Exchange Network: A statement certifying that the monitoring data and results have been uploaded into the California Environmental Data Exchange Network (CEDEN).

(d) Based on the Sediment Monitoring Report conclusions the San Diego Water Board may require a human health risk assessment to determine if the human health objective contained in Receiving Water Limitations in Provision A.2.a.(3)(b)(ii) has been attained at each sample station. In conducting a risk assessment, the Copermittees must consider any applicable and relevant information, including California Environmental Protection Agency's (Cal/EPA) Office of Environmental Health Hazard Assessment (OEHHA) policies for fish consumption and risk assessment, Cal/EPA's Department of Toxic Substances Control (DTSC) Risk Assessment, and USEPA Human Health Risk Assessment policies.

(3) ASBS Monitoring

For Watershed Management Areas with ASBS, the Copermittees must implement the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012, included in Attachment A to this Order.

f. Alternative Watershed Monitoring Requirements

The San Diego Water Board may direct the Copermittees to participate in an effort to develop alternative watershed monitoring with other regulated entities, other interested parties, and the San Diego Water Board to refine, coordinate, and implement regional monitoring and assessment programs to determine the status and trends of water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams.

2. MS4 Outfall Discharge Monitoring Requirements

The Copermittees must develop and conduct a program to monitor the discharges from the MS4 outfalls in each Watershed Management Area during dry weather and wet weather. Following San Diego Water Board acceptance of the Water Quality Improvement Plans for each Watershed Management Area, the Copermittees must conduct MS4 outfall discharge monitoring during implementation of the Water Quality Improvement Plan to assess the effectiveness of their jurisdictional runoff management programs toward effectively prohibiting non-storm water discharges into the MS4 and reducing pollutants in storm water discharges from their MS4s to the MEP. Any available monitoring data not collected specifically for this Order that meet the quality assurance criteria of the Copermittees and the monitoring requirements of this Order may be utilized by the Copermittees. The Copermittees must conduct the following MS4 outfall monitoring procedures:

a. Transitional MS4 Outfall Discharge Monitoring

Until the monitoring requirements and schedules of Provisions D.2.b-c are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, the Copermittees must conduct the following MS4 outfall discharge monitoring in the Watershed Management Area:

(1) MS4 Outfall Discharge Monitoring Station Inventory

Each Copermittee must identify all major MS4 outfalls that discharge directly to receiving waters within its jurisdiction and geo-locate those outfalls on a map of the MS4 pursuant to Provision E.2.b.(1). This information must be compiled into a MS4 outfall discharge monitoring station inventory, and must include the following information:

(a) Latitude and longitude of MS4 outfall point of discharge;

(b) Watershed Management Area;

(c) Hydrologic subarea;

(d) Outlet size;

(e) Accessibility (i.e. safety and without disturbance of critical habitat);

(f) Approximate drainage area; and

(g) Classification of whether the MS4 outfall is known to have persistent dry weather flows, transient dry weather flows, no dry weather flows, or unknown dry weather flows.

(2) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Until the monitoring requirements and schedules of Provision D.2.b are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board pursuant to Provision F.1.b, each Copermittee must perform dry weather MS4 outfall field screening monitoring to identify non-storm water and illicit discharges within its jurisdiction in accordance with Provision E.2.c, to determine which discharges are transient flows and which are persistent flows, and prioritize the dry weather MS4 discharges that will be investigated and eliminated in accordance with Provision E.2.d.

(a) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Frequency

Each Copermittee must field screen the MS4 outfalls in its inventory developed pursuant to Provision D.2.a.(1) as follows:

(i) For Copermittees with less than 125 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 80 percent of the outfalls must be visually inspected two times per year during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).

(ii) For Copermittees with 125 major MS4 outfalls or more, but less than or equal to 500 that discharge to receiving waters within a Watershed Management Area, all the outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv).

(iii) For Copermittees with more than 500 major MS4 outfalls that discharge to receiving waters within a Watershed Management Area, at least 500 outfalls must be visually inspected at least annually during dry weather conditions. For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major outfalls, see Provision D.2.a.(2)(a)(iv). Copermittees with more than 500 major MS4 outfalls within a Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

[a] Assessment of connectivity of the discharge to a flowing receiving water;

[b] Reported exceedances of NALs in water quality monitoring data;
[c] Surrounding land uses;
[d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
[e] Flow rate.

(iv) For any Copermittee with portions of its jurisdiction in more than one Watershed Management Area and more than 500 major MS4 outfalls within its jurisdiction, at least 500 major MS4 outfalls within its inventory must be visually inspected at least annually during dry weather conditions. Copermittees with more than 500 major MS4 outfalls in more than one Watershed Management Area must identify and prioritize at least 500 outfalls to be inspected considering the following:

[a] Assessment of connectivity of the discharge to a flowing receiving water;
[b] Reported exceedances of NALs in water quality monitoring data;
[c] Surrounding land uses;
[d] Presence of constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List; and
[e] Flow rate.

(v) Inspections of major MS4 outfalls conducted in response to public reports and staff or contractor reports and notifications may count toward the required visual inspections of MS4 outfall discharge monitoring stations.

(b) Transitional Dry Weather MS4 Outfall Discharge Field Screening Visual Observations

(i) An antecedent dry period of at least 72 hours following any storm event producing measurable rainfall greater than 0.1 inch is required prior to conducting field screening visual observations during a field screening monitoring event.

(ii) During the field screening monitoring event, each Copermittee must record visual observations consistent with Table D-5 at each MS4 outfall discharge monitoring station inspected.

Table D-5. Field Screening Visual Observations for MS4 Outfall Discharge Monitoring Stations

Field Observations
• Station identification and location • Presence of flow, or pooled or ponded water • If flow is present: - Flow estimation (i.e. width of water surface, approximate depth of water, approximate flow velocity, flow rate) - Flow characteristics (i.e. presence of floatables, surface scum, sheens, odor, color) - Flow source(s) suspected or identified from non-storm water source investigation - Flow source(s) eliminated during non-storm water source identification • If pooled or ponded water is present: - Characteristics of pooled or ponded water (i.e. presence of floatables, surface scum, sheens, odor, color) - Known or suspected source(s) of pooled or ponded water • Station description (i.e. deposits or stains, vegetation condition, structural condition, observable biology) • Presence and assessment of trash in and around station • Evidence or signs of illicit connections or illegal dumping

(iii) Each Copermittee must implement the requirements of Provisions E.2.d.(2)(c)-(e) based on the field observations required pursuant to Provision D.2.a.(2)(b)(ii).

(iv) Each Copermittee must evaluate field observations together with existing information available from prior reports, inspections and monitoring results to determine whether any observed flowing, pooled, or ponded waters are likely to be transient or persistent flow.[22]

(c) Transitional Dry Weather MS4 Outfall Discharge Field Screening Monitoring Records

Based upon the results of the transitional dry weather MS4 outfall discharge field screening monitoring conducted pursuant to Provisions D.2.a.(2)(a)-(b), each Copermittee must update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow.

(3) Transitional Wet Weather MS4 Outfall Discharge Monitoring

Until the monitoring requirements and schedules of Provision D.2.c are incorporated into a Water Quality Improvement Plan that is accepted by the

[22] Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

San Diego Water Board pursuant to Provision F.1.b, the Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

(a) Transitional Wet Weather MS4 Outfall Discharge Monitoring Stations

The Copermittees must select wet weather MS4 outfall discharge monitoring stations from the inventories developed pursuant to Provision D.2.a.(1) for each Watershed Management Area as follows:

(i) At least five wet weather MS4 outfall discharge monitoring stations that are representative of storm water discharges from areas consisting primarily of residential, commercial, industrial, and typical mixed-use land uses present within the Watershed Management Area;

(ii) At least one wet weather MS4 outfall discharge monitoring station for each Copermittee within the Watershed Management Area; and

(iii) The County of San Diego may select at least two (2) wet weather MS4 outfall discharge monitoring stations for the portion of the Santa Margarita River Watershed Management Area within its jurisdiction to be monitored during the transitional period until the Riverside County Copermittees are notified of coverage under this Order. After the Riverside County Copermittees are notified of coverage under this Order, the Copermittees in the Watershed Management Area must select wet weather MS4 outfall discharge monitoring stations consistent with the requirements above.

(b) Transitional Wet Weather MS4 Outfall Discharge Monitoring Frequency

Each wet weather MS4 outfall discharge monitoring station selected pursuant to Provision D.2.a.(3)(a) must be monitored once during the wet season (October 1 – April 30). The wet weather monitoring events must be selected to be representative of the range of hydrological conditions experienced in the region. At least 10 percent of samples must be conducted during the first wet weather event of the wet season, to include at least one such sample in each Watershed Management Area..

(c) Transitional Wet Weather MS4 Outfall Discharge Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

(i) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and

(ii) The flow rates and volumes measured or estimated from the MS4 outfall (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);

(d) Transitional Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in Table D-2 at each wet weather MS4 outfall discharge monitoring station.

(e) Transitional Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

(i) Analytes that are field measured are not required to be analyzed by a laboratory;

(ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;

(iii) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, and indicator bacteria;

(iv) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:

[a] Time-weighted composites collected over the length of the storm event or the first 24 hour period whichever is shorter, composed of discrete samples, which may be collected through the use of automated equipment, or

[b] Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or

[c] If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during

the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours;

(v) Only one analysis of the composite of aliquots is required;

(vi) The samples must be analyzed for the following constituents:

[a] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,

[b] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order, and

[c] Constituents listed in Table D-6.

Table D-6. Analytical Monitoring Constituents for Wet Weather MS4 Outfall Discharge Monitoring Stations

Conventionals, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
• Total Dissolved Solids • Total Suspended Solids • Turbidity • Total Hardness • Total Organic Carbon • Dissolved Organic Carbon • Sulfate • Methylene Blue Active Substances (MBAS) • Total Phosphorus • Orthophosphate • Nitrite[1] • Nitrate[1] • Total Kjeldhal Nitrogen • Ammonia	• Arsenic • Cadmium • Chromium • Copper • Iron • Lead • Nickel • Selenium • Thallium • Zinc	• Total Coliform • Fecal Coliform[2] • *Enterococcus*

Notes:
1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
2. *E. Coli* may be substituted for Fecal Coliform.

(f) Other Transitional Wet Weather MS4 Outfall Discharge Monitoring

The San Diego County Copermittees must continue the wet weather MS4 outfall monitoring program developed under Order No. R9-2007-0001, as approved by the San Diego Water Board, through its planned completion.

b. Dry Weather MS4 Outfall Discharge Monitoring

Each Copermittee must perform dry weather MS4 outfall monitoring to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision

E.2.c, and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision E.2.d. Each Copermittee must conduct the following dry weather MS4 outfall discharge monitoring within its jurisdiction:

(1) Dry Weather MS4 Outfall Discharge Field Screening Monitoring

Each Copermittee must continue to perform the dry weather MS4 outfall discharge field screening monitoring in accordance with the requirements of Provision D.2.a.(2). The Copermittee may adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of persistent flow non-storm water discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of visual inspections performed is equivalent to the number of visual inspections required under Provision D.2.a.(2)(a).

(2) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring

Each Copermittee must perform non-storm water persistent flow MS4 outfall discharge monitoring to determine which persistent non-storm water discharges contain concentrations of pollutants below NALs, and which persistent non-storm water discharges impact receiving water quality during dry weather. Each Copermittee must conduct the following non-storm water persistent flow MS4 outfall discharge monitoring within its jurisdiction:

(a) Prioritization of Non-Storm Water Persistent Flow MS4 Outfalls

Based upon the dry weather MS4 outfall discharge field screening monitoring records developed pursuant to Provision D.2.a.(2)(c), each Copermittee must identify and prioritize the MS4 outfalls with persistent flows based on the highest priority water quality conditions identified in the Water Quality Improvement Plan and any additional criteria developed by the Copermittee, which may include historical data and data from sources other than what the Copermittee collects.

(b) Non-Storm Water Persistent Flow MS4 Outfall Discharge Monitoring Frequency

(i) Based on the prioritization of major MS4 outfalls developed under Provision D.2.b.(2)(a), each Copermittee must identify, at a minimum, the 5 highest priority major MS4 outfalls with non-storm water persistent flows that the Copermittee will monitor within its jurisdiction in each Watershed Management Area. For Responsible Copermittees identified by a TMDL in Attachment E to this Order, if the 5 chosen outfall locations are not sufficient to determine compliance with the TMDL(s), then each Responsible Copermittee

must identify additional MS4 outfall monitoring locations within its jurisdiction sufficient to address compliance with the TMDL(s). If a Copermittee has less than 5 major outfalls within a Watershed Management Area, then the Copermittee must monitor all of its major MS4 outfalls with persistent flows within each Watershed Management Area. The location of the highest priority non-storm water persistent flow MS4 outfall monitoring stations must be identified on the map required pursuant to Provision E.2.b.(1). The map must specify which MS4 outfalls are being monitored for compliance with a TMDL.

(ii) Each of the highest priority non-storm water persistent flow MS4 outfall monitoring stations identified pursuant to Provision D.2.b.(2)(b)(i) must be monitored under dry weather conditions at least semi-annually until one of the following occurs:

[a] The non-storm water discharges have been effectively eliminated (i.e. no flowing, pooled, or ponded water) for three consecutive dry weather monitoring events; or

[b] The source(s) of the persistent flows has been identified as a category of non-storm water discharges that does not require an NPDES permit and does not have to be addressed as an illicit discharge because it was not identified as a source of pollutants (i.e. constituents in non-storm water discharge do not exceed NALs), and the persistent flow can be re-prioritized to a lower priority; or

[c] The constituents in the persistent flow non-storm water discharge do not exceed NALs, and the persistent flow can be re-prioritized to a lower priority; or

[d] The source(s) of the persistent flows has been identified as a non-storm water discharge authorized by a separate NPDES permit.

(iii) Where the criteria under Provision D.2.b.(2)(b)(ii) are not met, but the threat to water quality has been reduced by the Copermittee, the highest priority persistent flow MS4 outfall monitoring stations may be reprioritized accordingly for continued dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.b.(1).

(iv) Each Copermittee must document removal or re-prioritization of the highest priority persistent flow MS4 outfall monitoring stations identified under Provision D.2.b.(2)(a) in the Water Quality Improvement Plan Annual Report. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized major MS4 outfall in the Watershed Management Area within its jurisdiction, unless there are no remaining qualifying major MS4 outfalls within the Copermittee's jurisdiction in the Watershed Management Area.

(c) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Observations

During each semi-annual monitoring event, each Copermittee must record field observations consistent with Table D-5 at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

(d) Non-Storm Water Persistent Flow MS4 Outfall Discharge Field Monitoring

During each semi-annual monitoring event, if conditions allow the collection of the data, each Copermittee must monitor and record the parameters in Table D-2 at each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction.

(e) Non-Storm Water Persistent Flow MS4 Outfall Discharge Analytical Monitoring

During each semi-annual monitoring event in which measurable flow is present, each Copermittee must collect and analyze samples from each of the highest priority persistent flow MS4 outfall monitoring stations within its jurisdiction as follows:

(i) Analytes that are field measured are not required to be analyzed by a laboratory;

(ii) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;

(iii) Collect grab or composite samples to be analyzed at a qualified laboratory for the following constituents:

[a] Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,
[b] Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,
[c] Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,
[d] Applicable NAL constituents, and
[e] Constituents listed in Table D-7. The Copermittees may adjust the list of constituents for the Watershed Management Area if historical data or supporting information can be provided that demonstrates or justifies the analysis of a constituent is not necessary.

Table D-7. Analytical Monitoring Constituents for Persistent Flow MS4 Outfall Discharge Monitoring Stations

Conventionals, Nutrients	Metals (Total and Dissolved)	Indicator Bacteria
• Total Dissolved Solids • Total Suspended Solids • Total Hardness • Total Phosphorus • Orthophosphate • Nitrite[1] • Nitrate[1] • Total Kjeldhal Nitrogen • Ammonia	• Cadmium • Copper • Lead • Zinc	• Total Coliform • Fecal Coliform[2] • *Enterococcus*

Notes:
1. Nitrite and nitrate may be combined and reported as nitrite+nitrate.
2. *E. Coli* may be substituted for Fecal Coliform.

(iv) If the Copermittee identifies and eliminates the source of the persistent flow non-storm water discharge, analysis of the sample is not required.

c. Wet Weather MS4 Outfall Discharge Monitoring

The Copermittees must perform wet weather MS4 outfall monitoring to identify pollutants in storm water discharges from the MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order. The Copermittees must conduct the following wet weather MS4 outfall discharge monitoring within the Watershed Management Area:

(1) Wet Weather MS4 Outfall Discharge Monitoring Stations

The Copermittees may adjust the wet weather MS4 outfall discharge monitoring locations in the Watershed Management Area, as needed, to identify pollutants in storm water discharges from MS4s, to guide pollutant source identification efforts, and to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan, provided the number of stations is at least equivalent to the number of stations required under Provision D.2.a.(3)(a). Additional outfall monitoring locations, above the minimum per jurisdiction, may be required to demonstrate compliance with the WQBELs associated with the applicable TMDLs in Attachment E.

(2) Wet Weather MS4 Outfall Discharge Monitoring Frequency

The Copermittees must monitor the wet weather MS4 outfall discharge monitoring stations in the Watershed Management Area at least once (1) per year. The Copermittees may need to increase the frequency of monitoring in order to identify pollutants in storm water discharges from the MS4s causing or contributing to the highest priority water quality conditions, to guide pollutant source identification efforts, or to determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E to this Order.

(3) Wet Weather MS4 Outfall Discharge Field Observations

For each wet weather monitoring event, the following narrative descriptions and observations must be recorded at each wet weather MS4 outfall discharge monitoring station:

(a) A narrative description of the station that includes the location, date and duration of the storm event(s) sampled, rainfall estimates of the storm event, and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and

(b) The flow rates and volumes measured or estimated (data from nearby USGS gauging stations may be utilized, or flow rates may be measured or estimated in accordance with the USEPA Storm Water Sampling Guidance Document (EPA-833-B-92-001), section 3.2.1, or other method proposed by the Copermittees that is acceptable to the San Diego Water Board);

(4) Wet Weather MS4 Outfall Discharge Field Monitoring

For each wet weather monitoring event, the Copermittees must monitor and record the parameters in Table D-2 at each wet weather MS4 outfall discharge monitoring station.

(5) Wet Weather MS4 Outfall Discharge Analytical Monitoring

For each wet weather monitoring event, the Copermittees must collect and analyze samples from each wet weather MS4 outfall discharge monitoring station as follows:

(a) Analytes that are field measured are not required to be analyzed by a laboratory;

(b) The Copermittees must implement consistent sample collection methods for regional comparability of data, unless site-specific conditions indicate the need for alternate methods;

(c) Grab samples may be collected for pH, temperature, specific conductivity, dissolved oxygen, turbidity, hardness, and indicator bacteria;

(d) For all other constituents, composite samples must be collected for a duration adequate to be representative of changes in pollutant concentrations and runoff flows using one of the following techniques:

(i) Time-weighted composites collected over the length of the storm event or the first 24 hour period, whichever is shorter , composed of discrete samples, which may be collected through the use of automated equipment, or

(ii) Flow-weighted composites collected over the length of the storm event or a typical 24 hour period, whichever is shorter, which may be collected through the use of automated equipment, or

(iii) If automated compositing is not feasible, a composite sample may be collected using a minimum of 4 grab samples, collected during the first 24 hours of the storm water discharge, or for the entire storm water discharge if the storm event is less than 24 hours.

(e) Only one analysis of the composite of aliquots is required;

(f) Analysis for the following constituents is required:

(i) Constituents contributing to the highest priority water quality conditions identified in the Water Quality Improvement Plan,

(ii) Constituents listed as a cause for impairment of receiving waters in the Watershed Management Area listed on the CWA section 303(d) List,

(iii) Constituents for implementation plans or load reduction plans (e.g. Bacteria Load Reduction Plans, Comprehensive Load Reduction Plans) developed for watersheds where the Copermittees are listed responsible parties under the TMDLs in Attachment E to this Order,

(iv) Applicable SAL constituents, and

(v) The Copermittees may adjust the analytical monitoring required for the Watershed Management Area, if the Copermittees have historical data or supporting information that can demonstrate or provide justification that the analysis of a constituent is not necessary.

3. Special Studies

a. Within the term of this Order, the Copermittees must initiate the following special studies:

(1) At least two special studies in each Watershed Management Area to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that cause or contribute to highest priority water quality conditions identified in the Water Quality Improvement Plan.

(2) At least one special study for the San Diego Region to address pollutant and/or stressor data gaps and/or develop information necessary to more effectively address the pollutants and/or stressors that are impacting receiving waters on a regional basis in the San Diego Region.

(3) One of the two special studies in each Watershed Management Area required pursuant to Provision D.3.a.(1) may be replaced by a special study implemented pursuant to Provision D.3.a.(2).

b. The special studies must, at a minimum, be in conformance with the following criteria:

(1) The special studies must be related to the highest priority water quality conditions identified by the Copermittees in the Watershed Management Area and/or for the entire San Diego Region;

(2) The special studies developed pursuant to Provision D.3.a.(1) must:

(a) Be implemented within the applicable Watershed Management Area, and

(b) Require some form of participation by all the Copermittees within the Watershed Management Area;

(3) The special studies developed pursuant to Provision D.3.a.(2) must:

(a) Be implemented within the San Diego Region, and

(b) Require some form of participation by all Copermittees covered under the requirements of this Order.

(4) The Copermittees are encouraged to partner with environmental groups or third parties knowledgeable of watershed conditions to complete the required special studies.

c. Special studies developed to identify sources of pollutants and/or stressors should be pollutant and/or stressor specific and based on historical monitoring data and monitoring performed pursuant to Provisions D.1 and D.2. Development of source identification special studies should include the following:

(1) A compilation of known information on the specific pollutant and/or stressor, including data on potential sources and movement of the pollutant and/or stressor within the watershed. Data generated by the Copermittees and others, as well as information available from a literature research on the pollutant and/or stressor should be compiled and analyzed as appropriate.

(2) An identification of data gaps, based on the compiled information generated on the specific pollutant and/or stressor identified in Provision D.3.c.(1). Source identification special studies should be developed to fill identified data gaps.

(3) A monitoring plan that will collect and provide data the Copermittees can utilize to do the following:

(a) Quantify the relative loading or impact of a pollutant and/or stressor from a particular source or pollutant generating activity;

(b) Improve understanding of the fate of a pollutant and/or stressor in the environment;

(c) Develop an inventory of known and suspected sources of a pollutant and/or stressor in the Watershed Management Area; and/or

(d) Prioritize known and suspected sources of a pollutant and/or stressor based on relative magnitude in discharges, geographical distribution (i.e., regional or localized), frequency of occurrence in discharges, human health risk, and controllability.

d. Special studies initiated prior to the effective date of this Order that meet the requirements of Provision D.3.b and are implemented during the term of this Order as part of the Water Quality Improvement Plan may be utilized to fulfill the special study requirements of Provision D.3.a. Special studies completed before the effective date of this Order cannot be utilized to fulfill the special study requirements of Provision D.3.a.

e. The Copermittees must submit the monitoring plans for the special studies in the Water Quality Improvement Plans required pursuant to Provision F.1.

f. The Copermittees are encouraged to share the results of the special studies regionally among the Copermittees to provide information useful in improving and adapting the management of non-storm water and storm water runoff through the implementation of the Water Quality Improvement Plans.

4. Assessment Requirements

Each Copermittee must evaluate the data collected pursuant to Provisions D.1, D.2 and D.3, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E, to assess the progress of the water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a. Assessments must be performed as described in the following provisions:

a. Receiving Waters Assessments

(1) The Copermittees must assess and report the conditions of the receiving waters in the Watershed Management Area as follows:

(a) Based on data collected pursuant to Provision D.1.a, the assessments under Provision D.4.a.(2) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(b) Based on the data collected pursuant to Provisions D.1.a-e, the assessments required under Provision D.4.a.(2) must be included in the Report of Waste Discharge required pursuant to Provision F.5.b.

(2) The Copermittees must assess the status and trends of receiving water quality conditions in 1) coastal waters, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under dry weather and wet weather conditions. For each of the three types of receiving waters in each Watershed Management Area the Copermittees must:

(a) Determine whether or not the conditions of the receiving waters are meeting the numeric goals established pursuant to Provision B.3.a;

(b) Identify the most critical beneficial uses that must be protected to ensure overall health of the receiving water;

(c) Determine whether or not those critical beneficial uses are being protected;

(d) Identify short-term and/or long-term improvements or degradation of those critical beneficial uses;

(e) Determine whether or not the strategies established in the Water Quality Improvement Plan contribute towards progress in achieving the interim and final numeric goals of the Water Quality Improvement Plan; and

(f) Identify data gaps in the monitoring data necessary to assess Provisions D.4.a.(2)(a)-(e).

b. MS4 OUTFALL DISCHARGES ASSESSMENTS

(1) Non-Storm Water Discharges Reduction Assessments

(a) Each Copermittee must assess and report the progress of its illicit discharge detection and elimination program, required to be implemented pursuant to Provision E.2, toward effectively prohibiting non-storm water and illicit discharges into the MS4 within its jurisdiction as follows:

(i) Based on data collected pursuant to Provisions D.2.a.(2), the assessments under Provision D.4.b.(1)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(ii) Based on the data collected pursuant to Provisions D.2.b, the assessments required under Provision D.4.b.(1)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

(iii) Based on the data collected pursuant to Provisions D.2.b, the assessment required under Provision D.4.b.(1)(c) must be included in the Report of Waste Discharge required pursuant to F.5.b.

(b) Based on the transitional dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.a.(2), each Copermittee must assess and report the following:

(i) Identify the known and suspected controllable sources (e.g. facilities, areas, land uses, pollutant generating activities) of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area;

(ii) Identify sources of transient and persistent flows within the Copermittee's jurisdiction in the Watershed Management Area that have been reduced or eliminated; and

(iii) Identify modifications to the field screening monitoring locations and frequencies for the MS4 outfalls in its inventory necessary to identify and eliminate sources of persistent flow non-storm water discharges pursuant to Provision D.2.b.

(c) Based on the dry weather MS4 outfall discharge field screening monitoring required pursuant to Provision D.2.b.(1), each Copermittee must assess and report the following:

(i) The assessments required pursuant to Provision D.4.b.(1)(b);

(ii) Based on the data collected and applicable NALs in the Water Quality Improvement Plan, rank the MS4 outfalls in the Copermittee's jurisdiction according to potential threat to receiving water quality, and produce a prioritized list of major MS4 outfalls for follow-up action to update the Water Quality Improvement Plan, with the goal of eliminating persistent flow non-storm water discharges and/or pollutant loads in order of the ranked priority list through targeted programmatic actions and source investigations;

(iii) For the highest priority major MS4 outfalls with persistent flows that are in exceedance of NALs, identify the known and suspected sources within the Copermittee's jurisdiction in the Watershed Management Area that may cause or contribute to the NAL exceedances;

(iv) Each Copermittee must analyze the data collected pursuant to Provision D.2.b, and utilize a model or other method, to calculate or estimate the non-storm water volumes and pollutant loads collectively discharged from all the major MS4s outfalls in its jurisdiction identified as having persistent dry weather flows during the monitoring year. These calculations or estimates must be updated annually.

[a] Each Copermittee must calculate or estimate the annual non-storm water volumes and pollutant loads collectively discharged from the Copermittee's major MS4 outfalls to receiving waters within the Copermittee's jurisdiction, with an estimate of the percent contribution from each known source for each MS4 outfall;

[b] Each Copermittee must annually identify and quantify (i.e. volume and pollutant loads) sources of non-storm water not subject to the Copermittee's legal authority that are discharged from the Copermittee's major MS4 outfalls to downstream receiving waters.

(v) Each Copermittee must review the data collected pursuant to Provision D.2.b and findings from the assessments required pursuant to Provision D.4.b.(1)(c)(i)-(iv) at least once during the term of this Order to:

[a] Identify reductions and progress in achieving reductions in non-storm water and illicit discharges to the Copermittee's MS4 in the Watershed Management Area;

[b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction, with an estimate, if possible, of the non-storm water volume and/or pollutant load reductions attributable to specific water quality strategies implemented by the Copermittee; and

[c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittee in the Watershed Management Area toward reducing or eliminating non-storm water and pollutant loads discharging from the MS4 to receiving waters within its jurisdiction.

(vi) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(1)(c)(i)-(v).

(2) Storm Water Pollutant Discharges Reduction Assessments

(a) The Copermittees must assess and report the progress of the water quality improvement strategies, required to be implemented pursuant to Provisions B and E, toward reducing pollutants in storm water discharges from the MS4s within the Watershed Management Area as follows:

(i) Based on data collected pursuant to Provisions D.2.a.(3), the assessments under Provision D.4.b.(2)(b) must be included in the Transitional Monitoring and Assessment Program Annual Reports required pursuant to Provision F.3.b.(2).

(ii) Based on the data collected pursuant to Provisions D.2.c, the assessments required under Provision D.4.b.(2)(c) must be included in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

(iii) Based on the data collected pursuant to Provisions D.2.c, the assessment required under Provisions D.4.b.(2)(c)-(d) must be included in the Report of Waste Discharge required pursuant to F.5.b.

(b) Based on the transitional wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.a.(3) the Copermittees must assess and report the following:

(i) The Copermittees must analyze the monitoring data collected pursuant to Provision D.2.a.(3), and utilize a watershed model or other method, to calculate or estimate the following for each monitoring year:

[a] The average storm water runoff coefficient for each land use type within the Watershed Management Area;
[b] The volume of storm water and pollutant loads discharged from each of the Copermittee's monitored MS4 outfalls in its jurisdiction to receiving waters within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch;
[c] The total flow volume and pollutant loadings discharged from the Copermittee's jurisdiction within the Watershed Management Area over the course of the wet season, extrapolated from the data produced from the monitored MS4 outfalls; and
[d] The percent contribution of storm water volumes and pollutant loads discharged from each land use type within each hydrologic subarea with a major MS4 outfall to receiving waters or within each major MS4 outfall to receiving waters in the Copermittee's jurisdiction within the Watershed Management Area for each storm event with measurable rainfall greater than 0.1 inch.

(ii) Identify modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify pollutants in storm water discharges from the MS4s in the Watershed Management Area pursuant to Provision D.2.c.(1).

(c) Based on the wet weather MS4 outfall discharge monitoring required pursuant to Provision D.2.c the Copermittees must assess and report the following:

(i) The assessments required pursuant to Provision D.4.b.(2)(b);

(ii) Based on the data collected and applicable SALs in the Water Quality Improvement Plan, analyze and compare the monitoring data to the analyses and assumptions used to develop the Water Quality Improvement Plans, including strategies developed pursuant to Provision B.3, and evaluate whether those analyses and assumptions should be updated as a component of the adaptive management efforts pursuant to Provision B.5 for follow-up action to update the Water Quality Improvement Plan;

(iii) The Copermittees must review the data collected pursuant to Provision D.2.c and findings from the assessments required pursuant to Provisions D.4.b.(2)(c)(i)-(ii) at least once during the term of this Order to:

[a] Identify reductions or progress in achieving reductions in pollutant concentrations and/or pollutant loads from different land uses and/or drainage areas discharging from the Copermittees' MS4s in the Watershed Management Area;
[b] Assess the effectiveness of water quality improvement strategies being implemented by the Copermittees within the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters within the Watershed Management Area to the MEP, with an estimate, if possible, of the pollutant load reductions attributable to specific water quality strategies implemented by the Copermittees; and
[c] Identify modifications necessary to increase the effectiveness of the water quality improvement strategies implemented by the Copermittees in the Watershed Management Area toward reducing pollutants in storm water discharges from the MS4s to receiving waters in the Watershed Management Area to the MEP.

(iv) Identify data gaps in the monitoring data necessary to assess Provisions D.4.b.(2)(c)(i)-(iii).

(d) The Copermittees must evaluate all the data collected pursuant to Provision D.2.c, and incorporate new outfall monitoring data into time series plots for each long-term monitoring constituent for the Watershed Management Area, and perform statistical trends analysis on the cumulative long-term wet weather MS4 outfall discharge water quality data set.

c. Special Studies Assessments

The Copermittees must annually evaluate the results and findings from the special studies developed and implemented pursuant to Provision D.3, and assess their relevance to the Copermittees' efforts to characterize receiving water conditions, understand sources of pollutants and/or stressors, and control and reduce the discharges of pollutants from the MS4 outfalls to receiving waters in the Watershed Management Area. The Copermittees must report the results of the special studies assessments applicable to the Watershed Management Area, and identify any necessary modifications or updates to the Water Quality Improvement Plan based on the results in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3).

d. Integrated Assessment of Water Quality Improvement Plan

As part of the iterative approach and adaptive management process required for the Water Quality Improvement Plan pursuant to Provision B.5, the Copermittees in each Watershed Management Area must integrate the data collected pursuant to Provisions D.1-D.3, the findings from the assessments required pursuant to

Provisions D.4.a-c, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to assess the effectiveness of, and identify necessary modifications to, the Water Quality Improvement Plan as follows:

(1) The Copermittees must re-evaluate the priority water quality conditions and numeric goals for the Watershed Management Area, as needed, during the term of this Order pursuant to Provision B.5.a. The re-evaluation and recommendations for modifications to the priority water quality conditions, and/or numeric goals and corresponding schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The priority water quality conditions and numeric goals for the Watershed Management Area must be re-evaluated as follows:

(a) Re-evaluate the receiving water conditions in the Watershed Management Area in accordance with Provision B.2.a;

(b) Re-evaluate the impacts on receiving waters in the Watershed Management Area from MS4 discharges in accordance with Provision B.2.b;

(c) Re-evaluate the identification of MS4 sources of pollutants and/or stressors in accordance with Provision B.2.d;

(d) Identify beneficial uses of the receiving waters that are protected in accordance with Provision D.4.a;

(e) Evaluate the progress toward achieving the interim and final numeric goals for protecting impacted beneficial uses in the receiving waters.

(2) The Copermittees must re-evaluate the water quality improvement strategies for the Watershed Management Area during the term of this Order pursuant to Provision B.5.b. The re-evaluation and recommendations for modifications to the water quality improvement strategies and schedules may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. The water quality improvement strategies for the Watershed Management Area must be re-evaluated as follows:

(a) Identify the non-storm water and storm water pollutant loads from the Copermittees' MS4 outfalls in the Watershed Management Area, calculated or estimated pursuant to Provisions D.4.b;

(b) Identify the non-storm water and storm water pollutant load reductions, or other improvements to receiving water or water quality conditions, that are necessary to attain the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters;

(c) Identify the non-storm water and storm water pollutant load reductions, or other improvements to the quality of MS4 discharges, that are necessary for the Copermittees to demonstrate that non-storm water and storm water discharges from their MS4s are not causing or contributing to exceedances of receiving water limitations;

(d) Evaluate the progress of the water quality improvement strategies toward achieving the interim and final numeric goals identified in the Water Quality Improvement Plan for protecting beneficial uses in the receiving waters.

(3) The Copermittees must re-evaluate and adapt the water quality monitoring and assessment program for the Watershed Management Area when new information becomes available to improve the monitoring and assessment program pursuant to Provision B.5.c. The re-evaluation and recommendations for modifications to the monitoring and assessment program may be provided in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), but must at least be provided in the Report of Waste Discharge pursuant to Provision F.5.b. Modifications to the water quality monitoring and assessment program must be consistent with the requirements of Provision D.1-D.3. The re-evaluation of the water quality monitoring and assessment program for the Watershed Management Area must consider the data gaps identified by the assessments required pursuant to Provisions D.4.a-b, and results of the special studies implemented pursuant to Provision D.4.c.

5. Monitoring Provisions

Each Copermittee must comply with all the monitoring, reporting, and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

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E. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

The purpose of this provision is for each Copermittee to implement a program to control the contribution of pollutants to and the discharges from the MS4 within its jurisdiction. The goal of the jurisdictional runoff management programs is to implement strategies that effectively prohibit non-storm water discharges to the MS4 and reduce the discharge of pollutants in storm water to the MEP. This goal will be accomplished through implementing the jurisdictional runoff management programs in accordance with the strategies identified in the Water Quality Improvement Plans.

Each Copermittee must update its jurisdictional runoff management program document, in accordance with Provision F.2.a, to incorporate all the requirements of Provision E. Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision E, the Copermittee must continue implementing its current jurisdictional runoff management program.

1. Legal Authority Establishment and Enforcement

a. Each Copermittee must establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through statute, ordinance, permit, contract, order, or similar means. This legal authority must, at a minimum, authorize the Copermittee to:

(1) Prohibit and eliminate all illicit discharges and illicit connections to its MS4;

(2) Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites, including industrial and construction sites which have coverage under the statewide General Permit for Discharges of Storm Water Associated with Industrial Activities (Industrial General Permit) or General Permit for Discharges of Storm Water Associated with Construction Activities (Construction General Permit), as well as to those sites which do not;

(3) Control the discharge of spills, dumping, or disposal of materials other than storm water into its MS4;

(4) Control through interagency agreements among Copermittees the contribution of pollutants from one portion of the MS4 to another portion of the MS4;

(5) Control, by coordinating and cooperating with other owners of the MS4 such as Caltrans, the U.S. federal government, or sovereign Native American Tribes through interagency agreements, where possible, the contribution of pollutants from their portion of the MS4 to the portion of the MS4 within the Copermittee's jurisdiction;

(6) Require compliance with conditions in its statutes, ordinances, permits, contracts, orders, or similar means to hold dischargers to its MS4 accountable for their contributions of pollutants and flows;

(7) Require the use of BMPs to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;

(8) Require documentation on the effectiveness of BMPs implemented to prevent or reduce the discharge of pollutants in storm water from its MS4 to the MEP;

(9) Utilize enforcement mechanisms to require compliance with its statutes, ordinances, permits, contracts, orders, or similar means; and

(10) Carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with its statutes, ordinances, permits, contracts, orders, or similar means and with the requirements of this Order, including the prohibition of illicit discharges and connections to its MS4; the Copermittee must also have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities, including construction sites, discharging into its MS4.

b. With the first Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), each Copermittee must submit a statement certified by its Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative that the Copermittee has taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements contained in this Order.

2. Illicit Discharge Detection and Elimination

Each Copermittee must implement a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit. The illicit discharge detection and elimination program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements:

a. Non-Storm Water Discharges

Each Copermittee must address all non-storm water discharges as illicit discharges unless a non-storm water discharge is either identified as a discharge authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to the following requirements:

(1) Discharges of non-storm water to the MS4 from the following categories must be addressed as illicit discharges unless the discharge has coverage or meets the exception criteria under NPDES Permit No. CAG919003(Order No. R9-2015-0013, as it may be amended or reissued) for discharges to surface waters within the San Diego Region:

(1) Uncontaminated pumped ground water;

(2) Discharges from foundation drains;[23]

(3) Water from crawl space pumps; and

(4) Water from footing drains.[20]

(2) Discharges of non-storm water from water line flushing and water main breaks to the MS4 must be addressed as illicit discharges unless the discharge has coverage under NPDES Permit No. CAG679001 (Order No. R9-2010-0003, as it may be amended or reissued) or NPDES General Permit No. CAG140001 (Order 2014-0194-DWQ, as it may be amended or reissued). This category includes water line flushing and water main break discharges from water purveyors issued a water supply permit by the California Department of Public Health or federal military installations. Discharges from recycled or reclaimed water lines to the MS4 must be addressed as illicit discharges, unless the discharges have coverage under a separate NPDES permit.

(3) Discharges of non-storm water to the MS4 from the following categories must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a source of pollutants to receiving waters:

(a) Diverted stream flows;

(b) Rising ground waters;

(c) Uncontaminated ground water infiltration to MS4s;

(d) Springs;

(e) Flows from riparian habitats and wetlands;

(f) Discharges from potable water sources;

[23] Provision E.2.a.(1) only applies to this category of non-storm water if the system is designed to be located at or below the groundwater table to actively or passively extract groundwater during any part of the year.

(g) Discharges from foundation drains;[24] and

(h) Discharges from footing drains.[21]

(4) Discharges of non-storm water to the MS4 from the following categories must be controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means. Discharges of non-storm water to the MS4 from the following categories not controlled by the requirements given below through statute, ordinance, permit, contract, order, or similar means must be addressed by the Copermittee as illicit discharges.

(a) Air conditioning condensation

The discharge of air conditioning condensation should be directed to landscaped areas or other pervious surfaces, or to the sanitary sewer, where feasible.

(b) Individual residential vehicle washing

(i) The discharge of wash water should be directed to landscaped areas or other pervious surfaces where feasible; and

(ii) The minimization of water, washing detergent and other vehicle wash products used for residential vehicle washing, and the implementation of other practices or behaviors that will prevent the discharge of pollutants associated with individual residential vehicle washing from entering the MS4 must be encouraged.

(c) Dechlorinated swimming pool discharges

(i) Residual chlorine, algaecide, filter backwash, or other pollutants from swimming pools must be eliminated prior to discharging to the MS4; and

(ii) The discharge of saline swimming pool water must be directed to the sanitary sewer, landscaped areas, or other pervious surfaces that can accommodate the volume of water, unless the saline swimming pool water can be discharged via a pipe or concrete channel directly to a naturally saline water body (e.g. Pacific Ocean).

(5) Firefighting discharges to the MS4 must be addressed by the Copermittee as illicit discharges only if the Copermittee or the San Diego Water Board identifies the discharge as a significant source of pollutants to receiving waters. Firefighting discharges to the MS4 not identified as a significant

[24] Provision E.2.a.(3) only applies to this category of non-storm water discharge if the system is designed to be located above the groundwater table at all times of the year, and the system is only expected to discharge non-storm water under unusual circumstances.

source of pollutants to receiving waters, must be addressed, at a minimum, as follows:

(a) Non-emergency firefighting discharges

(i) Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) to the MS4 must be addressed as illicit discharges unless BMPs are implemented to prevent pollutants associated with such discharges to the MS4.

(ii) Non-emergency firefighting discharges (i.e., discharges from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems) must be addressed by a program, to be developed and implemented by the Copermittee, to reduce or eliminate pollutants in such discharges from entering the MS4.

(b) Emergency firefighting discharges

Each Copermittee should develop and encourage implementation of BMPs to reduce or eliminate pollutants in emergency firefighting discharges to the MS4s and receiving waters within its jurisdiction. During emergency situations, priority of efforts should be directed toward life, property, and the environment (in descending order). BMPs should not interfere with immediate emergency response operations or impact public health and safety.

(6) If the Copermittee or San Diego Water Board identifies any category of non-storm water discharges listed under Provisions E.2.a.(1)-(4) as a source of pollutants to receiving waters, the category must be prohibited through ordinance, order, or similar means and addressed as an illicit discharge. Alternatively, the Copermittee may propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges, and implement the controls if accepted by the San Diego Water Board as part of the Water Quality Improvement Plan.

(7) Each Copermittee must, where feasible and priorities and resources allow, reduce or eliminate non-storm water discharges listed under Provisions E.2.a.(1)-(4) into its MS4, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit.

b. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must include the following measures within its program to prevent and detect illicit discharges to the MS4:

(1) Each Copermittee must maintain an updated map of its entire MS4 and the

corresponding drainage areas. The accuracy of the MS4 map must be confirmed during the field screening required pursuant to Provision E.2.c. The MS4 map must be included as part of the jurisdictional runoff management program document. Any geographic information system (GIS) layers or files used by the Copermittee to maintain the MS4 map must be made available to the San Diego Water Board upon request. The MS4 map must identify the following:

(a) All segments of the MS4 owned, operated, and maintained by the Copermittee;

(b) All known locations of inlets that discharge and/or collect runoff into the Copermittee's MS4;

(c) All known locations of connections with other MS4s not owned or operated by the Copermittee (e.g. Caltrans MS4s);

(d) All known locations of MS4 outfalls and private outfalls that discharge runoff collected from areas within the Copermittee's jurisdiction;

(e) All segments of receiving waters within the Copermittee's jurisdiction that receive and convey runoff discharged from the Copermittee's MS4 outfalls;

(f) Locations of the MS4 outfalls, identified pursuant to Provision D.2.a.(1), within its jurisdiction; and

(g) Locations of the non-storm water persistent flow MS4 outfall discharge monitoring stations, identified pursuant to Provision D.2.b.(2), within its jurisdiction.

(2) Each Copermittee must use Copermittee personnel and contractors to assist in identifying and reporting illicit discharges and connections during their daily employment activities.

(3) Each Copermittee must promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges to or from the MS4, including the following methods for public reporting:

(a) Operate a public hotline, which can be Copermittee-specific or shared by the Copermittees, and must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week; and

(b) Designate an e-mail address for receiving electronic reports from the public, which can be Copermittee-specific or shared by the Copermittees,

and must be prominently displayed on the Copermittee's webpage and the Regional Clearinghouse required pursuant to Provision F.4.

(4) Each Copermittee must implement practices and procedures (including a notification mechanism) to prevent, respond to, contain, and clean up any spills that may discharge into the MS4 within its jurisdiction from any source. The Copermittee must coordinate, to the extent possible, with spill response teams to prevent entry of spills into the MS4, and prevent contamination of surface water, ground water, and soil. The Copermittee must coordinate spill prevention, containment, and response activities throughout all appropriate Copermittee departments, programs, and agencies.

(5) Each Copermittee must implement practices and procedures to prevent and limit infiltration of seepage from sanitary sewers (including private laterals and failing septic systems) to the MS4.

(6) Each Copermittee must coordinate, when necessary, with upstream Copermittees and/or entities to prevent illicit discharges from upstream sources into the MS4 within its jurisdiction.

c. FIELD SCREENING

Each Copermittee must conduct field screening (i.e. visual observations, field testing, and/or analytical testing) of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4 in accordance with the dry weather MS4 outfall discharge monitoring requirements in Provisions D.2.a.(2) and D.2.b.(1).

d. INVESTIGATE AND ELIMINATE ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must include the following measures within its program to investigate and eliminate illicit discharges to the MS4:

(1) Each Copermittee must prioritize and determine when follow-up investigations will be performed in response to visual observations and/or water quality monitoring data collected during an investigation of a detected non-storm water or illicit discharge to or from the MS4. The criteria for prioritizing investigations must consider the following:

(a) Pollutants identified as causing or contributing to the highest water quality priorities identified in the Water Quality Improvement Plan;

(b) Pollutants identified as causing or contributing, or threatening to cause or contribute to impairments in water bodies on the 303(d) List and/or in environmentally sensitive areas (ESAs), located within its jurisdiction;

(c) Pollutants identified from sources or land uses known to exist within the

area, drainage basin, or watershed that discharges to the portion of the MS4 within its jurisdiction included in the investigation;

(d) Pollutants identified as causing or contributing to an exceedance of a NAL in the Water Quality Improvement Plan; and

(e) Pollutants identified as a threat to human health or the environment.

(2) Each Copermittee must implement procedures to investigate and inspect portions of its MS4 that, based on reports or notifications, field screening, or other appropriate information, indicate a reasonable potential of receiving, containing, or discharging pollutants due to illicit discharges, illicit connections, or other sources of non-storm water. The procedures must include the following:

(a) Each Copermittee must develop criteria to:

(i) Assess the validity of each report or notification received; and

(ii) Prioritize the response to each report or notification received.

(b) Each Copermittee must prioritize and respond to each valid report or notification (e.g., public reports, staff or contractor reports and notifications, etc.) of an incident in a timely manner.

(c) In accordance with the requirements of Provision E.2.d.(1), each Copermittee must investigate and seek to identify the source(s) of discharges of non-storm water where flows are observed in and from the MS4 during the field screening required pursuant to Provision D.2.b.(1) as follows:

(i) Obvious illicit discharges must be immediately investigated to identify the source(s) of non-storm water discharges;

(ii) The investigation must include field investigations to identify sources or potential sources for the discharge, unless the source or potential source has already been identified during previous investigations; and

(iii) The investigation may include follow-up field investigations and/or reviewing Copermittee inventories and other land use data to identify potential sources of the discharge.

(d) Each Copermittee must maintain records and a database of the following information:

(i) Location of incident, including hydrologic subarea, portion of MS4

receiving the non-storm water or illicit discharge, and point of discharge or potential discharge from MS4 to receiving water;

(ii) Source of information initiating the investigation (e.g., public reports, staff or contractor reports and notifications, field screening, etc.);

(iii) Date the information used to initiate the investigation was received;

(iv) Date the investigation was initiated;

(v) Dates of follow-up investigations;

(vi) Identified or suspected source of the illicit discharge or connection, if determined;

(vii) Known or suspected related incidents, if any;

(viii) Result of the investigation; and

(ix) If a source cannot be identified and the investigation is not continued, document the response pursuant to the requirements of Provision E.2.d.(4).

(e) Each Copermittee must maintain records and, in accordance with the priorities of the Water Quality Improvement Plan, seek to identify the source(s) of non-storm water discharges from the MS4 where there is evidence of non-storm water having been discharged into or from the MS4 (e.g., pooled water), in accordance with MS4 outfall discharge monitoring requirements in Provisions D.2.a.(2) and D.2.b.(1).

(3) Each Copermittee must initiate the implementation of procedures, in a timely manner, to eliminate all detected and identified illicit discharges and connections within its jurisdiction. The procedures must include the following responses:

(a) Each Copermittee must enforce its legal authority, as required under Provision E.1, to eliminate illicit discharges and connections to the MS4.

(b) If the Copermittee identifies the source as a controllable source of non-storm water or illicit discharge or connection, the Copermittee must implement its Enforcement Response Plan pursuant to Provision E.6 and enforce its legal authority to prohibit and eliminate illicit discharges and connections to its MS4.

(c) If the Copermittee identifies the source of the discharge as a category of non-storm water discharges in Provision E.2.a, and the discharge is in exceedance of NALs in the Water Quality Improvement Plan, then the Copermittee must determine if: (1) this is an isolated incident or set of circumstances that will be addressed through its Enforcement Response Plan pursuant to Provision E.6, or (2) the category of discharge must be

addressed through the prohibition of that category of discharge as an illicit discharge pursuant to Provision E.2.a.(6).

(d) If the Copermittee suspects the source of the non-storm water discharge as natural in origin (i.e. non-anthropogenically influenced) and in conveyance into the MS4, then the Copermittee must document and provide the data and evidence necessary to demonstrate to the San Diego Water Board that it is natural in origin and does not require further investigation.

(e) If the Copermittee is unable to identify and document the source of a recurring non-storm water discharge to or from the MS4, then the Copermittee must address the discharge as an illicit discharge and update its jurisdictional runoff management program to address the common and suspected sources of the non-storm water discharge within its jurisdiction in accordance with the Copermittee's priorities.

(4) Each Copermittee must submit a summary of the non-storm water discharges and illicit discharges and connections investigated and eliminated within its jurisdiction with each Water Quality Improvement Plan Annual Report required under Provision F.3.b.(3) of this Order.

3. Development Planning

Each Copermittee must use their land use and planning authorities to implement a development planning program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. BMP Requirements for All Development Projects

Each Copermittee must prescribe the following BMP requirements during the planning process (i.e. prior to project approval and issuance of local permits) for all development projects (regardless of project type or size), where local permits are issued, including unpaved roads and flood management projects:

(1) General Requirements

(a) Onsite BMPs must be located so as to remove pollutants from runoff prior to its discharge to any receiving waters, and as close to the source as possible;

(b) Structural BMPs must not be constructed within waters of the U.S.

(c) Onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g.

mosquitos, rodents, or flies).

(2) Source Control BMP Requirements

The following source control BMPs must be implemented at all development projects where applicable and feasible:

(a) Prevention of illicit discharges into the MS4;

(b) Storm drain system stenciling or signage;

(c) Protect outdoor material storage areas from rainfall, run-on, runoff, and wind dispersal;

(d) Protect materials stored in outdoor work areas from rainfall, run-on, runoff, and wind dispersal;

(e) Protect trash storage areas from rainfall, run-on, runoff, and wind dispersal; and

(f) Any additional BMPs determined to be necessary by the Copermittee to minimize pollutant generation at each project.

(3) Low Impact Development (LID) BMP Requirements

The following LID BMPs must be implemented at all development projects where applicable and feasible:

(a) Maintenance or restoration of natural storage reservoirs and drainage corridors (including topographic depressions, areas of permeable soils, natural swales, and ephemeral and intermittent streams);[25]

(b) Buffer zones for natural water bodies (where buffer zones are technically infeasible, require project applicant to include other buffers such as trees, access restrictions, etc.);

(c) Conservation of natural areas within the project footprint including existing trees, other vegetation, and soils;

(d) Construction of streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided public safety is not compromised;

(e) Minimization of the impervious footprint of the project;

[25] Development projects proposing to dredge or fill materials in waters of the U.S. must obtain a CWA Section 401 Water Quality Certification. Projects proposing to dredge or fill waters of the state must obtain waste discharge requirements.

(f) Minimization of soil compaction to landscaped areas;

(g) Disconnection of impervious surfaces through distributed pervious areas;

(h) Landscaped or other pervious areas designed and constructed to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharging to the MS4;

(i) Small collection strategies located at, or as close as possible to, the source (i.e. the point where storm water initially meets the ground) to minimize the transport of runoff and pollutants to the MS4 and receiving waters;

(j) Use of permeable materials for projects with low traffic areas and appropriate soil conditions;

(k) Landscaping with native or drought tolerant species; and

(l) Harvesting and using precipitation.

b. PRIORITY DEVELOPMENT PROJECTS

Priority Development Projects are land development projects that fall under the planning and building authority of the Copermittee for which the Copermittee must impose specific requirements, in addition to those described in Provision E.3.a, including the implementation of structural BMPs to meet the performance requirements described in Provision E.3.c.

(1) Definition of Priority Development Project

Priority Development Projects include the following:

(a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.

(b) Redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface (collectively over the entire project site on an existing site of 10,000 square feet or more of impervious surfaces). This includes commercial, industrial, residential, mixed-use, and public development projects on public or private land.

(c) New and redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface (collectively over the entire project

site), and support one or more of the following uses:

(i) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812).

(ii) Hillside development projects. This category includes development on any natural slope that is twenty-five percent or greater.

(iii) Parking lots. This category is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(iv) Streets, roads, highways, freeways, and driveways. This category is defined as any paved impervious surface used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(d) New or redevelopment projects that create and/or replace 2,500 square feet or more of impervious surface (collectively over the entire project site), and discharging directly to an Environmentally Sensitive Area (ESA). "Discharging directly to" includes flow that is conveyed overland a distance of 200 feet or less from the project to the ESA, or conveyed in a pipe or open channel any distance as an isolated flow from the project to the ESA (i.e. not commingled with flows from adjacent lands).

(e) New development projects, or redevelopment projects that create and/or replace 5,000 square feet or more of impervious surface, that support one or more of the following uses:

(i) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(ii) Retail gasoline outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

(f) New or redevelopment projects that result in the disturbance of one or more acres of land and are expected to generate pollutants post construction.

(2) Special Considerations for Redevelopment Projects

The structural BMP performance requirements of Provision E.3.c are applicable to redevelopment Priority Development Projects, as defined in E.3.b.(1), as follows:

(a) Where redevelopment results in the creation or replacement of impervious surface in an amount of less than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision E.3.c apply only to the creation or replacement of impervious surface, and not the entire development; or

(b) Where redevelopment results in the creation or replacement of impervious surface in an amount of more than fifty percent of the surface area of the previously existing development, then the structural BMP performance requirements of Provision E.3.c apply to the entire development.

(3) Priority Development Project Exemptions

Each Copermittee has the discretion to exempt the following projects from being defined as Priority Development Projects:

(a) New or retrofit paved sidewalks, bicycle lanes, or trails that meet the following criteria:

(i) Designed and constructed to direct storm water runoff to adjacent vegetated areas, or other non-erodible permeable areas; OR

(ii) Designed and constructed to be hydraulically disconnected from paved streets or roads; OR

(iii) Designed and constructed with permeable pavements or surfaces in accordance with USEPA Green Streets guidance.[26]

(b) Retrofitting or redevelopment of existing paved alleys, streets or roads that are designed and constructed in accordance with the USEPA Green Streets guidance.[27]

c. PRIORITY DEVELOPMENT PROJECT STRUCTURAL BMP PERFORMANCE REQUIREMENTS

In addition to the BMP requirements listed for all development projects under Provision E.3.a, Priority Development Projects must also implement structural BMPs that conform to performance requirements described below.

(1) Storm Water Pollutant Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite structural BMPs to control pollutants in storm water that may be discharged from a project as follows:

[26] See "Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets" (USEPA, 2008).
[27] Ibid.

(a) Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapotranspire) onsite the pollutants contained in the volume of storm water runoff produced from a 24-hour 85th percentile storm event (design capture volume);[28]

(i) If a Copermittee determines that implementing BMPs to retain the full design capture volume onsite for a Priority Development Project is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize biofiltration BMPs. Biofiltration BMPs must be designed to have an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP,[29] and must be sized to:

[a] Treat 1.5 times the design capture volume not reliably retained onsite, OR
[b] Treat the design capture volume not reliably retained onsite with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.

(ii) If a Copermittee determines that biofiltration is not technically feasible, then the Copermittee may allow the Priority Development Project to utilize flow-thru treatment control BMPs to treat runoff leaving the site, AND mitigate for the design capture volume not reliably retained onsite pursuant to Provision E.3.c.(1)(b). Flow thru treatment control BMPs must be sized and designed to:

[a] Remove pollutants from storm water to the MEP;
[b] Filter or treat either: 1) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event, or 2) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two;

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[28] This volume is not a single volume to be applied to all areas covered by this Order. The size of the 85th percentile storm event is different for various parts of the San Diego Region. The Copermittees are encouraged to calculate the 85th percentile storm event for each of its jurisdictions using local rain data pertinent to its particular jurisdiction. In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees must describe their method for using isopluvial maps in its BMP Design Manuals.

[29] As part of the Copermittee's update to its BMP Design Manual, pursuant to Provision E.3.d, the Copermittee must provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

[c] Be ranked with high or medium pollutant removal efficiency for the Priority Development Project's most significant pollutants of concern. Flow-thru treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of flow-thru treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.

(b) A Priority Development Project may be allowed to utilize alternative compliance under Provision E.3.c.(3) in lieu of complying with the storm water pollutant control BMP performance requirements of Provision E.3.c.(1)(a). The Priority Development Project must mitigate for the portion of the pollutant load in the design capture volume not retained onsite if Provision E.3.c.(3) is utilized. If a Priority Development Project is allowed to utilize alternative compliance, flow-thru treatment control BMPs must be implemented to treat the portion of the design capture volume that is not reliably retained onsite. Flow-thru treatment control BMPs must be sized and designed in accordance with Provisions E.3.c.(1)(a)(ii)[a]-[c].

(2) Hydromodification Management BMP Requirements

Each Copermittee must require each Priority Development Project to implement onsite BMPs to manage hydromodification that may be caused by storm water runoff discharged from a project as follows:

(a) Post-project runoff conditions (flow rates and durations) must not exceed pre-development runoff conditions by more than 10 percent (for the range of flows that result in increased potential for erosion, or degraded instream habitat downstream of Priority Development Projects).

(i) In evaluating the range of flows that results in increased potential for erosion of natural (non-hardened) channels, the lower boundary must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks.

(ii) The Copermittees may use monitoring results collected pursuant to Provision D.1.a.(2) to re-define the range of flows resulting in increased potential for erosion, or degraded instream habitat conditions, as warranted by the data.

(b) Each Priority Development Project must avoid critical sediment yield areas known to the Copermittee or identified by the optional Watershed Management Area Analysis pursuant to Provision B.3.b.(4), or implement measures that allow critical coarse sediment to be discharged to receiving waters, such that there is no net impact to the receiving water.

(c) A Priority Development Project may be allowed to utilize alternative compliance under Provision E.3.c.(3) in lieu of complying with the performance requirements of Provision E.3.c.(2)(a). The Priority Development Project must mitigate for the post-project runoff conditions not fully managed onsite if Provision E.3.c.(3) is utilized.

(d) Exemptions

Each Copermittee has the discretion to exempt a Priority Development Project from the hydromodification management BMP performance requirements of Provisions E.3.c.(2) where the project discharges storm water runoff to:

(i) Existing underground storm drains discharging directly to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean;

(ii) Conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean; or

(iii) An area identified by the Copermittees as appropriate for an exemption by the optional Watershed Management Area Analysis incorporated into the Water Quality Improvement Plan pursuant to Provision B.3.b.(4).

(e) Interim Timeframe Exemptions

Until the Copermittees have updated their BMP Design Manual in accordance with Provision F.2.b with the requirements of Provision E, the Copermittees have the discretion to exempt a Priority Development Project from the hydromodification management BMP performance requirements of Provision E.3.c.(2) where the project discharges storm water runoff directly to:

(i) An engineered channel conveyance system with a capacity to convey peak flows generated by the 10-year storm event all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean; and

(ii) Large river reaches with a drainage area larger than 100 square miles and a 100-year flow capacity in excess of 20,000 cubic feet per second, provided that properly sized energy dissipation is included at all Priority Development Project discharge points.

(3) Alternative Compliance Program to Onsite Structural BMP Implementation

At the discretion of each Copermittee, Priority Development Projects may be allowed to participate in an alternative compliance program in lieu of implementing the onsite structural BMP performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a), provided that the Water Quality Improvement Plan includes the optional Watershed Management Area Analysis described in Provision B.3.b.(4), and Water Quality Equivalency calculations have been accepted by the San Diego Water Board's Executive Officer pursuant to Provision E.3.c.(3)(a). The alternative compliance program is available to a Priority Development Project only if the Priority Development Project applicant enters into a voluntary agreement with the Copermittee authorizing this arrangement. In addition to the voluntary agreement, relief from implementing structural BMPs onsite may be authorized by the Copermittee under the following conditions:

(a) Water Quality Equivalency

Copermittees must submit Water Quality Equivalency calculations for acceptance by the San Diego Water Board's Executive Officer prior to administering an alternative compliance program in order to establish a regional and technical basis for determining the water quality benefits associated with alternative compliance projects. Accepted Water Quality Equivalency calculations must be incorporated as part of any Copermittee's alternative compliance program necessary for evaluating Watershed Management Area Analysis candidate projects, project applicant-proposed alternative compliance projects, alternative compliance in lieu fee structures, and alternative compliance water quality credit systems as described in Provisions E.3.c.(3)(b)-(e).

(b) Watershed Management Area Analysis Candidate Projects

The Priority Development Project applicant agrees to fund, contribute funds to, or implement a candidate project identified by the Copermittees in the Watershed Management Area Analysis included in the Water Quality Improvement Plan, pursuant to Provisions B.3.b.(4) subject to the following conditions:

(i) The Copermittee must determine that implementation of the candidate project will have a greater overall water quality benefit for the Watershed Management Area than fully complying with the performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) onsite;

(ii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the in-lieu fee structure described in Provision E.3.c.(3)(c) must be followed;

(iii) If the Priority Development Project applicant chooses to fully or partially fund a candidate project, then the Copermittee must ensure that the funds to be obtained from the Priority Development Project applicant are sufficient to mitigate for impacts caused by not fully implementing structural BMPs onsite, pursuant to the performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a);

(iv) If the Priority Development Project applicant chooses to implement a candidate project, then the Copermittee must ensure that pollutant control and/or hydromodification management within the candidate project are sufficient to mitigate for impacts caused by not implementing structural BMPs fully onsite, pursuant to the performance requirements described in Provisions E.3.c.(1) and E.3.c.(2)(a);

(v) The voluntary agreement to fund, partially fund, or implement a candidate project must include reliable sources of funding for operation and maintenance of the candidate project;

(vi) Design of the candidate project must be conducted under an appropriately qualified engineer, geologist, architect, landscape architect, or other professional, licenses where applicable, and competent and proficient in the fields pertinent to the candidate project design;

(vii) The candidate project must be constructed as soon as possible, but no later than 4 years after the certificate of occupancy is granted for the first Priority Development Project that contributed funds toward the construction of the candidate project, unless a longer period of time is authorized by the San Diego Water Board Executive Officer; and

(viii) If the candidate project is constructed after the Priority Development Project is constructed, the Copermittee must require temporal mitigation for pollutant loads and altered flows that are discharged from the Priority Development Project.

(c) Project Applicant Proposed Alternative Compliance Projects

The Copermittee may allow a Priority Development Project applicant to propose and fund, contribute funds to, or implement an alternative compliance project not identified by the Watershed Management Area Analysis included in the Water Quality Improvement Plan pursuant to Provisions B.3.b.(4). This option is allowed provided the Copermittee determines that implementation of the alternative compliance project will have a greater overall water quality benefit for the Watershed Management Area than fully complying with the performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a) onsite, and is subject to the requirements described in Provisions E.3.c.(3)(a)(ii)-(viii).

(d) Alternative Compliance In-Lieu Fee Structure

If a Copermittee chooses to allow a Priority Development Project applicant to fund, or partially fund a candidate project or an alternative compliance project, then the Copermittee must develop and implement an in-lieu fee structure. This may be developed individually or with other Copermittees and/or entities, as a means for designing, developing, constructing, operating and maintaining offsite alternative compliance projects. The in-lieu fee must be transferred to the Copermittee (for public projects) or an escrow account (for private projects) prior to the construction of the Priority Development Project.

(e) Alternative Compliance Water Quality Credit System Option

The Copermittee may develop and implement an alternative compliance water quality credit system option, individually or with other Copermittees and/or entities, provided that such a credit system clearly exhibits that it will not allow discharges from Priority Development Projects to cause or contribute to a net impact over and above the impact caused by projects meeting the onsite structural BMP performance requirements of Provisions E.3.c.(1) and E.3.c.(2)(a). Any credit system that a Copermittee chooses to implement must be submitted to the San Diego Water Board Executive Officer for review and acceptance as part of the Water Quality Improvement Plan.

(4) Long-Term Structural BMP Maintenance

Each Copermittee must require the project applicant to submit proof of the mechanism under which ongoing long-term maintenance of all structural BMPs will be conducted.

(5) Infiltration and Groundwater Protection

(a) Structural BMPs designed to primarily function as large, centralized infiltration devices (such as large infiltration trenches and infiltration basins) must not cause or contribute to an exceedance of an applicable groundwater quality objective. At a minimum, such infiltration BMPs must be in conformance with the design criteria listed below, unless the development project applicant demonstrates to the Copermittee that one or more of the specific design criteria listed below are not necessary to protect groundwater quality. The design criteria listed below do not apply to small infiltration systems dispersed throughout a development project.

(i) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

(ii) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration BMPs are to be used;

(iii) Infiltration BMPs must be adequately maintained to remove pollutants in storm water to the MEP;

(iv) The vertical distance from the base of any infiltration BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;

(v) The soil through which infiltration is to occur must have physical and chemical characteristics (e.g., appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;

(vi) Infiltration BMPs must not be used for areas of industrial or light industrial activity, and other high threat to water quality land uses and activities as designated by each Copermittee, unless source control BMPs to prevent exposure of high threat activities are implemented, or runoff from such activities is first treated or filtered to remove pollutants prior to infiltration; and

(vii) Infiltration BMPs must be located a minimum of 100 feet horizontally from any water supply wells.

(b) The Copermittee may develop, individually or with other Copermittees, alternative mandatory design criteria to that listed above for infiltration BMPs which are designed to primarily function as centralized infiltration devices. Before implementing the alternative design criteria in the development planning process the Copermitee(s) must:

(i) Notify the San Diego Water Board of the intent to implement the alternative design criteria submitted; and

(ii) Comply with any conditions set by the San Diego Water Board.

d. BMP Design Manual Update

Each Copermittee must update its BMP Design Manual[30] pursuant to Provision F.2.b. Until the Copermittee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), the Copermittee must continue implementing its current BMP Design Manual. The Copermittee must implement the updated BMP Design Manual within 180 days following completion of the update pursuant to Provision

[30] The BMP Design Manual was formerly known as the Standard Storm Water Mitigation Plan under Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016.

F.2.b.(1), unless directed otherwise by the San Diego Water Board Executive Officer. The date the BMP Design Manual is implemented is the "effective date" of the BMP Design Manual. The update of the BMP Design Manual required pursuant to Provision F.2.b.(1) must include the following:

(1) Updated procedures to determine the nature and extent of storm water requirements applicable to a potential development or redevelopment projects. These procedures must inform project applicants of the storm water management requirements applicable to their project including, but not limited to, general requirements for all development projects, structural BMP design procedures and requirements, hydromodification management requirements, requirements specific to phased projects, and procedures specific to private developments and public improvement projects;

(2) Updated procedures to identify pollutants and conditions of concern for selecting the most appropriate structural BMPs that consider, at a minimum, the following:

(a) Receiving water quality (including pollutants for which receiving waters are listed as impaired under the CWA section 303(d) List);

(b) Pollutants, stressors, and/or receiving water conditions that cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(c) Land use type of the project and pollutants associated with that land use type; and

(d) Pollutants expected to be present onsite.

(3) Updated procedures for designing structural BMPs, including any updated performance requirements to be consistent with the requirements of Provision E.3.c for all structural BMPs listed in the BMP Design Manual;

(4) Long-term maintenance criteria for each structural BMP listed in the BMP Design Manual; and

(5) Alternative compliance criteria, in accordance with the requirements under Provision E.3.c.(3), if the Copermittee elects to allow Priority Development Projects within its jurisdiction to utilize alternative compliance.

e. Priority Development Project BMP Implementation and Oversight

Each Copermittee must implement a program that requires and confirms structural BMPs on all Priority Development Projects are designed, constructed, and maintained to remove pollutants in storm water to the MEP.

(1) Structural BMP Approval and Verification Process

(a) Each Copermittee must require and confirm that all Priority Development Projects implement the requirements of Provision E.3, except that the Copermittee may allow previous land development requirements to apply to a Priority Development Project if the conditions of Provision E.3.e.(1)(a)(i) or Provision E.3.e.(1)(a)(ii) are met:

(i) The Copermittee has, prior to the effective date of the BMP Design Manual required to be developed pursuant to Provision E.3.d:

[a] Approved[31] a design that incorporates the storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs consistent with the previous applicable MS4 permit requirements;[32] AND

[b] Issued a private project permit or approval, or functional equivalent for public projects, that authorizes the Priority Development Project applicant to commence construction activities based on a design that incorporates the storm water drainage system approved in conformance with Provision E.3.e.(1)(a)(i)[a]; AND

[c] Confirmed that there have been construction activities on the Priority Development Project site within the 365 days prior to the effective date of the BMP Design Manual, *OR* the Copermittee confirms that construction activities have commenced on the Priority Development Project site within the 180 days after the effective date of the BMP Design Manual, where construction activities are undertaken in reliance on the permit or approval, or functional equivalent for public projects, issued by the Copermittee in conformance with Provision E.3.e.(1)(a)(i)[b]; AND

[d] Issued all subsequent private project permits or approvals, or functional equivalent for public projects, that are needed to implement the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a] within 5 years of the effective date of the BMP Design Manual. The storm water drainage system for the Priority Development Project in its entirety, including all applicable structural pollutant treatment control and hydromodification management BMPs must remain in substantial conformity with the design initially approved in conformance with Provision E.3.e.(1)(a)(i)[a].

[31] For public projects, a design stamped by the City or County Engineer, or engineer of record for the project is considered an approved design.
[32] Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016 for San Diego County, Orange County, and Riverside County Copermittees, respectively

(ii) The Copermittee demonstrates it lacks the land use authority or legal authority to require a Priority Development Project to implement the requirements of Provision E.3.

(b) Each Copermittee must identify the roles and responsibilities of its various municipal departments in implementing the structural BMP requirements, including each stage of a project from application review and approval through BMP maintenance and inspections.

(c) Each Copermittee must require and confirm that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.

(d) Each Copermittee must require and confirm that prior to occupancy and/or intended use of any portion of the Priority Development Project, each structural BMP is inspected to verify that it has been constructed and is operating in compliance with all of its specifications, plans, permits, ordinances, and the requirements of this Order.

(2) Priority Development Project Inventory and Prioritization

(a) Each Copermittee must develop, maintain, and update at least annually, a watershed-based database to track and inventory all Priority Development Projects and associated structural BMPs within its jurisdiction. Inventories must be accurate and complete beginning from December 2002 for the San Diego County Copermittees, February 2003 for the Orange County Copermittees, and July 2005 for the Riverside County Copermittees. The use of an automated database system, such as GIS, is highly recommended. The database must include, at a minimum, the following information:

(i) Priority Development Project location (address and hydrologic subarea);

(ii) Descriptions of structural BMP type(s);

(iii) Date(s) of construction;

(iv) Party responsible for structural BMP maintenance;

(v) Dates and findings of structural BMP maintenance verifications; and

(vi) Corrective actions and/or resolutions, when applicable.

(b) Each Copermittee must prioritize the Priority Development Projects with structural BMPs within its jurisdiction. The designation of Priority Development Projects as high priority must consider the following:

(i) The highest water quality priorities identified in the Water Quality Improvement Plan;

(ii) Receiving water quality;

(iii) Number and sizes of structural BMPs;

(iv) Recommended maintenance frequency of structural BMPs;

(v) Likelihood of operation and maintenance issues of structural BMPs;

(vi) Land use and expected pollutants generated; and

(vii) Compliance record.

(3) Structural BMP Maintenance Verifications and Inspections

Each Copermittee is required to verify that structural BMPs on each Priority Development Project are adequately maintained, and continue to operate effectively to remove pollutants in storm water to the MEP through inspections, self-certifications, surveys, or other equally effective approaches.

(a) All (100 percent) of the structural BMPs at Priority Development Projects that are designated as high priority must be inspected directly by the Copermittee annually prior to each rainy season;

(b) For verifications performed through a means other than direct Copermittee inspection, adequate documentation must be required by the Copermittee to provide assurance that the required maintenance of structural BMPs at each Priority Development Project has been completed; and

(c) Appropriate follow-up measures (including re-inspections, enforcement, etc.) must be conducted to ensure that structural BMPs at each Priority Development Project continue to reduce pollutants in storm water to the MEP as originally designed.

f. DEVELOPMENT PROJECT ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all development projects, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

4. Construction Management

Each Copermittee must implement a construction management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. Project Approval Process

Prior to issuance of any local permit(s) that allows the commencement of construction projects that involve ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff, each Copermittee must:

(1) Require a pollution control plan, construction BMP plan, and/or an erosion and sediment control plan, to be submitted by the project applicant to the Copermittee;

(2) Confirm the pollution control plan, construction BMP plan, and/or erosion and sediment control plan, complies with the local grading ordinance, other applicable local ordinances, and the requirements of this Order;

(3) Confirm the pollution control, construction BMP, and/or erosion and sediment control plan, includes seasonally appropriate and effective BMPs and management measures described in Provision E.4.c, as applicable to the project; and

(4) Verify that the project applicant has obtained coverage under the statewide Construction General Permit (Order 2009-0009-DWQ or subsequent Order), if applicable.

b. Construction Site Inventory and Tracking

(1) Each Copermittee must maintain and update, at least quarterly, a watershed-based inventory of all construction projects issued a local permit that allows ground disturbance or soil disturbing activities that can potentially generate pollutants in storm water runoff. The use of an automated database system, such as GIS, is highly recommended. The inventory must include:

(a) Relevant contact information for each site (e.g., name, address, phone, and email for the owner and contractor);

(b) The basic site information including location (address and hydrologic subarea), Waste Discharge Identification (WDID) number (if applicable), size of the site, and approximate area of disturbance;

(c) Whether or not the site is considered a high threat to water quality, as defined in Provision E.4.b.(2) below;

(d) The project start and completion dates;

(e) The required inspection frequency, as defined in the Copermittee's jurisdictional runoff management program document;

(f) The date the Copermittee accepted or approved the pollution control plan, construction BMP plan, and/or erosion and sediment control plan; and

(g) Whether or not there are ongoing enforcement actions administered to the site.

(2) Each Copermittee must identify all construction sites within its jurisdiction that represent a high threat to downstream surface water quality. The designation of construction sites as high threat to water quality must consider the following:

(a) Sites located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(b) Sites located within the same hydrologic subarea and tributary to a water body segment listed as impaired for sediment on the CWA section 303(d) List;

(c) Sites located within, directly adjacent to, or discharging directly to a receiving water within an ESA; and

(d) Other sites determined by the Copermittees or the San Diego Water Board as a high threat to water quality.

c. Construction Site BMP Implementation

Each Copermittee must implement, or require the implementation of effective BMPs to reduce discharges of pollutants in storm water from construction sites to the MEP, and effectively prohibit non-storm water discharges from construction sites into the MS4. These BMPs must be site specific, seasonally appropriate, and construction phase appropriate. BMPs must be implemented at each construction site year round. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30). Copermittees must implement, or require the implementation of, BMPs in the following categories:

(1) Project Planning;

(2) Good Site Management "Housekeeping", including waste management;

(3) Non-storm Water Management;

(4) Erosion Control;

(5) Sediment Control;

(6) Run-on and Run-off Control; and

(7) Active/Passive Sediment Treatment Systems, where applicable.

d. CONSTRUCTION SITE INSPECTIONS

Each Copermittee must conduct construction site inspections to require and confirm compliance with its local permits and applicable local ordinances, and the requirements of this Order. Priority for site inspections must consider threat to water quality pursuant to Provision E.4.b as well as the nature of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) Inspection Frequency

(a) Each Copermittee must conduct inspections at all inventoried sites, including high threat to water quality sites, at an appropriate frequency for each phase of construction to confirm the site reduces the discharge of pollutants in storm water from construction sites to the MEP, and effectively prohibits non-storm water discharges from entering the MS4.

(b) Each Copermittee must establish appropriate inspection frequencies for high threat to water quality sites, and all other sites, for each phase of construction. Inspection frequencies appropriate for addressing the highest water quality priorities identified in the Water Quality Improvement Plan, and for complying with the requirements of this Order must be identified in each Copermittee's jurisdictional runoff management program document.

(c) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to require and confirm site compliance with its local permits and applicable local ordinances, and the requirements of this Order.

(2) Inspection Content

Inspections of construction sites by the Copermittee must include, at a minimum:

(a) Verification of coverage under the Construction General Permit (Notice of Intent (NOI) and/or WDID number) during initial inspections, when applicable;

(b) Assessment of compliance with its local permits and applicable local ordinances related to pollution prevention, including the implementation and maintenance of applicable BMPs;

(c) Assessment of BMP adequacy and effectiveness;

(d) Visual observations of actual non-storm water discharges;

(e) Visual observations of actual or potential discharge of sediment and/or construction related materials from the site;

(f) Visual observations of actual or potential illicit connections; and

(g) If any violations are found and BMP corrections are needed, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

(3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried construction sites. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

(a) Site name, location (address and hydrologic subarea), and WDID number (if applicable);

(b) Inspection date;

(c) Approximate amount of rainfall since last inspection;

(d) Description of problems observed with BMPs and indication of need for BMP addition/repair/replacement and any scheduled re-inspection, and date of re-inspection;

(e) Descriptions of any other specific inspection comments which must, at a minimum, include rationales for longer compliance time;

(f) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and

(g) Resolution of problems noted and date problems fixed.

e. CONSTRUCTION SITE ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all its inventoried construction sites, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

5. Existing Development Management

Each Copermittee must implement an existing development management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and includes, at a minimum, the following requirements:

a. EXISTING DEVELOPMENT INVENTORY AND TRACKING

Each Copermittee must maintain, and update at least annually, a watershed-based inventory of the existing development within its jurisdiction that may discharge a pollutant load to and from the MS4. The use of an automated database system, such as GIS, is highly recommended. The inventory must, at a minimum, include:

(1) Name, location (hydrological subarea and address, if applicable) of the following types of existing development with its jurisdiction:

(a) Commercial facilities or areas;

(b) Industrial facilities;

(c) Municipal facilities, including:

(i) MS4 and related structures;[33]

(ii) Roads, streets, and highways;

(iii) Parking facilities;

(iv) Municipal airfields;

(v) Parks and recreation facilities;

[33] The inventory may refer to the MS4 map required to be maintained pursuant to Provision E.2.b.(1).

(vi) Flood management facilities, flood control devices and structures;

(vii) Operating or closed municipal landfills;

(viii) Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewer collection systems;

(ix) Corporate yards, including maintenance and storage yards for materials, waste, equipment, and vehicles;

(x) Hazardous waste collection facilities;

(xi) Other treatment, storage or disposal facilities for municipal waste; and

(xii) Other municipal facilities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(d) Residential areas, which may be designated by one or more of the following:

(i) Residential management area;

(ii) Drainage basin or area;

(iii) Land use (e.g., single family, multi-family, rural);

(iv) Neighborhood;

(v) Common Interest Area;

(vi) Home Owner Association;

(vii) Mobile home park; and/or

(viii) Other designations accepted by the San Diego Water Board Executive Officer.

(2) A description of the facility or area, including the following information:

(a) Classification as commercial, industrial, municipal, or residential;

(b) Status of facility or area as active or inactive;

(c) Identification if a business is a mobile business;

(d) SIC Code or NAICS Code, if applicable;

(e) Industrial General Permit NOI and/or WDID number, if applicable;

(f) Identification if a residential area is or includes a Common Interest Area / Home Owner Association, or mobile home park;

(g) Identification of pollutants generated and potentially generated by the facility or area;

(h) Whether the facility or area is adjacent to an ESA;

(i) Whether the facility or area is tributary to and within the same hydrologic subarea as a water body segment listed as impaired on the CWA section 303(d) List and generates pollutants for which the water body segment is impaired; and

(3) An annually updated map showing the location of inventoried existing development, watershed boundaries, and water bodies.

b. EXISTING DEVELOPMENT BMP IMPLEMENTATION AND MAINTENANCE

Each Copermittee must designate a minimum set of BMPs required for all inventoried existing development, including special event venues. The designated minimum BMPs must be specific to facility or area types and pollutant generating activities, as appropriate.

(1) Commercial, Industrial, and Municipal Facilities and Areas

(a) Pollution Prevention

Each Copermittee must require the use of pollution prevention methods by the commercial, industrial, and municipal facilities and areas in its inventoried existing development to address the priorities and strategies in the Water Quality Improvement Plan.

(b) BMP Implementation

Each Copermittee must require the implementation of designated BMPs at commercial facilities and areas, industrial facilities, and implement designated BMPs at municipal facilities in its inventoried existing development.

(c) BMP Operation and Maintenance

(i) Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development.

(ii) Each Copermittee must implement a schedule of operation and maintenance activities for its MS4 and related structures (including

but not limited to catch basins, storm drain inlets, detention basins, etc.), and verify proper operation of all its municipal structural treatment controls designed to reduce pollutants (including floatables) in storm water discharges to or from its MS4s and related drainage structures. Operation and maintenance activities may include, but is not limited to, the following:

[a] Inspections of the MS4 and related structures;
[b] Cleaning of the MS4 and related structures; and
[c] Proper disposal of materials removed from cleaning of the MS4 and related structures.

(iii) Each Copermittee must implement a schedule of operation and maintenance for public streets, unpaved roads, paved roads, and paved highways within its jurisdiction to minimize pollutants that can be discharged in storm water.

(iv) Each Copermittee must implement controls to prevent infiltration of sewage into the MS4 from leaking sanitary sewers. Copermittees that operate both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate seeping sewage from infiltrating the MS4. Copermittees that do not operate both a municipal sanitary sewer system and a MS4 must coordinate with sewering agencies to keep themselves informed of relevant and appropriate maintenance activities and sanitary sewage projects in their jurisdiction that may cause or contribute to seepage of sewage into the MS4.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must require the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from commercial facilities and areas and industrial facilities, and implement BMPs at municipal facilities in its inventoried existing development. Such BMPs must include, as appropriate, educational activities, permits, certifications and other measures for applicators and distributors.

(2) Residential Areas

(a) Pollution Prevention

Each Copermittee must promote and encourage the use of pollution prevention methods, where appropriate, by the residential areas in its inventoried existing development.

(b) BMP Implementation

Each Copermittee must promote and encourage the implementation of designated BMPs at residential areas in its inventoried existing development.

(c) BMP Operation and Maintenance

Each Copermittee must properly operate and maintain, or require the proper operation and maintenance of designated BMPs at residential areas in its inventoried existing development.

(d) Pesticides, Herbicides, and Fertilizers BMPs

Each Copermittee must promote and encourage the implementation of BMPs to reduce pollutants in storm water discharges to the MEP and effectively prohibit non-storm water discharges associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from residential areas in its inventoried existing development.

c. EXISTING DEVELOPMENT INSPECTIONS

Each Copermittee must conduct inspections of inventoried existing development to ensure compliance with applicable local ordinances and permits, and the requirements of this Order.

(1) Inspection Frequency

(a) Each Copermittee must establish appropriate inspection frequencies for inventoried existing development in accordance with the following requirements:

(i) At a minimum, inventoried existing development must be inspected once every five years utilizing one or more of the following methods:

[a] Drive-by inspections by Copermittee municipal and contract staff;
[b] Onsite inspections by Copermittee municipal and contract staff; and/or
[c] Visual inspections of publicly accessible inventoried facilities or areas by volunteer monitoring or patrol programs that have been trained by the Copermittee;

(ii) The frequency of inspections must be appropriate to confirm that BMPs are being implemented to reduce the discharge of pollutants in storm water from the MS4 to the MEP and effectively prohibit non-storm water discharges to the MS4;

(iii) The frequency of inspections must be based on the potential for a facility or area to discharge non-storm water and pollutants in storm water, and should reflect the priorities set forth in the Water Quality Improvement Plan;

(iv) Each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial facilities and areas, industrial facilities, and municipal facilities in its inventoried existing development;[34] and

(v) Inventoried existing development must be inspected by the Copermittee, as needed, in response to valid public complaints.

(b) Based upon inspection findings, each Copermittee must implement all follow-up actions (i.e. education and outreach, re-inspection, enforcement) necessary to require and confirm compliance with its applicable local ordinances and permits and the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

(2) Inspection Content

(a) Inspections of existing development must include, at a minimum:

(i) Visual inspections for the presence of actual non-storm water discharges;

(ii) Visual inspections for the presence of actual or potential discharge of pollutants;

(iii) Visual inspections for the presence of actual or potential illicit connections; and

(iv) Verification that the description of the facility or area in the inventory, required pursuant to Provision E.5.a.(2), has not changed.

(b) Onsite inspections of existing development by the Copermittee must include, at a minimum:

(i) Assessment of compliance with its applicable local ordinances and permits related to non-storm water and storm water discharges and runoff;

(ii) Assessment of the implementation of the designated BMPs;

(iii) Verification of coverage under the Industrial General Permit, when applicable; and

[34] If any commercial, industrial, or municipal facilities or areas require multiple onsite inspections during any given year, those additional inspection may count toward the total annual inspection requirement. This requirement excludes linear municipal facilities (i.e., MS4 linear channels, sanitary sewer collection systems, streets, roads and highways).

(iv) If any problems or violations are found, inspectors must take and document appropriate actions in accordance with the Enforcement Response Plan pursuant to Provision E.6.

(3) Inspection Tracking and Records

Each Copermittee must track all inspections and re-inspections at all inventoried existing development. The Copermittee must retain all inspection records in an electronic database or tabular format, which must be made available to the San Diego Water Board upon request. Inspection records must include, at a minimum:

(a) Name and location of the facility or area (address and hydrologic subarea) consistent with the inventory name and location, pursuant to Provision E.5.a.(1);

(b) Inspection and re-inspection date(s);

(c) Inspection method(s) (i.e. drive-by, onsite);

(d) Observations and findings from the inspection(s);

(e) For onsite inspections of existing development by Copermittee municipal or contract staff, the records must also include, as applicable:

(i) Description of any problems or violations found during the inspection(s);

(ii) Description of enforcement actions issued in accordance with the Enforcement Response Plan pursuant to Provision E.6; and

(iii) The date problems or violations were resolved.

d. EXISTING DEVELOPMENT ENFORCEMENT

Each Copermittee must enforce its legal authority established pursuant to Provision E.1 for all its inventoried existing development, as necessary, to achieve compliance with the requirements of this Order, in accordance with its Enforcement Response Plan pursuant to Provision E.6.

e. RETROFITTING AND REHABILITATING AREAS OF EXISTING DEVELOPMENT

(1) Retrofitting Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to retrofit areas of existing development within its jurisdiction to address identified sources of pollutants and/or stressors that

contribute to the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

(a) Each Copermittee must identify areas of existing development as candidates for retrofitting, focusing on areas where retrofitting will address pollutants and/or stressors that contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(b) Candidates for retrofitting projects may be utilized to reduce pollutants that may be discharged in storm water from areas of existing development, and/or address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters;

(c) Each Copermittee must develop a strategy to facilitate the implementation of retrofitting projects in areas of existing development identified as candidates;

(d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance retrofitting projects; and

(e) Where retrofitting projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional retrofitting projects (i.e. projects that can receive and/or treat storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment) adjacent to and/or downstream of the areas of existing development.

(2) Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development

Each Copermittee must describe in its jurisdictional runoff management program document, a program to rehabilitate streams, channels, and/or habitats in areas of existing development within its jurisdiction to address the highest priority water quality conditions in the Watershed Management Area. The program must be implemented as follows:

(a) Each Copermittee must identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation, focusing on areas where stream, channel, and/or habitat rehabilitation projects will address the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(b) Candidates for stream, channel, and/or habitat rehabilitation projects may be utilized to address storm water runoff flows and durations from areas of existing development that cause or contribute to hydromodification in receiving waters, rehabilitate channelized or hydromodified streams, restore wetland and riparian habitat, restore watershed functions, and/or restore beneficial uses of receiving waters;

(c) Each Copermittee must develop a strategy to facilitate the implementation of stream, channel, and/or habitat rehabilitation projects in areas of existing development identified as candidates;

(d) Each Copermittee should identify areas of existing development where Priority Development Projects may be allowed or should be encouraged to implement or contribute toward the implementation of alternative compliance stream, channel, and/or habitat rehabilitation projects; and

(e) Where stream, channel, and/or habitat rehabilitation projects within specific areas of existing development are determined to be infeasible to address the highest priority water quality conditions in the Water Quality Improvement Plan, the Copermittee should collaborate and cooperate with other Copermittees and/or entities in the Watershed Management Area to identify, develop, and implement regional stream, channel, and/or habitat rehabilitation projects (i.e. projects that can receive storm water from one or more areas of existing development and will result in a net benefit to water quality and the environment).

6. Enforcement Response Plans

Each Copermittee must develop and implement an Enforcement Response Plan as part of its jurisdictional runoff management program document. The Enforcement Response Plan must describe the applicable approaches and options to enforce its legal authority established pursuant to Provision E.1, as necessary, to achieve compliance with the requirements of this Order. The Enforcement Response Plan must be in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include the following:

a. Enforcement Response Plan Components

The Enforcement Response Plan must include the following individual components:

(1) Illicit Discharge Detection and Elimination Enforcement Component;

(2) Development Planning Enforcement Component;

(3) Construction Management Enforcement Component; and

(4) Existing Development Enforcement Component.

b. Enforcement Response Approaches and Options

Each component of the Enforcement Response Plan must describe the enforcement response approaches that the Copermittee will implement to compel compliance with its statutes, ordinances, permits, contracts, orders, or similar means, and the requirements of this Order. The description must include the protocols for implementing progressively stricter enforcement responses. The enforcement response approaches must include appropriate sanctions to compel compliance, including, at a minimum, the following tools or their equivalent:

(1) Verbal and written notices of violation;

(2) Cleanup requirements;

(3) Fines;

(4) Bonding requirements;

(5) Administrative and criminal penalties;

(6) Liens;

(7) Stop work orders; and

(8) Permit and occupancy denials.

c. Correction of Violations

(1) Violations must be corrected in a timely manner with the goal of correcting the violations within 30 calendar days after the violations are discovered, or prior to the next predicted rain event, whichever is sooner.

(2) If more than 30 calendar days are required to achieve compliance, then a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

d. Escalated Enforcement

(1) The Enforcement Response Plan must include a definition of "escalated enforcement." Escalated enforcement must include any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan. Escalated enforcement may be defined differently for development planning, construction sites, commercial facilities or areas, industrial facilities, municipal facilities, and residential areas.

(2) Where the Copermittee determines escalated enforcement is not required, a rationale must be recorded in the applicable electronic database or tabular system used to track violations.

(3) Escalated enforcement actions must continue to increase in severity, as necessary, to compel compliance as soon as possible.

e. Reporting of Non-Compliant Sites

(1) Each Copermittee must notify the San Diego Water Board in writing within five (5) calendar days of issuing escalated enforcement (as defined in the Copermittee's Enforcement Response Plan) to a construction site that poses a significant threat to water quality as a result of violations or other non-compliance with its permits and applicable local ordinances, and the requirements of this Order. Written notification may be provided electronically by email to the appropriate San Diego Water Board staff.

(2) Each Copermittee must notify the San Diego Water Board of any persons required to obtain coverage under the statewide Industrial General Permit and Construction General Permit and failing to do so, within five (5) calendar days from the time the Copermittee become aware of the circumstances. Written notification may be provided electronically by email to RB9_Nonfilers@waterboards.ca.gov.

7. Public Education and Participation

Each Copermittee must implement, individually or with other Copermittees, a public education and participation program in accordance with the strategies identified in the Water Quality Improvement Plan to promote and encourage the development of programs, management practices, and behaviors that reduce the discharge of pollutants in storm water to the MEP, prevent controllable non-storm water discharges from entering the MS4, and protect water quality standards in receiving waters. The public education and participation program must be implemented in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1) and include, at a minimum, the following requirements:

a. Public Education

The public education program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

(1) Educational activities, public information activities, and other appropriate outreach activities intended to reduce pollutants associated with the application of pesticides, herbicides and fertilizer and other pollutants of

concern in storm water discharges to and from its MS4 to the MEP, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed to address the highest priority water quality conditions identified in the Water Quality Improvement Plan;

(2) Educational activities, public information activities, and other appropriate outreach activities to facilitate the proper management and disposal of used oil and toxic materials; and

(3) Appropriate education and training measures for specific target audiences, such as construction site operators, residents, underserved target audiences and school-aged children, as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed, based on high risk behaviors and pollutants of concern.

b. PUBLIC PARTICIPATION

The public participation program component implemented within the Copermittee's jurisdiction must include, at a minimum, the following:

(1) A process for members of the public to participate in updating the highest priority water quality conditions, numeric goals, and water quality improvement strategies in the Water Quality Improvement Plan;

(2) Opportunities for members of the public to participate in providing the Copermittee recommendations for improving the effectiveness of the water quality improvement strategies implemented within its jurisdiction; and

(3) Opportunities for members of the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters.

8. Fiscal Analysis

a. Each Copermittee must secure the resources necessary to meet all the requirements of this Order.

b. Each Copermittee must conduct an annual fiscal analysis of its jurisdictional runoff management program in its entirety. The fiscal analysis must include the following:

(1) Identification of the various categories of expenditures necessary to implement the requirements of this Order, including a description of the specific capital, operation and maintenance, and other expenditure items to be accounted for in each category of expenditures;

(2) The staff resources needed and allocated to meet the requirements of this Order, including any development, implementation, and enforcement activities required;

(3) The estimated expenditures for Provisions E.8.b.(1) and E.8.b.(2) for the current fiscal year; and

(4) The source(s) of funds that are proposed to meet the necessary expenditures described in Provisions E.8.b.(1) and E.8.b.(2), including legal restrictions on the use of such funds, for the current fiscal year and next fiscal year.

c. Each Copermittee must submit a summary of the annual fiscal analysis with each Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3).

d. Each Copermittee must provide the documentation used to develop the summary of the annual fiscal analysis upon request by the San Diego Water Board.

F. REPORTING

The purpose of this provision is to determine and document compliance with the requirements set forth in this Order. The goal of reporting is to communicate to the San Diego Water Board and the people of the State of California the implementation status of each jurisdictional runoff management program and compliance with the requirements of this Order. This goal is to be accomplished through the submittal of specific deliverables to the San Diego Water Board by the Copermittees.

1. Water Quality Improvement Plans

The Copermittees for each Watershed Management Area must develop and submit the Water Quality Improvement Plan in accordance with the following requirements:

a. WATER QUALITY IMPROVEMENT PLAN DEVELOPMENT

Each Water Quality Improvement Plan must be developed in accordance with the following process:

(1) Public Participation Process

The Copermittees must implement a public participation process to solicit data, information, and recommendations to be utilized in the development of the Water Quality Improvement Plan. The public participation process must include the following:

(a) The Copermittees must develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. The schedule may be adjusted as necessary by the Copermittees, provided the public is provided timely notification of the changes to the schedule.

(b) The Copermittees must form a Water Quality Improvement Consultation Panel to provide recommendations during the development of the Water Quality Improvement Plan. The Water Quality Improvement Consultation Panel must consist of at least the following members:

(i) A representative of the San Diego Water Board;

(ii) A representative of the environmental community familiar with the water quality conditions of concern of the receiving waters in the Watershed Management Area, preferably from an environmental interest group associated with a water body within the Watershed Management Area; and

(iii) A representative of the development community familiar with the opportunities and constraints for implementing structural BMPs,

retrofitting projects, and stream, channel or habitat rehabilitation projects in the Watershed Management Area, preferably with relevant engineering, hydrology, and/or geomorphology experience in the Watershed Management Area.

(c) The Copermittees must coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

(2) Priority Water Quality Conditions

(a) The Copermittees must solicit data, information and recommendations from the public to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area.

(b) The Copermittees must review the priority water quality conditions the Copermittees plan on including in the Water Quality Improvement Plan with the Water Quality Improvement Consultation Panel to receive recommendations or concurrence.

(c) The Copermittees must consider revisions to the priority water quality conditions based on recommendations from the Water Quality Improvement Consultation Panel.

(d) The Copermittees must include all the potential water quality improvement strategies identified by the public and the Water Quality Improvement Consultation Panel with the submittal of the priority water quality conditions to the San Diego Water Board.

(e) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.2 to the San Diego Water Board as early as 6 months and no later than 12 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed priority water quality conditions and potential water quality improvement strategies for public review and comment for a minimum of 30 days.

(f) The Copermittees must consider revisions to the priority water quality conditions and potential water quality improvement strategies developed pursuant to Provision B.2 based on public comments received by the close of the comment period.

(3) Water Quality Improvement Goals, Strategies and Schedules

(a) The Copermittees must solicit recommendations from the public on potential numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and recommendations on the strategies that should be implemented to achieve the potential numeric goals.

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel and consider revisions to the following items based on the Panel's recommendations:

(i) The numeric goals and schedules the Copermittees propose to include in the Water Quality Improvement Plan;

(ii) The water quality improvement strategies and schedules the Copermittees propose to implement in the Watershed Management Area and include in the Water Quality Improvement Plan; and

(iii) If the Copermittees choose to implement Provision B.3.b.(4), the results of the Watershed Management Area Analysis the Copermittees proposed to incorporate into the Water Quality Improvement Plan.

(c) The Copermittees must submit the Water Quality Improvement Plan requirements of Provision B.3 to the San Diego Water Board as early as 9 months and no later than 18 months after the commencement of coverage under this Order. Upon receipt, the San Diego Water Board will issue a public notice and release the proposed water quality improvement goals, strategies and schedules for public review and comment for a minimum of 30 days.

(d) The Copermittees must consider revisions to the water quality improvement goals, strategies and schedules developed pursuant to Provision B.3 based on public comments received by the close of the comment period.

b. WATER QUALITY IMPROVEMENT PLAN SUBMITTAL AND IMPLEMENTATION

(1) Within 24 months after the commencement of coverage under this Order, the Copermittees for each Watershed Management Area must submit a complete Water Quality Improvement Plan in accordance with the requirements of Provision B of this Order to the San Diego Water Board. The San Diego Water Board will issue a public notice and release the Water Quality Improvement Plan for public review and comment for a minimum of 30 days.

(2) The Copermittees must consider revisions to the Water Quality Improvement Plan based on written comments received by the close of the public comment period.

(3) The Copermittees must promptly submit any revisions to the Water Quality Improvement Plan to the San Diego Water Board no later than 60 days after the close of the public comment period.

(4) If issues concerning the Water Quality Improvement Plan are resolved informally through discussions among the Copermittees, the San Diego Water Board and interested parties, the San Diego Water Board Executive Officer may provide written notification of acceptance to the Copermittees that the Water Quality Improvement Plan meets the requirements of Provision B. However, if the Executive Officer determines that significant issues with the Water Quality Improvement Plan remain, the matter will be scheduled for San Diego Water Board consideration at a public meeting.

(5) The Copermittees must commence with implementation of the Water Quality Improvement Plan, in accordance with the water quality improvement strategies and schedules therein, upon written notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

(6) During implementation of the Water Quality Improvement Plan the Copermittees must correct any deficiencies in the Plan identified by the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report following a request by the Board to do so.

(7) The Water Quality Improvement Plan must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of receiving notification of acceptance with the Water Quality Improvement Plan by the San Diego Water Board Executive Officer.

2. Updates

a. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATES

Each Copermittee must update its jurisdictional runoff management program document in accordance with the following requirements:

(1) Each Copermittee is encouraged to seek public and key stakeholder participation and comments, as early and often as possible during the process of developing updates to its jurisdictional runoff management program document;

(2) Each Copermittee must update its jurisdictional runoff management program document to incorporate the requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the jurisdictional runoff management program document based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;

(3) Each Copermittee must submit updates to its jurisdictional runoff management program, with the supporting rationale for the modifications, either in the Water Quality Improvement Plan Annual Report required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b;

(4) The Copermittee must revise proposed modifications to its jurisdictional runoff management program as directed by the San Diego Water Board Executive Officer; and

(5) Updated jurisdictional runoff management program documents must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of submitting the Water Quality Improvement Plan Annual Report.

b. BMP Design Manual Updates

Each Copermittee must update its BMP Design Manual in accordance with the following requirements:

(1) Each Copermittee must update its BMP Design Manual to incorporate the requirements of Provisions E.3.a-d concurrent with the submittal of the Water Quality Improvement Plan. Each Copermittee must correct any deficiencies in the BMP Design Manual based on comments received from the San Diego Water Board in the updates submitted with the Water Quality Improvement Plan Annual Report;

(2) Any future updates to the BMP Design Manual made after its update pursuant to Provision F.2.b.(1) is completed must be consistent with the requirements of Provisions E.3.a-d and must be submitted as part of the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b; and

(3) BMP Design Manuals must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of completing the update.

(4) If the San Diego Water Board amends Provisions E.3.a-d during the permit term but after the Copermittee has completed the update pursuant to Provision F.2.b.(1), the Copermittee must revise its BMP Design Manual to

incorporate the amended Provision E.3.a-d requirements as soon as possible but not later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer. Under these circumstances, the effective date of the BMP Design Manual is no later than 90 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer.

c. WATER QUALITY IMPROVEMENT PLAN UPDATES

(1) The Water Quality Improvement Plans must be updated in accordance with the following process:

(a) The Copermittees must develop and implement a public participation process to obtain data, information and recommendations for updating the Water Quality Improvement Plan. The public participation process must provide for a publicly available and noticed schedule of opportunities for the public to participate and provide comments during the development of updates to the Water Quality Improvement Plan;

(b) The Copermittees must consult with the Water Quality Improvement Consultation Panel on proposed updates of the Water Quality Improvement Plan, and consider the Water Quality Improvement Consultation Panel's recommendations in finalizing the proposed updates;

(c) The Copermittees for each Watershed Management Area must submit 1) proposed updates to the Water Quality Improvement Plan and supporting rationale, and 2) recommendations received from the public and the Water Quality Improvement Consultation Panel and the rationale for the requested updates, either in the Water Quality Improvement Plan Annual Reports required pursuant to Provision F.3.b.(3), or as part of the Report of Waste Discharge required pursuant to Provision F.5.b. The updates submitted will be deemed accepted for inclusion in the Water Quality Improvement Plan ninety (90) days after submission unless otherwise directed in writing by the San Diego Water Board Executive Officer;

(d) The Copermittees must revise the requested updates as directed by the San Diego Water Board Executive Officer; and

(e) Updated Water Quality Improvement Plans must be made available on the Regional Clearinghouse required pursuant to Provision F.4 within 30 days of acceptance of the requested updates by the San Diego Water Board.

(2) No later than six months following Office of Administrative Law and USEPA approval of any TMDL Basin Plan amendment with wasteload allocations (WLAs) assigned to the Copermittees during the term of this Order, the

Copermittees must initiate an update to the applicable Water Quality Improvement Plans in accordance with Provision F.1 or Provision F.2.c.(1) to incorporate the requirements of the TMDL WLAs.

3. Progress Reporting

a. Progress Report Presentations

The Copermittees for each Watershed Management Area must periodically appear before the San Diego Water Board, as requested by the Board, to provide progress reports on the implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs.

b. Annual Reports

(1) Transitional Jurisdictional Runoff Management Program Annual Reports

(a) Each Copermittee must complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted.

(b) Each Copermittee must submit the information on the Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) specific to the area within its jurisdiction in each Watershed Management Area.

(c) In addition to submitting the Jurisdictional Runoff Management Program Annual Report Form during the transitional reporting period, each Copermittee may continue to utilize and submit the jurisdictional runoff management program annual reporting format of its previous NPDES permit until the first Water Quality Improvement Plan Annual Report is required to be submitted.

(2) Transitional Monitoring and Assessment Program Annual Reports

The Copermittees for each Watershed Management Area must submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted under this Order. The Transitional

Monitoring and Assessment Program Annual Reports must include:

(a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1.a and D.2.a, summarized and presented in tabular and graphical form; and

(b) The findings from the assessments required pursuant to Provisions D.4.a.(1)(a), D.4.b.(1)(a)(i), D.4.b.(2)(a)(i).

(3) Water Quality Improvement Plan Annual Reports

The Copermittees for each Watershed Management Area must submit a Water Quality Improvement Plan Annual Report for each reporting period no later than January 31 of the following year. The annual reporting period consists of two different periods: 1) July 1 to June 30 of the following year for the jurisdictional runoff management programs, 2) October 1 to September 30 of the following year for the monitoring and assessment programs. The Water Quality Improvement Plan Annual Reports must be made available on the Regional Clearinghouse required pursuant to Provision F.4. Each Annual Report must include the following:

(a) The receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, summarized and presented in tabular and graphical form;

(b) The progress of the special studies required pursuant to Provision D.3, and the findings, interpretations and conclusions of a special study, or each phase of a special study, upon its completion;

(c) The findings, interpretations and conclusions from the assessments required pursuant to Provision D.4;

(d) The progress of implementing the Water Quality Improvement Plan, including, but not limited to, the following:

(i) The progress toward achieving the interim and final numeric goals for the highest water quality priorities for the Watershed Management Area;

(ii) The water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods;

(iii) The water quality improvement strategies planned for implementation during the next reporting period;

(iv) Proposed modifications to the water quality improvement strategies, the public comments received and the supporting rationale for the

proposed modifications;

(v) Previous modifications or updates incorporated into the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document and implemented by the Copermittees in the Watershed Management Area; and

(vi) Proposed modifications or updates to the Water Quality Improvement Plan and/or each Copermittee's jurisdictional runoff management program document;

(e) A completed Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D to this Order or a revised form accepted by the San Diego Water Board) for each Copermittee in the Watershed Management Area, certified by a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative; and

(f) Each Copermittee must provide any data or documentation utilized in developing the Water Quality Improvement Plan Annual Report upon request by the San Diego Water Board. Any Copermittee monitoring data utilized in developing the Water Quality Improvement Plan Annual Report must be uploaded to the California Environmental Data Exchange Network (CEDEN).[35] Any Copermittee monitoring and assessment data utilized in developing the Water Quality Improvement Plan Annual Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

c. Regional Monitoring and Assessment Report

(1) The Copermittees must submit a Regional Monitoring and Assessment Report no later than 180 days prior to the expiration date of this Order. The Regional Monitoring and Assessment Report may be submitted as part of the Report of Waste Discharge required pursuant to Provision F.5.b. In preparing the report the Copermittees must consider the receiving water and MS4 outfall discharge monitoring data collected pursuant to Provisions D.1 and D.2, and the findings, interpretations, and conclusions from the assessments required pursuant to Provision D.4. Based on these considerations the report must assess the following:

[35] Data must be uploaded to CEDEN Southern California Regional Data Center (http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx) using the templates provided on the CEDEN website.

(a) The beneficial uses of the receiving waters within the San Diego Region that are supported and not adversely affected by the Copermittees' MS4 discharges;

(b) The beneficial uses of the receiving waters within the San Diego Region that are adversely impacted by the Copermittees' MS4 discharges;

(c) The progress toward protecting the beneficial uses in the receiving waters within the San Diego Region from the Copermittees' discharges; and

(d) Pollutants or conditions of emerging concern that may impact beneficial uses in the receiving waters within the San Diego Region.

(2) The Regional Monitoring and Assessment Report must include recommendations for improving the implementation and assessment of the Water Quality Improvement Plans and jurisdictional runoff management programs.

(3) Each Copermittee must provide any data or documentation utilized in developing the Regional Monitoring and Assessment Report upon request by the San Diego Water Board. Any Copermittee monitoring and assessment data utilized in developing the Regional Monitoring and Assessment Report must be available for access on the Regional Clearinghouse required pursuant to Provision F.4.

4. Regional Clearinghouse

The Copermittees must develop, update, and maintain an internet-based Regional Clearinghouse that is made available to the public no later than 18 months after the effective date of this Order.[36]

a. The Copermittees, through the Regional Clearinghouse, must make the following documents and data available for access, and organized by Watershed Management Area. The documents and data may be linked to other internet-based data portals and databases where the original documents are stored:

(1) Water Quality Improvement Plan for the Watershed Management Area, and all updated versions with date of update;

(2) Annual Reports for the Watershed Management Area;

(3) Jurisdictional Runoff Management Program document for each Copermittee within the Watershed Management Area, and all updated versions with date of update;

[36] The Copermittees may develop, update and maintain the clearinghouse(s) of other Copermittees or agencies.

(4) BMP Design Manual for each Copermittee within the Watershed Management Area, and all updated versions with date of update;

(5) Reports from special studies (e.g. source identification, BMP effectiveness assessment) conducted in the Watershed Management Area;

(6) Monitoring data collected pursuant to Provision D for each Watershed Management Area must be uploaded to CEDEN,[37] with links to the uploaded data; and

(7) Available GIS data, layers, and/or shapefiles used to develop the maps generated and maintained by the Copermittees for the Water Quality Improvement Plans, Annual Reports, and jurisdictional runoff management program documents.

b. The Copermittees, through the Regional Clearinghouse, must make the following information and documents available for access:

(1) Contact information (point of contact, phone number, email address, and mailing address) for each Copermittee;

(2) Public hotline number for reporting non-storm water and illicit discharges for each Copermittee;

(3) Email address for reporting non-storm water and illicit discharges for each Copermittee;

(4) Link to each Copermittee's website, if available, where the public may find additional information about the Copermittee's storm water management program and for requesting records for the implementation of its program;

(5) Information about opportunities for the public to participate in programs and/or activities that can result in the prevention or elimination of non-storm water discharges to the MS4, reduction of pollutants in storm water discharges from the MS4, and/or protection of the quality of receiving waters; and

(6) Reports from regional monitoring programs in which the Copermittees participate (e.g. Southern California Monitoring Coalition, Southern California Coastal Water Research Project Bight Monitoring);

(7) Regional Monitoring and Assessment Reports; and

(8) Any other information, data, and documents the Copermittees determine as appropriate for making available to the public.

[37] Data must be uploaded to CEDEN Southern California Regional Data Center (http://www.sccwrp.org/Data/DataSubmission/SouthernCaliforniaRegionalDataCenter.aspx) using the templates provided on the CEDEN website.

5. Report of Waste Discharge

The Copermittees subject to the requirements of this Order must submit to the San Diego Water Board a complete Report of Waste Discharge as an application for the re-issuance of this Order and NPDES permit. The Report of Waste Discharge must be submitted no later than 180 days in advance of the expiration date of this Order. The Report of Waste Discharge must contain the following minimum information:

a. Names and addresses of the Copermittees;

b. Names and titles of the primary contacts of the Copermittees;

c. Proposed changes to the Copermittees' Water Quality Improvement Plans and the supporting justification;

d. Proposed changes to the Copermittees' jurisdictional runoff management programs and the supporting justification;

e. Any other information necessary for the re-issuance of this Order;

f. Any information to be included as part of the Report of Waste Discharge pursuant to the requirements of this Order; and

g. Any other information required by federal regulations for NPDES permit reissuance.

6. Reporting Provisions

Each Copermittee must comply with all the reporting and recordkeeping provisions of the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

G. PRINCIPAL WATERSHED COPERMITTEE RESPONSIBILITIES

1. The Copermittees within each Watershed Management Area must designate a Principal Watershed Copermittee and notify the San Diego Water Board of the name of the Principal Watershed Copermittee. An individual Copermittee should not be designated a Principal Watershed Copermittee for more than two Watershed Management Areas. The notification may be submitted with the Water Quality Improvement Plan required pursuant to Provision F.1 of this Order.

2. The Principal Watershed Copermittee is responsible for, at a minimum, the following:

   a. Serving as liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues, and when necessary and appropriate, representing the Copermittees in the Watershed Management Area before the San Diego Water Board;

   b. Facilitating the development of the Water Quality Improvement Plan in accordance with the requirements of Provision B of this Order;

   c. Coordinating the submittal of the deliverables required by Provisions F.1, F.2, F.3.a, and F.3.b of this Order; and

   d. Coordinating and developing, with the other Principal Watershed Copermittees, the requirements of Provisions F.3.c, F.4, and F.5.b of this Order.

3. The Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order. Each Copermittee within the Watershed Management Area is responsible for complying with the requirements of this Order.

H. MODIFICATION OF ORDER

1. Modifications of the Order may be initiated by the San Diego Water Board or by the Copermittees. Requests by Copermittees must be made to the San Diego Water Board.

2. Minor modifications to the Order may be made by the San Diego Water Board where the proposed modification complies with all the prohibitions and limitations, and other requirements of this Order.

3. This Order may also be re-opened and modified, revoked and, reissued or terminated in accordance with the provisions of 40 CFR 122.44, 122.62 to 122.64, and 124.5. Causes for taking such actions include, but are not limited to, failure to comply with any condition of this Order and permit, and endangerment to human health or the environment resulting from the permitted activity.

4. This Order may be re-opened for modification for cause including but not limited to the following:

   a. Any of the TMDLs in Attachment E to this Order are amended in the Basin Plan by San Diego Water Board, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA;

   b. The Basin Plan is amended by the San Diego Water Board to incorporate a new TMDL, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA; or

   c. Updating or revising the monitoring and reporting requirements is determined to be necessary, at the discretion of the San Diego Water Board. Such modification(s) may include, but is (are) not limited to, revision(s) to: (i) implement recommendations from Southern California Coastal Water Research Project (SCCWRP), (ii) develop, refine, implement, and/or coordinate a regional monitoring program, (iii) develop and implement improved monitoring and assessment programs in keeping with San Diego Water Board Resolution No. R9-2012-0069, Resolution in Support of a Regional Monitoring Framework, and/or (iv) add provisions to require the Copermittees to evaluate and provide information on cost and values of the monitoring and reporting program.

I. STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

Each Copermittee must comply with all the Standard Permit Provisions and General Provisions contained in Attachment B to this Order.

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ATTACHMENT A

DISCHARGE PROHIBITIONS AND SPECIAL PROTECTIONS

1. Basin Plan Waste Discharge Prohibitions

California Water Code Section 13243 provides that a Regional Water Board, in a water quality control plan, may specify certain conditions or areas where the discharge of waste or certain types of waste is not permitted. The following waste discharge prohibitions in the Water Quality Control Plan for the San Diego Basin (Basin Plan) are applicable to any person, as defined by Section 13050(c) of the California Water Code, who is a citizen, domiciliary, or political agency or entity of California whose activities in California could affect the quality of waters of the state within the boundaries of the San Diego Region.

1. The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code Section 13050, is prohibited.

2. The discharge of waste to land, except as authorized by waste discharge requirements or the terms described in California Water Code Section 13264 is prohibited.

3. The discharge of pollutants or dredged or fill material to waters of the United States except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit or a dredged or fill material permit (subject to the exemption described in California Water Code Section 13376) is prohibited.

4. Discharges of recycled water to lakes or reservoirs used for municipal water supply or to inland surface water tributaries thereto are prohibited, unless this San Diego Water Board issues a NPDES permit authorizing such a discharge; the proposed discharge has been approved by the State Department of Health Services (DHS) and the operating agency of the impacted reservoir; and the discharger has an approved fail-safe long-term disposal alternative.

5. The discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited. Allowances for dilution may be made at the discretion of the San Diego Water Board. Consideration would include streamflow data, the degree of treatment provided and safety measures to ensure reliability of facility performance. As an example, discharge of secondary effluent would probably be permitted if streamflow provided 100:1 dilution capability.

6. The discharge of waste in a manner causing flow, ponding, or surfacing on lands not owned or under the control of the discharger is prohibited, unless the discharge is authorized by the San Diego Water Board.

7. The dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters in any manner which may permit its being transported into the waters, is prohibited unless authorized by the San Diego Water Board.

8. Any discharge to a storm water conveyance system that is not composed entirely of "*storm water*" is prohibited unless authorized by the San Diego Water Board. [The federal regulations, 40 CFR 122.26(b)(13), define storm water as storm water runoff, snow melt runoff, and surface runoff and drainage. 40 CFR 122.26(b)(2) defines an illicit discharge as any discharge to a storm water conveyance system that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities.] [§122.26 amended at 56 FR 56553, November 5, 1991; 57 FR 11412, April 2, 1992].

9. The unauthorized discharge of treated or untreated sewage to waters of the state or to a storm water conveyance system is prohibited.

10. The discharge of industrial wastes to conventional septic tank/subsurface disposal systems, except as authorized by the terms described in California Water Code Section 13264, is prohibited.

11. The discharge of radioactive wastes amenable to alternative methods of disposal into the waters of the state is prohibited.

12. The discharge of any radiological, chemical, or biological warfare agent into waters of the state is prohibited.

13. The discharge of waste into a natural or excavated site below historic water levels is prohibited unless the discharge is authorized by the San Diego Water Board.

14. The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited.

15. The discharge of treated or untreated sewage from vessels to Mission Bay, Oceanside Harbor, Dana Point Harbor, or other small boat harbors is prohibited.

16. The discharge of untreated sewage from vessels to San Diego Bay is prohibited.

17. The discharge of treated sewage from vessels to portions of San Diego Bay that are less than 30 feet deep at mean lower low water (MLLW) is prohibited.

18. The discharge of treated sewage from vessels, which do not have a properly functioning US Coast Guard certified Type I or Type II marine sanitation device, to portions of San Diego Bay that are greater than 30 feet deep at mean lower low water (MLLW) is prohibited.

2. Attachment B to State Water Board Resolution 2012-0012, as amended by State Water Board Resolution No. 2012-0031.

Special Protections for Areas of Special Biological Significance (ASBS), Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges

I. PROVISIONS FOR POINT SOURCE DISCHARGES OF STORM WATER AND NONPOINT SOURCE WASTE DISCHARGES

The following terms, prohibitions, and special conditions (hereafter collectively referred to as special conditions) are established as limitations on point source storm water and nonpoint source discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in Areas of Special Biological Significance (ASBS), as required for State Water Quality Protection Areas pursuant to California Public Resources Code Sections 36700(f) and 36710(f). These Special Protections are adopted by the State Water Board as part of the California Ocean Plan (Ocean Plan) General Exception.

The special conditions are organized by category of discharge. The State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Water Boards) will determine categories and the means of regulation for those categories [e.g., Point Source Storm Water National Pollutant Discharge Elimination System (NPDES) or Nonpoint Source].

A. PERMITTED POINT SOURCE DISCHARGES OF STORM WATER

1. General Provisions for Permitted Point Source Discharges of Storm Water

   a. Existing storm water discharges into an ASBS are allowed only under the following conditions:

      (1) The discharges are authorized by an NPDES permit issued by the State Water Board or Regional Water Board;

      (2) The discharges comply with all of the applicable terms, prohibitions, and special conditions contained in these Special Protections; and

      (3) The discharges:

         (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;

         (ii) Are designed to prevent soil erosion;

         (iii) Occur only during wet weather;

         (iv) Are composed of only storm water runoff.

   b. Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.

   c. The discharge of trash is prohibited.

d. Only discharges from existing storm water outfalls are allowed. Any proposed or new storm water runoff discharge shall be routed to existing storm water discharge outfalls and shall not result in any new contribution of waste to an ASBS (i.e., no additional pollutant loading). "Existing storm water outfalls" are those that were constructed or under construction prior to January 1, 2005. "New contribution of waste" is defined as any addition of waste beyond what would have occurred as of January 1, 2005. A change to an existing storm water outfall, in terms of re-location or alteration, in order to comply with these special conditions, is allowed and does not constitute a new discharge.

e. Non-storm water discharges are prohibited except as provided below:

(1) The term "non-storm water discharges" means any waste discharges from a municipal separate storm sewer system (MS4) or other NPDES permitted storm drain system to an ASBS that are not composed entirely of storm water.

(2) (i) The following non-storm water discharges are allowed, provided that the discharges are essential for emergency response purposes, structural stability, slope stability or occur naturally:

(a) Discharges associated with emergency fire fighting operations.

(b) Foundation and footing drains.

(c) Water from crawl space or basement pumps.

(d) Hillside dewatering.

(e) Naturally occurring groundwater seepage via a storm drain.

(f) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.

(ii) An NPDES permitting authority may authorize non-storm water discharges to an MS4 with a direct discharge to an ASBS only to the extent the NPDES permitting authority finds that the discharge does not alter natural ocean water quality in the ASBS.

(3) Authorized non-storm water discharges shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.

2. Compliance Plans for Inclusion in Storm Water Management Plans (SWMP) and Storm Water Pollution Prevention Plans (SWPPP).

The discharger shall specifically address the prohibition of non-storm water runoff and the requirement to maintain natural water quality for storm water discharges to an ASBS in an ASBS Compliance Plan to be included in its SWMP or a SWPPP, as appropriate to permit type. If a statewide permit includes a SWMP, then the discharger shall prepare a stand-alone compliance plan for ASBS discharges. The ASBS Compliance Plan is subject to approval by the Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (for permits issued by Regional Water Boards).

a. The Compliance Plan shall include a map of surface drainage of storm water runoff, showing areas of sheet runoff, prioritize discharges, and describe any structural Best Management Practices (BMPs) already employed and/or BMPs to be employed in the future. Priority discharges are those that pose the greatest water quality threat and which are identified to require installation of structural BMPs. The map shall also show the storm water conveyances in relation to other features such as service areas, sewage conveyances and treatment facilities, landslides, areas prone to erosion, and waste and hazardous material storage areas, if applicable. The SWMP or SWPPP shall also include a procedure for updating the map and plan when changes are made to the storm water conveyance facilities.

b. The ASBS Compliance Plan shall describe the measures by which all non-authorized non-storm water runoff (e.g., dry weather flows) has been eliminated, how these measures will be maintained over time, and how these measures are monitored and documented.

c. For Municipal Separate Storm Sewer System (MS4s), the ASBS Compliance Plan shall require minimum inspection frequencies as follows:

(1) The minimum inspection frequency for construction sites shall be weekly during rainy season;

(2) The minimum inspection frequency for industrial facilities shall be monthly during the rainy season;

(3) The minimum inspection frequency for commercial facilities (e.g., restaurants) shall be twice during the rainy season; and

(4) Storm water outfall drains equal to or greater than 18 inches (457 mm) in diameter or width shall be inspected once prior to the beginning of the rainy season and once during the rainy season and maintained to remove trash and other anthropogenic debris.

d. The ASBS Compliance Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff, that are necessary to comply with these special conditions, will be achieved through BMPs. Structural BMPs need not be installed if the discharger can document to the satisfaction of the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that such installation would pose a threat to health or safety. BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm shall be designed to achieve on average the following target levels:

(1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or

(2) A 90% reduction in pollutant loading during storm events, for the applicant's total discharges.

The baseline for these determinations is the effective date of the Exception, except for those structural BMPs installed between January 1, 2005 and adoption of these Special Protections, and the reductions must be achieved and documented within six (6) years of the effective date.

e. The ASBS Compliance Plan shall address erosion control and the prevention of anthropogenic sedimentation in ASBS. The natural habitat conditions in the ASBS shall not be altered as a result of anthropogenic sedimentation.

f. The ASBS Compliance Plan shall describe the non-structural BMPs currently employed and planned in the future (including those for construction activities), and include an implementation schedule. The ASBS Compliance Plan shall include non-structural BMPs that address public education and outreach. Education and outreach efforts must adequately inform the public that direct discharges of pollutants from private property not entering an MS4 are prohibited. The ASBS Compliance Plan shall also describe the structural BMPs, including any low impact development (LID) measures, currently employed and planned for higher threat discharges and include an implementation schedule. To control storm water runoff discharges (at the end-of-pipe) during a design storm, permittees must first consider, and use where feasible, LID practices to infiltrate, use, or evapotranspirate storm water runoff on-site, if LID practices would be the most effective at reducing pollutants from entering the ASBS.

g. The BMPs and implementation schedule shall be designed to ensure that natural water quality conditions in the receiving water are achieved and maintained by either reducing flows from impervious surfaces or reducing pollutant loading, or some combination thereof.

h. If the results of the receiving water monitoring described in IV.B. of these special conditions indicate that the storm water runoff is causing or contributing to an alteration of natural ocean water quality in the ASBS, the discharger shall submit a report to the State Water Board and Regional Water Board within 30 days of receiving the results.

(1) The report shall identify the constituents in storm water runoff that alter natural ocean water quality and the sources of these constituents.

(2) The report shall describe BMPs that are currently being implemented, BMPs that are identified in the SWMP or SWPPP for future implementation, and any additional BMPs that may be added to the SWMP or SWPPP to address the alteration of natural water quality. The report shall include a new or modified implementation schedule for the BMPs.

(3) Within 30 days of the approval of the report by the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits), the discharger shall revise its ASBS Compliance Plan to incorporate any new or modified BMPs that have been or will be implemented, the implementation schedule, and any additional monitoring required.

(4) As long as the discharger has complied with the procedures described above and is implementing the revised SWMP or SWPPP, the discharger does not have to repeat the same procedure for continuing or recurring exceedances of natural ocean water quality conditions due to the same constituent.

(5) The requirements of this section are in addition to the terms, prohibitions, and conditions contained in these Special Protections.

3. Compliance Schedule

a. On the effective date of the Exception, all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.

b. Within eighteen (18) months from the effective date of the Exception, the discharger shall submit a draft written ASBS Compliance Plan to the State Water Board Executive Director (statewide permits) or Regional Water Board Executive Officer (Regional Water Board permits) that describes its strategy to comply with these special conditions, including the requirement to maintain natural water quality in the affected ASBS. The ASBS Compliance Plan shall include a description of appropriate non-structural controls and a time schedule to implement structural controls (implementation schedule) to comply with these special conditions for inclusion in the discharger's SWMP or SWPPP, as appropriate to permit type. The final ASBS Compliance Plan, including a description and final schedule for structural controls based on the results of runoff and receiving water monitoring, must be submitted within thirty (30) months from the effective date of the Exception.

c. Within 18 months of the effective date of the Exception, any non-structural controls that are necessary to comply with these special conditions shall be implemented.

d. Within six (6) years of the effective date of the Exception, any structural controls identified in the ASBS Compliance Plan that are necessary to comply with these special conditions shall be operational.

e. Within six (6) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, then the discharger must re-sample the receiving water, pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85th percentile threshold of reference water quality data, and the pre-storm receiving water levels, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.

f. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may only authorize additional time to comply with the special conditions d. and e., above if good cause exists to do so. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in d. or e. The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by

the discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality.

The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. for municipalities, a demonstration of significant hardship to discharger ratepayers, by showing the relationship of storm water fees to annual household income for residents within the discharger's jurisdictional area, and the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate; or

2. for other governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

B. NONPOINT SOURCE DISCHARGES

1. General Provisions for Nonpoint Sources

   a. Existing nonpoint source waste discharges are allowed into an ASBS only under the following conditions:

      (1) The discharges are authorized under waste discharge requirements, a conditional waiver of waste discharge requirements, or a conditional prohibition issued by the State Water Board or a Regional Water Board.

      (2) The discharges are in compliance with the applicable terms, prohibitions, and special conditions contained in these Special Protections.

      (3) The discharges:

         (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;

         (ii) Are designed to prevent soil erosion;

         (iii) Occur only during wet weather;

         (iv) Are composed of only storm water runoff.

   b. Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.

   c. The discharge of trash is prohibited.

   d. Only existing nonpoint source waste discharges are allowed. "Existing nonpoint source waste discharges" are discharges that were ongoing prior to January 1, 2005. "New nonpoint source discharges" are defined as those that commenced on or after January 1,

2005. A change to an existing nonpoint source discharge, in terms of relocation or alteration, in order to comply with these special conditions, is allowed and does not constitute a new discharge.

e. Non-storm water discharges from nonpoint sources (those not subject to an NPDES Permit) are prohibited except as provided below:

(1) The term "non-storm water discharges" means any waste discharges that are not composed entirely of storm water.

(2) The following non-storm water discharges are allowed, provided that the discharges are essential for emergency response purposes, structural stability, slope stability, or occur naturally:

(i) Discharges associated with emergency fire fighting operations.

(ii) Foundation and footing drains.

(iii) Water from crawl space or basement pumps.

(iv) Hillside dewatering.

(v) Naturally occurring groundwater seepage via a storm drain.

(vi) Non-anthropogenic flows from a naturally occurring stream via a culvert or storm drain, as long as there are no contributions of anthropogenic runoff.

(3) Authorized non-storm water discharges shall not cause or contribute to a violation of the water quality objectives in Chapter II of the Ocean Plan nor alter natural ocean water quality in an ASBS.

f. At the San Clemente Island ASBS, discharges incidental to military training and research, development, test, and evaluation operations are allowed. Discharges incidental to underwater demolition and other in-water explosions are not allowed in the two military closure areas in the vicinity of Wilson Cove and Castle Rock. Discharges must not result in a violation of the water quality objectives, including the protection of the marine aquatic life beneficial use, anywhere in the ASBS.

g. At the San Nicolas Island and Begg Rock ASBS, discharges incidental to military research, development, testing, and evaluation of, and training with, guided missile and other weapons systems, fleet training exercises, small-scale amphibious warfare training, and special warfare training are allowed. Discharges incidental to underwater demolition and other in-water explosions are not allowed. Discharges must not result in a violation of the water quality objectives, including the protection of the marine aquatic life beneficial use, anywhere in the ASBS.

h. All other nonpoint source discharges not specifically authorized above are prohibited.

2. Planning and Reporting

a. The nonpoint source discharger shall develop an ASBS Pollution Prevention Plan, including an implementation schedule, to address storm water runoff and any other nonpoint source discharges from its facilities. The ASBS Pollution Prevention Plan must be equivalent in contents to an ASBS Compliance Plan as described in I (A)(2) in this document. The ASBS Pollution Prevention Plan is subject to approval by the Executive Director of the State Water Board (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements).

b. The ASBS Pollution Prevention Plan shall address storm water discharges (wet weather flows) and, in particular, describe how pollutant reductions in storm water runoff that are necessary to comply with these special conditions, will be achieved through Management Measures and associated Management Practices (Management Measures/Practices). Structural BMPs need not be installed if the discharger can document to the satisfaction of the State Water Board Executive Director or Regional Water Board Executive Officer that such installation would pose a threat to health or safety. Management Measures to control storm water runoff during a design storm shall achieve on average the following target levels:

(1) Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the Ocean Plan; or

(2) A 90% reduction in pollutant loading during storm events, for the applicant's total discharges.

The baseline for these determinations is the effective date of the Exception, except for those structural BMPs installed between January 1, 2005 and adoption of these Special Protections, and the reductions must be achieved and documented within six (6) years of the effective date.

c. If the results of the receiving water monitoring described in IV.B. of these special conditions indicate that the storm water runoff or other nonpoint source pollution is causing or contributing to an alteration of natural ocean water quality in the ASBS, the discharger shall submit a report to the State Water Board and the Regional Water Board within 30 days of receiving the results.

(1) The report shall identify the constituents that alter natural water quality and the sources of these constituents.

(2) The report shall describe Management Measures/Practices that are currently being implemented, Management Measures/Practices that are identified in the ASBS Pollution Prevention Plan for future implementation, and any additional Management Measures/Practices that may be added to the Pollution Prevention Plan to address the alteration of natural water quality. The report shall include a new or modified implementation schedule for the Management Measures/Practices.

(3) Within 30 days of the approval of the report by the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements), the discharger shall revise its ASBS Pollution Prevention Plan to incorporate any new or modified Management Measures/Practices that have been or

will be implemented, the implementation schedule, and any additional monitoring required.

(4) As long as the discharger has complied with the procedures described above and is implementing the revised ASBS Pollution Prevention Plan, the discharger does not have to repeat the same procedure for continuing or recurring exceedances of natural water quality conditions due to the same constituent.

(5) The requirements of this section are in addition to the terms, prohibitions, and conditions contained in these Special Protections.

3. Compliance Schedule

a. On the effective date of the Exception, all non-authorized non-storm water discharges (e.g., dry weather flow) are effectively prohibited.

b. Within eighteen (18) months from the effective date of the Exception, the dischargers shall submit a draft written ASBS Pollution Prevention Plan to the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) that describes its strategy to comply with these special conditions, including the requirement to maintain natural ocean water quality in the affected ASBS. The Pollution Prevention Plan shall include a description of appropriate non-structural controls and a time schedule to implement structural controls to comply with these special conditions for inclusion in the discharger's Pollution Prevention Plan. The final ASBS Pollution Prevention Plan, including a description and final schedule for structural controls based on the results of runoff and receiving water monitoring, must be submitted within thirty (30) months from the effective date of the Exception.

c. Within 18 months of the effective date of the Exception, any non-structural controls that are necessary to comply with these Special Protections shall be implemented.

d. Within six (6) years of the effective date of the Exception, any structural controls identified in the ASBS Pollution Prevention Plan that are necessary to comply with these special conditions shall be operational.

e. Within six (6) years of the effective date of the Exception, all dischargers must comply with the requirement that their discharges into the affected ASBS maintain natural ocean water quality. If the initial results of post-storm receiving water quality testing indicate levels higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, then the discharger must re-sample the receiving water pre- and post-storm. If after re-sampling the post-storm levels are still higher than the 85th percentile threshold of reference water quality data and the pre-storm receiving water levels, for any constituent, then natural ocean water quality is exceeded. See attached Flowchart.

f. The Executive Director of the State Water Board (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) may only authorize additional time to comply with the special conditions d. and e., above if good cause exists to do so. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in (d.) or (e.). The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by the discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality.

The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. a demonstration that the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate; or

2. for governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

II. ADDITIONAL REQUIREMENTS FOR PARKS AND RECREATION FACILITIES

In addition to the provisions in Section I (A) or I (B), respectively, a discharger with parks and recreation facilities shall comply with the following:

A. The discharger shall include a section in an ASBS Compliance Plan (for NPDES dischargers) or an ASBS Pollution Prevention Plan (for nonpoint source dischargers) to address storm water runoff from parks and recreation facilities.

1. The plan shall identify all pollutant sources, including sediment sources, which may result in waste entering storm water runoff. Pollutant sources include, but are not limited to, roadside rest areas and vistas, picnic areas, campgrounds, trash receptacles, maintenance facilities, park personnel housing, portable toilets, leach fields, fuel tanks, roads, piers, and boat launch facilities.

2. The plan shall describe BMPs or Management Measures/Practices that will be implemented to control soil erosion (both temporary and permanent erosion controls) and reduce or eliminate pollutants in storm water runoff in order to achieve and maintain natural water quality conditions in the affected ASBS. The plan shall include BMPs or Management Measures/Practices to ensure that trails and culverts are maintained to prevent erosion and minimize waste discharges to ASBS.

3. The plan shall include BMPs or Management Measures/Practices to prevent the discharge of pesticides or other chemicals, including agricultural chemicals, in storm water runoff to the affected ASBS.

4. The plan shall include BMPs or Management Measures/Practices that address public education and outreach. The goal of these BMPs or Management Measures/Practices is to ensure that the public is adequately informed that waste discharges to the affected ASBS are prohibited or limited by special conditions in these Special Protections. The BMPs or Management Measures/Practices shall include signage at camping, picnicking, beach and roadside parking areas, and visitor centers, or other appropriate measures, which notify the public of any applicable requirements of these Special Protections and identify the ASBS boundaries.

5. The plan shall include BMPs or Management Measures/Practices that address the prohibition against the discharge of trash to ASBS. The BMPs or Management Measures/Practices shall include measures to ensure that adequate trash receptacles are available for public use at visitor facilities, including parking areas, and that the receptacles are adequately maintained to prevent trash discharges into the ASBS. Appropriate measures include covering trash receptacles to prevent trash from being wind blown and periodically emptying the receptacles to prevent overflows.

6. The plan shall include BMPs or Management Measures/Practices to address runoff from parking areas and other developed features to ensure that the runoff does not alter natural water quality in the affected ASBS. BMPs or Management Measures/Practices shall include measures to reduce pollutant loading in runoff to the ASBS through installation of natural area buffers (LID), treatment, or other appropriate measures.

B. Maintenance and repair of park and recreation facilities must not result in waste discharges to the ASBS. The practice of road oiling must be minimized or eliminated, and must not result in waste discharges to the ASBS.

III. ADDITIONAL REQUIREMENTS – WATERFRONT AND MARINE OPERATIONS

In addition to the provisions in Section I (A) or I (B), respectively, a discharger with waterfront and marine operations shall comply with the following:

A. For discharges related to waterfront and marine operations, the discharger shall develop a Waterfront and Marine Operations Management Plan (Waterfront Plan). This plan shall contain appropriate Management Measures/Practices to address nonpoint source pollutant discharges to the affected ASBS.

1. The Waterfront Plan shall contain appropriate Management Measures/Practices for any waste discharges associated with the operation and maintenance of vessels, moorings, piers, launch ramps, and cleaning stations in order to ensure that beneficial uses are protected and natural water quality is maintained in the affected ASBS.

2. For discharges from marinas and recreational boating activities, the Waterfront Plan shall include appropriate Management Measures, described in The Plan for California's Nonpoint Source Pollution Control Program, for marinas and recreational boating, or equivalent practices, to ensure that nonpoint source pollutant discharges do not alter natural water quality in the affected ASBS.

3. The Waterfront Plan shall include Management Practices to address public education and outreach to ensure that the public is adequately informed that waste discharges to the affected ASBS are prohibited or limited by special conditions in these Special

Protections. The management practices shall include appropriate signage, or similar measures, to inform the public of the ASBS restrictions and to identify the ASBS boundaries.

4. The Waterfront Plan shall include Management Practices to address the prohibition against trash discharges to ASBS. The Management Practices shall include the provision of adequate trash receptacles for marine recreation areas, including parking areas, launch ramps, and docks. The plan shall also include appropriate Management Practices to ensure that the receptacles are adequately maintained and secured in order to prevent trash discharges into the ASBS. Appropriate Management Practices include covering the trash receptacles to prevent trash from being windblown, staking or securing the trash receptacles so they don't tip over, and periodically emptying the receptacles to prevent overflow.

5. The discharger shall submit its Waterfront Plan to the by the State Water Board Executive Director (statewide waivers or waste discharge requirements) or Executive Officer of the Regional Water Board (Regional Water Board waivers or waste discharge requirements) within six months of the effective date of these special conditions. The Waterfront Plan is subject to approval by the State Water Board Executive Director or the Regional Water Board Executive Officer, as appropriate. The plan must be fully implemented within 18 months of the effective date of the Exception.

B. The discharge of chlorine, soaps, petroleum, other chemical contaminants, trash, fish offal, or human sewage to ASBS is prohibited. Sinks and fish cleaning stations are point source discharges of wastes and are prohibited from discharging into ASBS. Anthropogenic accumulations of discarded fouling organisms on the sea floor must be minimized.

C. Limited-term activities, such as the repair, renovation, or maintenance of waterfront facilities, including, but not limited to, piers, docks, moorings, and breakwaters, are authorized only in accordance with Chapter III.E.2 of the Ocean Plan.

D. If the discharger anticipates that the discharger will fail to fully implement the approved Waterfront Plan within the 18 month deadline, the discharger shall submit a technical report as soon as practicable to the State Water Board Executive Director or the Regional Water Board Executive Officer, as appropriate. The technical report shall contain reasons for failing to meet the deadline and propose a revised schedule to fully implement the plan.

E. The State Water Board or the Regional Water Board may, for good cause, authorize additional time to comply with the Waterfront Plan. Good cause means a physical impossibility or lack of funding.

If a discharger claims physical impossibility, it shall notify the Board in writing within thirty (30) days of the date that the discharger first knew of the event or circumstance that caused or would cause it to fail to meet the deadline in Section III.A.5. The notice shall describe the reason for the noncompliance or anticipated noncompliance and specifically refer to this Section of this Exception. It shall describe the anticipated length of time the delay in compliance may persist, the cause or causes of the delay as well as measures to minimize the impact of the delay on water quality, the measures taken or to be taken by the

discharger to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance. The discharger shall adopt all reasonable measures to avoid and minimize such delays and their impact on water quality. The discharger may request an extension of time for compliance based on lack of funding. The request for an extension shall require:

1. a demonstration of significant hardship by showing that the discharger has made timely and complete applications for all available bond and grant funding, and either no bond or grant funding is available, or bond and/or grant funding is inadequate.

2. for governmental agencies, a demonstration and documentation of a good faith effort to acquire funding through that agency's budgetary process, and a demonstration that funding was unavailable or inadequate.

IV. MONITORING REQUIREMENTS

Monitoring is mandatory for all dischargers to assure compliance with the Ocean Plan. Monitoring requirements include both: (A) core discharge monitoring, and (B) ocean receiving water monitoring. The State and Regional Water Boards must approve sampling site locations and any adjustments to the monitoring programs. All ocean receiving water and reference area monitoring must be comparable with the Water Boards' Surface Water Ambient Monitoring Program (SWAMP).

Safety concerns: Sample locations and sampling periods must be determined considering safety issues. Sampling may be postponed upon notification to the State and Regional Water Boards if hazardous conditions prevail.

Analytical Chemistry Methods: All constituents must be analyzed using the lowest minimum detection limits comparable to the Ocean Plan water quality objectives. For metal analysis, all samples, including storm water effluent, reference samples, and ocean receiving water samples, must be analyzed by the approved analytical method with the lowest minimum detection limits (currently Inductively Coupled Plasma/Mass Spectrometry) described in the Ocean Plan.

A. CORE DISCHARGE MONITORING PROGRAM

1. General sampling requirements for timing and storm size:

   Runoff must be collected during a storm event that is greater than 0.1 inch and generates runoff, and at least 72 hours from the previously measurable storm event. Runoff samples shall be collected during the same storm and at approximately the same time when post-storm receiving water is sampled, and analyzed for the same constituents as receiving water and reference site samples (see section IV B) as described below.

2. Runoff flow measurements

   a. For municipal/industrial storm water outfalls in existence as of December 31, 2007, 18 inches (457mm) or greater in diameter/width (including multiple outfall pipes in combination having a width of 18 inches, runoff flows must be measured or calculated, using a method acceptable to and approved by the State and Regional Water Boards.

b. This will be reported annually for each precipitation season to the State and Regional Water Boards.

3. Runoff samples – storm events

a. For outfalls equal to or greater than 18 inches (0.46m) in diameter or width:

(1) samples of storm water runoff shall be collected during the same storm as receiving water samples and analyzed for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and

(2) samples of storm water runoff shall be collected and analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS.

(3) If an applicant has no outfall greater than 36 inches, then storm water runoff from the applicant's largest outfall shall be further collected during the same storm as receiving water samples and analyzed for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates).

b. For outfalls equal to or greater than 36 inches (0.91m) in diameter or width:

(1) samples of storm water runoff shall be collected during the same storm as receiving water samples and analyzed for oil and grease, total suspended solids, and, within the range of the southern sea otter indicator bacteria or some other measure of fecal contamination; and

(2) samples of storm water runoff shall be further collected during the same storm as receiving water samples and analyzed for Ocean Plan Table B metals for protection of marine life, Ocean Plan polynuclear aromatic hydrocarbons (PAHs), current use pesticides (pyrethroids and OP pesticides), and nutrients (ammonia, nitrate and phosphates); and

(3) samples of storm water runoff shall be collected and analyzed for critical life stage chronic toxicity (one invertebrate or algal species) at least once during each storm season when receiving water is sampled in the ASBS.

c. For an applicant not participating in a regional monitoring program [see below in Section IV (B)] in addition to (a.) and (b.) above, a minimum of the two largest outfalls or 20 percent of the larger outfalls, whichever is greater, shall be sampled (flow weighted composite samples) at least three times annually during wet weather (storm event) and analyzed for all Ocean Plan Table A constituents, Table B constituents for marine aquatic life protection (except for toxicity, only chronic toxicity for three species shall be required), DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, and Ocean Plan indicator bacteria. For parties discharging to ASBS in

more than one Regional Water Board region, at a minimum, one (the largest) such discharge shall be sampled annually in each Region.

4. The Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may reduce or suspend core monitoring once the storm runoff is fully characterized. This determination may be made at any point after the discharge is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.

B. Ocean Receiving Water and Reference Area Monitoring Program

In addition to performing the Core Discharge Monitoring Program in Section II.A above, all applicants having authorized discharges must perform ocean receiving water monitoring. In order to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS, dischargers may choose either (1) an individual monitoring program, or (2) participation in a regional integrated monitoring program.

1. Individual Monitoring Program: The requirements listed below are for those dischargers who elect to perform an individual monitoring program to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within the affected ASBS. In addition to Core Discharge Monitoring, the following additional monitoring requirements shall be met:

   a. Three times annually, during wet weather (storm events), the receiving water at the point of discharge from the outfalls described in section (IV)(A)(3)(c) above shall be sampled and analyzed for Ocean Plan Table A constituents, Table B constituents for marine aquatic life, DDT, PCBs, Ocean Plan PAHs, OP pesticides, pyrethroids, nitrates, phosphates, salinity, chronic toxicity (three species), and Ocean Plan indicator bacteria.

      The sample location for the ocean receiving water shall be in the surf zone at the point of discharges; this must be at the same location where storm water runoff is sampled. Receiving water shall be sampled prior to (pre-storm) and during (or immediately after) the same storm (post storm). Post storm sampling shall be during the same storm and at approximately the same time as when the runoff is sampled. Reference water quality shall also be sampled three times annually and analyzed for the same constituents pre-storm and post-storm, during the same storm seasons when receiving water is sampled. Reference stations will be determined by the State Water Board's Division of Water Quality and the applicable Regional Water Board(s).

   b. Sediment sampling shall occur at least three times during every five (5) year period. The subtidal sediment (sand or finer, if present) at the discharge shall be sampled and analyzed for Ocean Plan Table B constituents for marine aquatic life, DDT, PCBs, PAHs, pyrethroids, and OP pesticides. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed.

   c. A quantitative survey of intertidal benthic marine life shall be performed at the discharge and at a reference site. The survey shall be performed at least once every five (5) year period. The survey design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The results of the survey shall be

completed and submitted to the State Water Board and Regional Water Board at least six months prior to the end of the permit cycle.

d. Once during each five (5) year period, a bioaccumulation study shall be conducted to determine the concentrations of metals and synthetic organic pollutants at representative discharge sites and at representative reference sites. The study design is subject to approval by the Regional Water Board and the State Water Board's Division of Water Quality. The bioaccumulation study may include California mussels (*Mytilus californianus*) and/or sand crabs (*Emerita analoga* or *Blepharipoda occidentalis*). Based on the study results, the Regional Water Board and the State Water Board's Division of Water Quality, may adjust the study design in subsequent permits, or add or modify additional test organisms (such as shore crabs or fish), or modify the study design appropriate for the area and best available sensitive measures of contaminant exposure.

e. Marine Debris: Representative quantitative observations for trash by type and source shall be performed along the coast of the ASBS within the influence of the discharger's outfalls. The design, including locations and frequency, of the marine debris observations is subject to approval by the Regional Water Board and State Water Board's Division of Water Quality.

f. The monitoring requirements of the Individual Monitoring Program in this section are minimum requirements. After a minimum of one (1) year of continuous water quality monitoring of the discharges and ocean receiving waters, the Executive Director of the State Water Board (statewide permits) or Executive Officer of the Regional Water Board (Regional Water Board permits) may require additional monitoring, or adjust, reduce or suspend receiving water and reference station monitoring. This determination may be made at any point after the discharge and receiving water is fully characterized, but is best made after the monitoring results from the first permit cycle are assessed.

2. Regional Integrated Monitoring Program: Dischargers may elect to participate in a regional integrated monitoring program, in lieu of an individual monitoring program, to fulfill the requirements for monitoring the physical, chemical, and biological characteristics of the ocean receiving waters within their ASBS. This regional approach shall characterize natural water quality, pre- and post-storm, in ocean reference areas near the mouths of identified open space watersheds and the effects of the discharges on natural water quality (physical, chemical, and toxicity) in the ASBS receiving waters, and should include benthic marine aquatic life and bioaccumulation components. The design of the ASBS stratum of a regional integrated monitoring program may deviate from the otherwise prescribed individual monitoring approach (in Section IV.B.1) if approved by the State Water Board's Division of Water Quality and the Regional Water Boards.

a. Ocean reference areas shall be located at the drainages of flowing watersheds with minimal development (in no instance more than 10% development), and shall not be located in CWA Section 303(d) listed waterbodies or have tributaries that are 303(d) listed. Reference areas shall be free of wastewater discharges and anthropogenic non- storm water runoff. A minimum of low threat storm runoff discharges (e.g. stream highway overpasses and campgrounds) may be allowed on a case-by-case basis. Reference areas shall be located in the same region as the ASBS receiving water monitoring occurs. The reference areas for each Region are subject to approval by the participants in the regional monitoring program and the State Water

Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean reference water samples must be collected from each station, each from a separate storm during the same storm season that receiving water is sampled. A minimum of one reference location shall be sampled for each ASBS receiving water site sampled per responsible party. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.

b. ASBS ocean receiving water must be sampled in the surf zone at the location where the runoff makes contact with ocean water (i.e. at "point zero"). Ocean receiving water stations must be representative of worst-case discharge conditions (i.e. co-located at a large drain greater than 36 inches, or if drains greater than 36 inches are not present in the ASBS then the largest drain greater than18 inches.) Ocean receiving water stations are subject to approval by the participants in the regional monitoring program and the State Water Board's Division of Water Quality and the applicable Regional Water Board(s). A minimum of three ocean receiving water samples must be collected during each storm season from each station, each from a separate storm. A minimum of one receiving water location shall be sampled in each ASBS per responsible party in that ASBS. For parties discharging to ASBS in more than one Regional Water Board region, at a minimum, one reference station and one receiving water station shall be sampled in each region.

c. Reference and receiving water sampling shall commence during the first full storm season following the adoption of these special conditions, and post-storm samples shall be collected during the same storm event when storm water runoff is sampled. Sampling shall occur in a minimum of two storm seasons. For those ASBS dischargers that have already participated in the Southern California Bight 2008 ASBS regional monitoring effort, sampling may be limited to only one storm season.

d. Receiving water and reference samples shall be analyzed for the same constituents as storm water runoff samples. At a minimum, constituents to be sampled and analyzed in reference and discharge receiving waters must include oil and grease, total suspended solids, Ocean Plan Table B metals for protection of marine life, Ocean Plan PAHs, pyrethroids, OP pesticides, ammonia, nitrate, phosphates, and critical life stage chronic toxicity for three species. In addition, within the range of the southern sea otter, indicator bacteria or some other measure of fecal contamination shall be analyzed.

3. Waterfront and Marine Operations: In addition to the above requirements for ocean receiving water monitoring, additional monitoring must be performed for marinas and boat launch and pier facilities:

a. For all marina or mooring field operators, in mooring fields with 10 or more occupied moorings, the ocean receiving water must be sampled for Ocean Plan indicator bacteria, residual chlorine, copper, zinc, grease and oil, methylene blue active substances (MBAS), and ammonia nitrogen.

(1) For mooring field operators opting for an individual monitoring program (Section IV.B.1 above), this sampling must occur weekly (on the weekend) from May through October.

(2) For mooring field operators opting to participate in a regional integrated monitoring program (Section IV.B.2 above), this sampling must occur monthly from May through October on a high use weekend in each month. The Water Boards may allow a reduction in the frequency of sampling, through the regional monitoring program, after the first year of monitoring.

b. For all mooring field operators, the subtidal sediment (sand or finer, if present) within mooring fields and below piers shall be sampled and analyzed for Ocean Plan Table B metals (for marine aquatic life beneficial use), acute toxicity, PAHs, and tributyltin. For sediment toxicity testing, only an acute toxicity test using the amphipod *Eohaustorius estuarius* must be performed. This sampling shall occur at least three times during a five (5) year period. For mooring field operators opting to participate in a regional integrated monitoring program, the Water Boards may allow a reduction in the frequency of sampling after the first sampling effort's results are assessed.

Glossary

At the point of discharge(s) – Means in the surf zone immediately where runoff from an outfall meets the ocean water (a.k.a., at point zero).

Areas of Special Biological Significance (ASBS) – 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. All Areas of Special Biological Significance are also classified as a subset of State Water Quality Protection Areas.

Design storm – For purposes of these Special Protections, a design storm is defined as the volume of runoff produced from one inch of precipitation per day or, if this definition is inconsistent with the discharger's applicable storm water permit, then the design storm shall be the definition included in the discharger's applicable storm water permit.

Development – Relevant to reference monitoring sites, means urban, industrial, agricultural, grazing, mining, and timber harvesting land uses.

Higher threat discharges - Permitted storm drains discharging equal to or greater than 18 inches, industrial storm drains, agricultural runoff discharged through an MS4, discharges associated with waterfront and marina operations (e.g., piers, launch ramps, mooring fields, and associated vessel support activities, except for passive discharges defined below), and direct discharges associated with commercial or industrial activities to ASBS.

Low Impact Development (LID) – A sustainable practice that benefits water supply and contributes to water quality protection. Unlike traditional storm water management, which entails collecting and conveying storm water runoff through storm drains, pipes, or other conveyances to a centralized storm water facility, LID focuses on using site design and storm water management to maintain the site's pre-development runoff rates and volumes. The goal of LID is to mimic a site's predevelopment hydrology by using design techniques that infiltrate, filter, store, evaporate, and detain runoff close to the source of rainfall.

Marine Operations – Marinas or mooring fields that contain slips or mooring locations for 10 or more vessels.

Management Measure (MM) - Economically achievable measures for the control of the addition of pollutants from various classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives. For example, in the "marinas and recreational boating" land- use category specified in the Plan for California's Nonpoint Source Pollution Control Program (NPS Program Plan) (SWRCB, 1999), "boat cleaning and maintenance" is considered a MM or the source of a specific class or type of NPS pollution.

Management Practice (MP) - The practices (e.g., structural, non-structural, operational, or other alternatives) that can be used either individually or in combination to address a specific MM class or classes of NPS pollution. For example, for the "boat cleaning and maintenance" MM, specific MPs can include, but are not limited to, methods for the selection of environmentally sensitive hull paints or methods for cleaning/removal of hull copper anti- fouling paints.

Municipal Separate Storm Sewer System (MS4) – A municipally-owned storm sewer system regulated under the Phase I or Phase II storm water program implemented in compliance with Clean Water Act section 402(p). Note that an MS4 program's boundaries are not necessarily congruent with the permittee's political boundaries.

Natural Ocean Water Quality - The water quality (based on selected physical, chemical and biological characteristics) that is required to sustain marine ecosystems, and which is without apparent human influence, *i.e.*, an absence of significant amounts of: (a) man-made constituents (*e.g.,* DDT); (b) other chemical (*e.g.,* trace metals), physical (temperature/thermal pollution, sediment burial), and biological (*e.g.*, bacteria) constituents at concentrations that have been elevated due to man's activities above those resulting from the naturally occurring processes that affect the area in question; and (c) non-indigenous biota (*e.g.,* invasive algal bloom species) that have been introduced either deliberately or accidentally by man. Discharges "*shall not alter natural ocean water quality*" as determined by a comparison to the range of constituent concentrations in reference areas agreed upon via the regional monitoring program(s). If monitoring information indicates that *natural ocean water quality* is not maintained, but there is sufficient evidence that a discharge is not contributing to the alteration of natural water quality, then the Regional Water Board may make that determination. In this case, sufficient information must include runoff sample data that has equal or lower concentrations for the range of constituents at the applicable reference area(s).

Nonpoint source – Nonpoint pollution sources generally are sources that do not meet the definition of a point source. Nonpoint source pollution typically results from land runoff, precipitation, atmospheric deposition, agricultural drainage, marine/boating operations or hydrologic modification. Nonpoint sources, for purposes of these Special Protections, include discharges that are not required to be regulated under an NPDES permit.

Non-storm water discharge – Any runoff that is not the result of a precipitation event. This is often referred to as "dry weather flow."

Non-structural control – A Best Management Practice that involves operational, maintenance, regulatory (e.g., ordinances) or educational activities designed to reduce or eliminate pollutants in runoff, and that are not structural controls (i.e. there are no physical structures involved).

Physical impossibility - Means any act of God, war, fire, earthquake, windstorm, flood or natural catastrophe; unexpected and unintended accidents not caused by discharger or its employees' negligence; civil disturbance, vandalism, sabotage or terrorism; restrain by court order or public authority or agency; or action or non-action by, or inability to

obtain the necessary authorizations or approvals from any governmental agency other than the permittee.

Representative sites and monitoring procedures – Are to be proposed by the discharger, with appropriate rationale, and subject to approval by Water Board staff.

Sheet-flow – Runoff that flows across land surfaces at a shallow depth relative to the cross- sectional width of the flow. These types of flow may or may not enter a storm drain system before discharge to receiving waters.

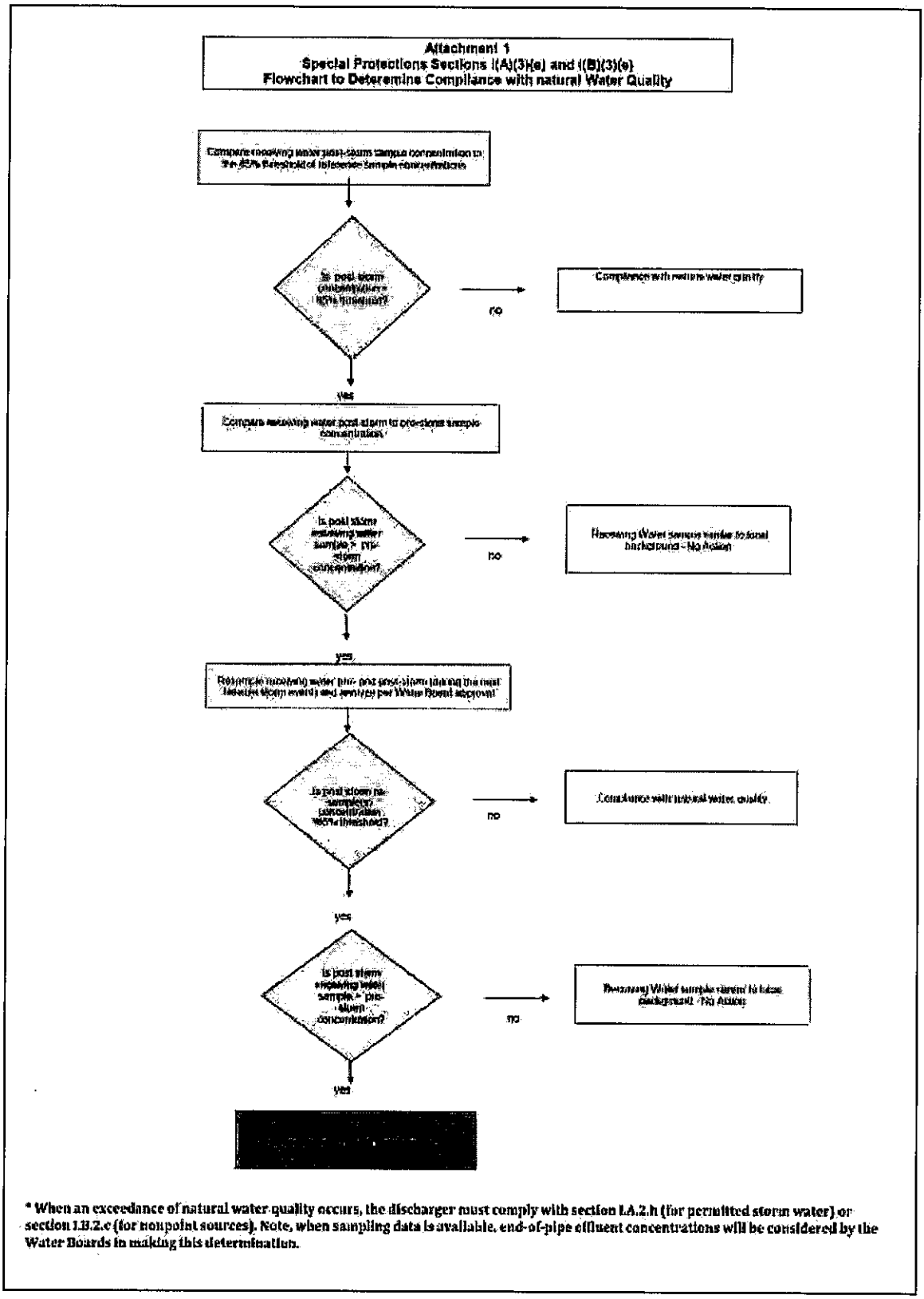
Storm Season – Also referred to as rainy season, means the months of the year from the onset of rainfall during autumn until the cessation of rainfall in the spring.

Structural control – A Best Management Practice that involves the installation of engineering solutions to the physical treatment or infiltration of runoff.

Surf Zone - The surf zone is defined as the submerged area between the breaking waves and the shoreline at any one time.

Surface Water Ambient Monitoring Program (SWAMP) comparable – Means that the monitoring program must 1) meet or exceed 2008 SWAMP Quality Assurance Program Management Plan (QAPP) Measurement Quality Objectives, or 2) have a Quality Assurance Project Plan that has been approved by SWAMP; in addition data must be formatted to match the database requirements of the SWAMP Information Management System. Adherence to the measurement quality objectives in the Southern California Bight 2008 ASBS Regional Monitoring Program QAPP and data base management comprises being SWAMP comparable.

Waterfront Operations - Piers, launch ramps, and cleaning stations in the water or on the adjacent shoreline.



* When an exceedance of natural water quality occurs, the discharger must comply with section I.A.2.h (for permitted storm water) or section I.B.2.c (for nonpoint sources). Note, when sampling data is available, end-of-pipe effluent concentrations will be considered by the Water Boards in making this determination.

ATTACHMENT B

STANDARD PERMIT PROVISIONS AND GENERAL PROVISIONS

1. Standard Permit Provisions

Code of Federal Regulations Title 40 Section 122.41 (40 CFR 122.41) includes conditions, or provisions, that apply to all National Pollutant Discharge Elimination System (NPDES) permits. Additional provisions applicable to NPDES permits are in 40 CFR 122.42. All applicable provisions in 40 CFR 122.41 and 40 CFR 122.42 must be incorporated into this Order and NPDES permit. The applicable 40 CFR 122.41 and 40 CFR 122.42 provisions are as follows:

a. DUTY TO COMPLY [40 CFR 122.41(a)]

The Copermittee must comply with all of the provisions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(1) The Copermittee must comply with effluent standards or prohibitions established under Section 307(a) of the CWA for toxic pollutants and with standards for sewage sludge use or disposal established under Section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement. [40 CFR 122.41(a)(1)]

(2) The CWA provides that any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any such sections in a permit issued under Section 402, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to a civil penalty not to exceed $25,000 per day for each violation. The CWA provides that any person who *negligently* violates Section 301, 302, 306, 307, 308, 318, or 405 of the CWA, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the CWA, is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who *knowingly* violates such sections, or such conditions or limitations is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than $100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, and who knows at that time that he thereby places another person in imminent

danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than $500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than $1,000,000 and can be fined up to $2,000,000 for second or subsequent convictions.
[40 CFR 122.41(a)(2)]

(3) Any person may be assessed an administrative penalty by the San Diego Regional Water Quality Control Board (San Diego Water Board), State Water Resources Control Board (State Water Board), or United States Environmental Protection Agency (USEPA) for violating Section 301, 302, 306, 307, 308, 318 or 405 of the CWA, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed $10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed $25,000. Penalties for Class II violations are not to exceed $10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed $125,000.
[40 CFR 122.41(a)(3)]

b. DUTY TO REAPPLY [40 CFR 122.41(b)]

If a Copermittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the Copermittee must apply for and obtain a new permit.

c. NEED TO HALT OR REDUCE ACTIVITY NOT A DEFENSE [40 CFR 122.41(c)]

It shall not be a defense for a Copermittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

d. DUTY TO MITIGATE [40 CFR 122.41(d)]

The Copermittee must take all reasonable steps to minimize or prevent any discharge or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

e. PROPER OPERATION AND MAINTENANCE [40 CFR 122.41(e)]

The Copermittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Copermittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems that are installed by a Copermittee only when the operation is necessary to achieve compliance with the conditions of this permit.

f. PERMIT ACTIONS [40 CFR 122.41(f)]

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the Copermittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

g. PROPERTY RIGHTS [40 CFR 122.41(g)]

This permit does not convey any property rights of any sort, or any exclusive privilege.

h. DUTY TO PROVIDE INFORMATION [40 CFR 122.41(h)]

The Copermittee must furnish to the San Diego Water Board, State Water Board, or USEPA within a reasonable time, any information which the San Diego Water Board, State Water Board, or USPEA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The Copermittee must also furnish to the San Diego Water Board, State Water Board, or USPEA upon request, copies of records required to be kept by this permit.

i. INSPECTION AND ENTRY [40 CFR 122.41(i)]

The Copermittee must allow the San Diego Water Board, State Water Board, USEPA, and/or their authorized representative (including an authorized contractor acting as their representative), upon presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the Copermittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit; [40 CFR 122.41(i)(1)]

(2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit; [40 CFR 122.41(i)(2)]

(3) Inspect and photograph at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; [40 CFR 122.41(i)(3)] and

(4) Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location. [40 CFR 122.41(i)(4)]

j. MONITORING AND RECORDS [40 CFR 122.41(j)]

(1) Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity. [40 CFR 122.41(j)(1)]

(2) Except for records of monitoring information required by this permit related to the Copermittee's sewage sludge use and disposal activities, which shall be retained for

a period of at least five (5) years (or longer as required by 40 CFR Part 503), the Copermittee must retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time. [40 CFR 122.41(j)(2)]

(3) Records for monitoring information must include: [40 CFR 122.41(j)(3)]

(a) The date, exact place, and time of sampling or measurements; [40 CFR 122.41(j)(3)(i)]
(b) The individual(s) who performed the sampling or measurements; [40 CFR 122.41(j)(3)(ii)]
(c) The date(s) analyses were performed; [40 CFR 122.41(j)(3)(iii)]
(d) The individual(s) who performed the analyses; [40 CFR 122.41(j)(3)(iv)]
(e) The analytical techniques or methods used; [40 CFR 122.41(j)(3)(v)] and
(f) The results of such analyses. [40 CFR 122.41(j)(3)(vi)]

(4) Monitoring must be conducted according to test procedures under 40 CFR Part 136 unless another method is required under 40 CFR Subchapters N or O. [40 CFR 122.41(j)(4)]

In the case of pollutants for which there are no approved methods under 40 CFR Part 136 or otherwise required under 40 CFR Subchapters N and O, monitoring must be conducted according to a test procedure specified in the permit for such pollutants. [40 CFR 122.44(i)(1)(iv)]

(5) The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both. [40 CFR 122.41(j)(5)]

k. SIGNATORY REQUIREMENT [40 CFR 122.41(k)]

(1) All applications, reports, or information submitted to the San Diego Water Board, State Water Board, or USEPA must be signed and certified. (See 40 CFR 122.22) [40 CFR 122.41(k)(1)]

(a) *For a municipality, State, Federal, or other public agency.* [All applications must be signed] by either a principal executive officer or ranking elected official. [40 CFR 122.22(a)(3)]

(b) All reports required by permits, and other information requested by the San Diego Water Board, State Water Board, or USEPA must be signed by a person described in paragraph (a) of this section, or by a duly authorized

representative of that person. A person is a duly authorized representative only if: [40 CFR 122.22(b)]

(i) The authorization is made in writing by a person described in paragraph (a) of this section; [40 CFR 122.22(b)(1)]

(ii) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company, (A duly authorized representative may thus be either a named individual or any individual occupying a named position.) [40 CFR 122.22(b)(2)] and,

(iii) The written authorization is submitted to the San Diego Water Board and State Water Board. [40 CFR 122.22(b)(3)]

(c) *Changes to authorization.* If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the San Diego Water Board prior to or together with any reports, information, or applications to be signed by an authorized representative. [40 CFR 122.22(c)]

(d) *Certification.* Any person signing a document under paragraph (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations." [40 CFR 122.22(d)]

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both. [40 CFR 122.41(k)(2)]

I. REPORTING REQUIREMENTS [40 CFR 122.41(l)]

(1) *Planned changes.* The Copermittee must give notice to the San Diego Water Board as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when: [40 CFR 122.41(l)(1)]

(a) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR 122.29(b); [40 CFR 122.41(l)(1)(i)] or

(b) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under 40 CFR 122.42(a)(1). [40 CFR 122.41(l)(1)(ii)]

(c) The alteration or addition results in a significant change in the Copermittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan. [40 CFR 122.41(l)(1)(iii)]

(2) *Anticipated noncompliance.* The Copermittee must give advance notice to the San Diego Water Board or State Water Board of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements. [40 CFR 122.41(l)(2)]

(3) *Transfers.* This permit is not transferable to any person except after notice to the San Diego Water Board. The San Diego Water Board may require modification or revocation and reissuance of the permit to change the name of the Copermittee and incorporate such other requirements as may be necessary under the CWA. [40 CFR 122.41(l)(3)]

(4) *Monitoring reports.* Monitoring results must be reported at the intervals specified elsewhere in this permit. [40 CFR 122.41(l)(4)]

(a) Monitoring results must be reported on a Discharge Monitoring Report (DMR) form or forms provided or specified by the San Diego Water Board or State Water Board for reporting results of monitoring of sludge use or disposal practices. [40 CFR 122.41(l)(4)(i)]

(b) If the Copermittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136 or another method required for an industry-specific waste stream under 40 CFR Subchapters N or O, the results of this monitoring must be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the San Diego Water Board or State Water Board. [40 CFR 122.41(l)(4)(ii)]

(c) Calculations for all limitations which require averaging of measurements must utilize an arithmetic mean unless otherwise specified in the permit. [40 CFR 122.41(l)(4)(iii)]

(5) *Compliance schedules.* Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit must be submitted no later than 14 days following each schedule date. [40 CFR 122.41(l)(5)]

(6) *Twenty-four hour reporting.*

(a) The Copermittee must report any noncompliance that may endanger health or the environment. Any information must be provided orally within 24 hours from the time the Copermittee becomes aware of the circumstances. A written submission must also be provided within five (5) days of the time the Copermittee becomes aware of the circumstances. The written submission must contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. [40 CFR 122.41(l)(6)(i)]

(b) The following must be included as information which must be reported within 24 hours under this paragraph: [40 CFR 122.41(l)(6)(ii)]

(i) Any unanticipated bypass that exceeds any effluent limitation in the permit (See 40 CFR 122.41(g)). [40 CFR 122.41(l)(6)(ii)(A)]
(ii) Any upset which exceeds any effluent limitation in the permit. [40 CFR 122.41(l)(6)(ii)(B)] and,
(iii) Violation of a maximum daily discharge limitation for any of the pollutants listed by the San Diego Water Board in the permit to be reported within 24 hours. (See 40 CFR 122.44(g)) [40 CFR 122.41(l)(6)(ii)(C)]

(c) The San Diego Water Board may waive the above-required written report on a case-by-case basis if the oral report has been received within 24 hours. [40 CFR 122.41(l)(6)(iii)]

(7) *Other noncompliance.* The Copermittee must report all instances of noncompliance not reported in accordance with the standard provisions required under 40 CFR 122.41(l)(4), (5), and (6), at the time monitoring reports are submitted. The reports must contain the information listed in the standard provisions required under 40 CFR 122.41(l)(6). [40 CFR 122.41(l)(7)]

(8) *Other information.* When the Copermittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the San Diego Water Board, State Water Board, or USEPA, the Copermittee must promptly submit such facts or information. [40 CFR 122.41(l)(8)]

m. BYPASS [40 CFR 122.41(m)]

(1) *Definitions.*

(a) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility. [40 CFR 122.41(m)(1)(i)] or

(b) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or

substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
[40 CFR 122.41(m)(1)(ii)]

(2) *Bypass not exceeding limitations.* The Copermittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the standard provisions required under 40 CFR 122.41(m)(3) and (4).
[40 CFR 122.41(m)(2)]

(3) *Notice.*

(a) *Anticipated bypass.* If the Copermittee knows in advance of the need for a bypass, it must submit a notice, if possible at least ten days before the date of the bypass. [40 CFR 122.41(m)(3)(i)] or

(b) *Unanticipated bypass.* The Copermittee must submit notice of an unanticipated bypass in accordance with the standard provisions required under 40 CFR 122.41(l)(6) (24-hour notice).
[40 CFR 122.41(m)(3)(ii)]

(4) *Prohibition of Bypass.*

(a) Bypass is prohibited, and the San Diego Water Board may take enforcement action against a Copermittee for bypass, unless:
[40 CFR 122.41(m)(4)(i)]

(i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; [40 CFR 122.41(m)(4)(i)(A)]
(ii) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance;
[40 CFR 122.41(m)(4)(i)(B)] and,
(iii) The Copermittee submitted notice in accordance with the standard provisions required under 40 CFR 122.41(m)(3).
[40 CFR 122.41(m)(4)(i)(C)]

(b) The San Diego Water Board may approve an anticipated bypass, after considering its adverse effects, if the San Diego Water Board determines that it will meet the three conditions listed above.
[40 CFR 122.41(m)(4)(ii)]

n. UPSET [40 CFR 122.41(n)]

(1) *Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because

of factors beyond the reasonable control of the Copermittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation. [40 CFR 122.41(n)(1)]

(2) *Effect of an upset.* An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the standard provisions required under 40 CFR 122.41(n)(3) are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review. [40 CFR 122.41(n)(2)]

(3) *Conditions necessary for a demonstration of upset.* A Copermittee who wishes to establish the affirmative defense of upset must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that: [40 CFR 122.41(n)(3)]

(a) An upset occurred and that the Copermittee can identify the cause(s) of the upset; [40 CFR 122.41(n)(3)(i)]
(b) The permitted facility was at the time being properly operated; [40 CFR 122.41(n)(3)(ii)] and
(c) The Copermittee submitted notice of the upset in accordance with the standard provisions required under 40 CFR 122.41(l)(6)(ii)(B) (24-hour notice). [40 CFR 122.41(n)(3)(iii)]
(d) The Copermittee complied with any remedial measures pursuant to the standard provisions required under 40 CFR 122.41(d). [40 CFR 122.41(n)(3)(iii)]

(4) *Burden of proof.* In any enforcement proceeding, the Copermittee seeking to establish the occurrence of an upset has the burden of proof. [40 CFR 122.41(n)(4)]

o. STANDARD PERMIT PROVISIONS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEMS [40 CFR 122.42(c)]

The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the San Diego Water Board or State Water Board under 40 CFR 122.26(a)(1)(v) must submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report must include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions; [40 CFR 122.42(c)(1)]

(2) Proposed changes to the storm water management programs that are established as permit conditions. Such proposed changes must be consistent with 40 CFR 122.26(d)(2)(iii); [40 CFR 122.42(c)(2)] and

(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under 40 CFR 122.26(d)(2)(iv) and (v); [40 CFR 122.42(c)(3)]

(4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [40 CFR 122.42(c)(4)]

(5) Annual expenditures and budget for year following each annual report; [40 CFR 122.42(c)(5)]

(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [40 CFR 122.42(c)(6)]

(7) Identification of water quality improvements or degradation. [40 CFR 122.42(c)(7)]

p. STANDARD PERMIT PROVISIONS FOR STORM WATER DISCHARGES [40 CFR 122.42(d)]

The initial permits for discharges composed entirely of storm water issued pursuant to 40 CFR 122.26(e)(7) must require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

2. General Provisions

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. The general provisions applicable to this Order and NPDES permit are as follows:

a. DISCHARGE OF WASTE IS A PRIVILEGE

No discharge of waste into the waters of the State, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the State are privileges, not rights. [CWC Section 13263(g)]

b. DURATION OF ORDER AND NPDES PERMIT

(1) *Effective date*. This Order supersedes Order No. R9-2007-0001 for the San Diego County Copermittees listed in Table 1a and became effective on June 27, 2013. This Order as amended by Order R9-2015-0001 supersedes Order No. R9-2009-0002 for the Orange County Copermittees listed in Table 1b and its amendments through Order No. R9-2015-0001 became effective April 1, 2015. This Order as amended by Order Nos. R9-2015-0001 and R9-2015-0100 supersedes Order No. R9-2010-0016 for the Riverside County Copermittees listed in Table 1c and its amendments through Order No. R9-2015-0100 became effective January 7, 2016.

(2) *Expiration*. This Order and NPDES permit expires five years after June 27, 2013, its initial effective date. [40 CFR 122.46(a)]

(3) *Continuation of expired order*. After this Order and NPDES permit expires, the terms and conditions of this Order and NPDES permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with.

c. AVAILABILITY

A copy of this Order must be kept at a readily accessible location and must be available to on-site personnel at all times.

d. CONFIDENTIALITY OF INFORMATION

Except as provided for in 40 CFR 122.7, no information or documents submitted in accordance with or in application for this Order will be considered confidential, and all such information and documents shall be available for review by the public at the San Diego Water Board office.

Claims of confidentiality for the following information will be denied:
[40 CFR 122.7(b)]

(1) The name and address of any permit applicant or Copermittee;
[40 CFR 122.7(b)(1)] and

(2) Permit applications and attachments, permits, and effluent data.
[40 CFR 122.7(b)(2)]

e. EFFLUENT LIMITATIONS

(1) *Interim effluent limitations.* The Copermittee must comply with any interim effluent limitations as established by addendum, enforcement action, or revised waste discharge requirements which have been, or may be, adopted by the San Diego Water Board.

(2) *Other effluent limitations and standards.* If any applicable 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 CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the San Diego Water Board shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. [40 CFR 122.44(b)(1)]

f. DUTY TO MINIMIZE OR CORRECT ADVERSE IMPACTS

The Copermittee must take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this Order, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncompliance.

g. PERMIT ACTIONS

The filing of a request by the Copermittee for modification, revocation and reissuance, or termination of this Order, or a notification of planned change in or anticipated noncompliance with this Order does not stay any condition of this Order. (See 40 CFR 122.41(f)) In addition, the following provisions apply to this Order:

(1) Upon application by any affected person, or on its own motion, the San Diego Water Board may review and revise the requirements in this Order. All requirements must be reviewed periodically. [CWC Section 13263(e)]

(2) This Order may be terminated or modified for cause, including, but not limited to, all of the following: [CWC Section 13381]

(a) Violation of any condition contained in the requirements of this Order. [CWC Section 13381(a)]

(b) Obtaining the requirements in this Order by misrepresentation, or failure to disclose fully all relevant facts. [CWC Section 13381(b)]

(c) A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. [CWC Section 13381(c)]

(3) When this Order is transferred to a new owner or operator, such requirements as may be necessary under the CWC may be incorporated into this Order.

h. NPDES Permitted Non-Storm Water Discharges

The San Diego Water Board has, in prior years, issued a limited number of individual NPDES permits for non-storm water discharges to MS4s. The San Diego Water Board or State Water Board may in the future, upon prior notice to the Copermittee(s), issue an NPDES permit for any non-storm water discharge (or class of non-storm water discharges) to an MS4.

i. Monitoring

In addition to the standard provisions required under 40 CFR 122.41(j) and (l)(4), the following general monitoring provisions apply to this Order:

(1) Where procedures are not otherwise specified in Order, sampling, analysis and quality assurance/quality control must be conducted in accordance with the Quality Assurance Management Plan (QAMP) for the State of California's Surface Water Ambient Monitoring Program (SWAMP), adopted by the State Water Resources Control Board (State Water Board).

(2) Pursuant to 40 CFR 122.41(j)(2) and CWC Section 13383(a), each Copermittee must retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least five (5) years from the date of the sample, measurement, report or application. This period may be extended by request of the San Diego Water Board at any time.

(3) All chemical, bacteriological, and toxicity analyses must be conducted at a laboratory certified for such analyses by the California Department of Public Health or a laboratory approved by the San Diego Water Board.

(4) For priority toxic pollutants that are identified in the California Toxics Rule (CTR) (65 Fed. Reg. 31682), the Copermittees must instruct their laboratories to establish calibration standards that are equivalent to or lower than the Minimum Levels (MLs) published in Appendix 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). If a Copermittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR Part 136, the lowest quantifiable concentration of the lowest calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Copermittee must submit documentation from the laboratory to the San Diego Water Board for approval prior to raising the ML for any priority toxic pollutant.

j. ENFORCEMENT

(1) The San Diego Water Board is authorized to enforce the terms of this Order under several provisions of the CWC, including, but not limited to, CWC Sections 13385, 13386, and 13387.

(2) Nothing in this Order shall be construed to protect the Copermittee from its liabilities under federal, state, or local laws.

(3) The CWC provides for civil and criminal penalties comparable to, and in some cases greater than, those provided for under the CWA.

(4) Except as provided in the standard conditions required under 40 CFR 122.41(m) and (n), nothing in this Order shall be construed to relieve the Copermittee from civil or criminal penalties for noncompliance.

(5) Nothing in this Order shall be construed to preclude the institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties to which the Copermittee is or may be subject to under Section 311 of the CWA.

(6) Nothing in this Order shall be construed to preclude institution of any legal action or relieve the Copermittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authoring preserved by Section 510 of the CWA.

k. SEVERABILITY

The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this Order shall not be affected thereby.

l. APPLICATIONS

Any application submitted by a Copermittee for reissuance or modification of this Order must satisfy all applicable requirements specified in federal regulations as well as any additional requirements for submittal of a Report of Waste Discharge specified in the CWC and the California Code of Regulations.

m. IMPLEMENTATION

All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

n. REPORT SUBMITTALS

(1) All report submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement.

(2) Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal.

(3) The Principal Watershed Copermittee(s) must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

(4) Unless otherwise directed, the Copermittees must submit one electronic copy of each report required under this Order to the San Diego Water Board at SanDiego@waterboards.ca.gov.

(5) When hard copies are requested or required, the Copermittees must submit reports and provide notifications as required by this Order to:

EXECUTIVE OFFICER
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
2375 NORTHSIDE DRIVE, SUITE 100
SAN DIEGO CA 92108
Telephone: (619) 516-1990 Fax: (619) 516-1994

ATTACHMENT C

ACRONYMS AND ABBREVIATIONS

AMAL	Average Monthly Action Level
ASBS	Area(s) of Special Biological Significance
BMP	Best Management Practice
Basin Plan	Water Quality Control Plan for the San Diego Basin
CEQA	California Environmental Quality Act
CCR	California Code of Regulations
CFR	Code of Federal Regulations
CWA	Clean Water Act
CWC	California Water Code
CZARA	Coastal Zone Act Reauthorization Amendments of 1990
ESAs	Environmentally Sensitive Areas
GIS	Geographic Information System
IBI	Index of Biological Integrity
LID	Low Impact Development
MDAL	Maximum Daily Action Level
MEP	Maximum Extent Practicable
MS4	Municipal Separate Storm Sewer System
NAL	Non-Storm Water Action Level
NAICS	North American Industry Classification System
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
ROWD	Report of Waste Discharge (application for NPDES reissuance)
SAL	Storm Water Action Level
San Diego Water Board	California Regional Water Quality Control Board, San Diego Region
SIC	Standard Industrial Classification Code
State Water Board	State Water Resources Control Board
TMDL	Total Maximum Daily Load
USEPA	United States Environmental Protection Agency
WDID	Waste Discharge Identification Number
WLA	Waste Load Allocation
WQBEL	Water Quality Based Effluent Limitation

DEFINITIONS

Active/Passive Sediment Treatment - Using mechanical, electrical or chemical means to flocculate or coagulate suspended sediment for removal from runoff from construction sites prior to discharge.

Anthropogenic Litter – Trash generated from human activities, not including sediment.

Average Monthly Action Level – The highest allowable average of daily discharges over a calendar month.

Beneficial Uses - The uses of water necessary for the survival or wellbeing of man, plants, and wildlife. These uses of water serve to promote tangible and intangible economic, social, and environmental goals. "Beneficial Uses" of the waters of the State that may be protected include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Existing beneficial uses are uses that were attained in the surface or ground water on or after November 28, 1975; and potential beneficial uses are uses that would probably develop in future years through the implementation of various control measures. "Beneficial Uses" are equivalent to "Designated Uses" under federal law. [California Water Code Section 13050(f)].

Best Management Practices (BMPs) - Defined in 40 CFR 122.2 as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

Bioassessment - The use of biological community information to evaluate the biological integrity of a water body and its watershed. With respect to aquatic ecosystems, bioassessment is the collection and analysis of samples of the benthic macroinvertebrate community together with physical/habitat quality measurements associated with the sampling site and the watershed to evaluate the biological condition (i.e. biotic integrity) of a water body.

Biofiltration - Practices that use vegetation and amended soils to detain and treat runoff from impervious areas. Treatment is through filtration, infiltration, adsorption, ion exchange, and biological uptake of pollutants.

Biological Integrity - Defined in Karr J.R. and D.R. Dudley. 1981. Ecological perspective on water quality goals. *Environmental Management* 5:55-68 as: "A balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of natural habitat of the region." Also referred to as ecosystem health.

BMP Design Manual – A plan developed to eliminate, reduce, or mitigate the impacts of runoff from development projects, including Priority Development Projects.

Chronic Toxicity – A measurement of sublethal effect (e.g. reduced growth, reproduction) to experimental test organisms exposed to an effluent or receiving waters compared to that of the control organisms.

Clean Water Act Section 303(d) Water Body - An impaired water body in which water quality does not meet applicable water quality standards and/or is not expected to meet water quality standards, even after the application of technology based pollution controls required by the CWA. The discharge of runoff to these water bodies by the Copermittees is significant because these discharges can cause or contribute to violations of applicable water quality standards.

Construction Activities – Actions implemented during construction of development or redevelopment projects during the Preliminary Task (including rough grading and/or disking, clearing and grubbing operations, or any soil disturbance prior to mass grading), Grading or Land Development (including topography and slope reconfiguration, alluvium removals, canyon cleanouts, rock undercuts, keyway excavations, land form grading, and stockpiling of select material for capping operations), Streets and Utility Installation (including excavation and street paving, lot grading, curbs, gutters and sidewalks, public utilities, public water facilities including fire hydrants, public sanitary sewer systems, storm sewer systems and/or other drainage improvements), or Vertical Construction (including the build out of structures from foundations to roofing, including rough landscaping).

Construction Site – Any project, including projects requiring coverage under the Construction General Permit, that involves soil disturbing activities including, but not limited to, clearing, grading, disturbances to ground such as stockpiling, and excavation.

Contamination - As defined in the Porter-Cologne Water Quality Control Act, contamination is "an impairment of the quality of waters of the State by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. 'Contamination' includes any equivalent effect resulting from the disposal of waste whether or not waters of the State are affected."

Copermittee – A permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator [40 CFR 122.26(b)(1)]. For the purposes of this Order, a Copermittee is one of the individual permittees identified in Tables 1a-1c of this Order.

Copermittees – All of the individual Copermittees, collectively.

Critical Channel Flow (Qc) – The channel flow that produces the critical shear stress that initiates bed movement or that erodes the toe of channel banks. When measuring Qc, it should be based on the weakest boundary material – either bed or bank.

Daily Discharge – Defined as either: (1) the total mass of the constituent discharged over the calendar day or any 24 hour period that reasonably represents a calendar day for purposes of sampling (as specified in the permit), for a constituent with limitations expressed in units of mass or; (2) the unweighted arithmetic mean measurement of the constituent over the day for a constituent with limitations expressed in other units of measurement (e.g. concentration.)

The Daily Discharge may be determined by the analytical results of a composite sample taken over the course of one day (a calendar day, or other 24 hour period other than a day), or by the arithmetic mean of analytical results from one or more grab samples taken over the course of a day.

Development Projects - Construction, rehabilitation, redevelopment, or reconstruction of any public or private projects.

Dry Season –May 1 to September 30.

Dry Weather – Weather is considered dry if the preceding 72 hours has been without measurable precipitation (>0.1 inch).

Enclosed Bays – Enclosed bays are indentations along the coast that enclose an area of oceanic water within distinct headlands or harbor works. Enclosed bays include all bays where the narrowest distance between the headlands or outermost bay works is less than 75 percent of the greatest dimension of the enclosed portion of the bay. Enclosed bays do not include inland surface waters or ocean waters.

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

Environmentally Sensitive Areas (ESAs) - Areas that include but are not limited to all Clean Water Act Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Board and San Diego Water Board; State Water Quality Protected Areas; water bodies designated with the RARE beneficial use by the State Water Board and San Diego Water Board; areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermittees.

Estuaries – Waters, including coastal lagoons, located at the mouth of streams that serve as areas of mixing fresh and ocean waters. Coastal lagoons and mouths of streams that are temporarily separated from the ocean by sandbars shall be considered estuaries. Estuarine waters shall be considered to extend from a bay or the open ocean to a point upstream where there is no significant mixing of fresh water and ocean water. Estuaries do not include inland surface waters or ocean waters.

Existing Development – Any area that has been developed and exists for municipal, commercial, industrial, or residential purposes, uses, or activities. May include areas that are not actively used for its originally developed purpose, but may be re-purposed or redeveloped for another use or activity.

Flow Duration – The long-term period of time that flows occur above a threshold that causes significant sediment transport and may cause excessive erosion damage to creeks and streams (not a single storm event duration). The simplest way to visualize this is to consider a histogram of pre- and post-project flows using long-term records of hourly data. To maintain pre-development flow duration means that the total number of hours (counts) within each range of flows in a flow-duration histogram cannot increase between the pre- and post-development condition. Flow duration within the range of geomorphologically significant flows is important for managing erosion.

Grading - The cutting and/or filling of the land surface to a desired slope or elevation.

Groundwater – Subsurface water that occurs beneath the water table in soils and geologic formations that are fully saturated.

Hazardous Material – Any substance that poses a threat to human health or the environment due to its toxicity, corrosiveness, ignitability, explosive nature or chemical reactivity. These also include materials named by the USEPA in 40 CFR 116 to be reported if a designated quantity of the material is spilled into the waters of the U.S. or emitted into the environment.

Hazardous Waste - Hazardous waste is defined as "any waste which, under Section 600 of Title 22 of this code, is required to be managed according to Chapter 30 of Division 4.5 of Title 22 of this code" [CCR Title 22, Division 4.5, Chapter 11, Article 1].

Household Hazardous Waste – Paints, cleaning products, and other hazardous wastes generated during home improvement or maintenance activities.

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

Illicit Connection – Any man-made conveyance or drainage system through which a non-storm water discharge to the storm water drainage system occurs or may occur. Any connection to the MS4 that conveys an illicit discharge.

Illicit Discharge - Any discharge to the MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit and discharges resulting from firefighting activities [40 CFR 122.26(b)(2)].

Inactive Areas – Areas of construction activity that are not active and those that have been active and are not scheduled to be re-disturbed for at least 14 days.

Infiltration – In the context of low impact development, infiltration is defined as the percolation of water into the ground. Infiltration is often expressed as a rate (inches per hour), which is determined through an infiltration test. In the context of non-storm water, infiltration is water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow [40 CFR 35.2005(20)].

Inland Surface Waters – Includes all surface waters of the State that do not include the ocean, enclosed bays, or estuaries.

Jurisdictional Runoff Management Program Document – A written description of the specific jurisdictional runoff management measures and programs that each Copermittee will implement to comply with this Order and ensure that storm water pollutant discharges in runoff are reduced to the MEP and do not cause or contribute to a violation of water quality standards.

Low Impact Development (LID) – A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions.

Low Impact Development Best Management Practices (LID BMPs) – LID BMPs include schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States through storm water management and land development strategies that emphasize conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions. LID BMPs include retention practices that do not allow runoff, such as infiltration, rain water harvesting and reuse, and evapotranspiration. LID BMPs also include flow-through practices such as biofiltration that may have some discharge of storm water following pollutant reduction.

Major Outfall – As defined in the Code of Federal Regulations, a major outfall is a MS4 outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (i.e. discharge from a single conveyance other than a circular pipe which is associated with a drainage area of more than 50 acres); or, for MS4s that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or equivalent), a MS4 outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (i.e. discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

Maximum Daily Action Level (MDAL) –The highest allowable daily discharge of a pollutant, over a calendar day (or 24 hour period). For pollutants with action levels expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with action levels expressed in other units of measurement, the daily discharge is calculated as the arithmetic mean measurement of the pollutant over the day.

Maximum Extent Practicable (MEP) – The technology-based standard established by Congress in CWA section 402(p)(3)(B)(iii) for storm water that operators of MS4s must meet. Technology-based standards establish the level of pollutant reductions that dischargers must achieve, typically by treatment or by a combination of source control and treatment control BMPs. MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense). MEP considers economics and is generally, but not necessarily, less stringent than BAT. A definition for MEP is not provided either in the statute or in the regulations. Instead the definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their runoff management programs. Their total collective and individual activities conducted pursuant to the runoff management programs becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for MS4 maintenance). In the absence of a proposal acceptable to the San Diego Water Board, the San Diego Water Board defines MEP.

In a memo dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," Elizabeth Jennings, Senior Staff Counsel, SWRCB addressed the achievement of the MEP standard as follows:

"To achieve the MEP standard, municipalities must employ whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibitive. In selecting BMPs to achieve the MEP standard, the following factors may be useful to consider:

a. *Effectiveness: Will the BMPs address a pollutant (or pollutant source) of concern?*
b. *Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?*
c. *Public Acceptance: Does the BMP have public support?*
d. *Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?*
e. *Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?*

The final determination regarding whether a municipality has reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, and not by the municipal discharger. If a municipality reviews a lengthy menu of BMPs and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit derived, it would have met the standard. Where a choice may be made between two BMPs that should provide generally comparable effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs that would address a pollutant source, or to pick a BMP based solely on cost, which would be clearly less effective. In selecting BMPs the municipality must make a serious attempt to comply and practical solutions may not be lightly rejected. In any case, the burden would be on the municipal discharger to show compliance with its permit. After selecting a menu of BMPs, it is the responsibility of the discharger to ensure that all BMPs are implemented."

Monitoring Year – October 1 to September 30

Municipal Separate Storm Sewer System (MS4) – A conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designated or used for collecting or conveying storm water; (iii) Which is not a combined sewer; (iv) Which is not part of the Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.26.

National Pollutant Discharge Elimination System (NPDES) - The national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA.

Non-Storm Water - All discharges to and from a MS4 that do not originate from precipitation events (i.e., all discharges from a MS4 other than storm water). Non-storm water includes illicit discharges and NPDES permitted discharges.

Nuisance - As defined in the Porter-Cologne Water Quality Control Act, a nuisance is "anything which meets all of the following requirements: 1) Is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. 2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. 3) Occurs during, or as a result of, the treatment or disposal of wastes."

Ocean Waters – The territorial marine waters of the State as defined by California law to the extent these waters are outside of enclosed bays, estuaries, and coastal lagoons. Discharges to ocean waters are regulated in accordance with the State Board's California Ocean Plan.

Order – Unless otherwise specified, refers to this Order, Order No. R9-2013-0001 (NPDES No. CAS0109266)

Outfall - Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the US and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the US and are used to convey waters of the US.

Persistent Flow - Persistent flow is defined as the presence of flowing, pooled, or ponded water more than 72 hours after a measureable rainfall event of 0.1 inch or greater during three consecutive monitoring and/or inspection events. All other flowing, pooled, or ponded water is considered transient.

Person - A person is defined as an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof [40 CFR 122.2].

Point Source - Any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, landfill leachate collection systems, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

Pollutant - Any agent that may cause or contribute to the degradation of water quality such that a condition of pollution or contamination is created or aggravated.

Pollution - As defined in the Porter-Cologne Water Quality Control Act, pollution is "the alteration of the quality of the waters of the State by waste, to a degree which unreasonably affects either of the following: 1) The waters for beneficial uses; or 2) Facilities that serve these beneficial uses." Pollution may include contamination.

Pollution Prevention - Pollution prevention is defined as practices and processes that reduce or eliminate the generation of pollutants, in contrast to source control BMPs, treatment control BMPs, or disposal.

Pre-Development Runoff Conditions – Approximate flow rates and durations that exist or existed onsite before land development occurs. For new development projects, this equates to runoff conditions immediately before project construction. For redevelopment projects, this equates to runoff conditions from the project footprint assuming infiltration characteristics of the underlying soil, and existing grade. Runoff coefficients of concrete or asphalt must not be used. A redevelopment Priority Development Project must use available information pertaining to existing underlying soil type and onsite existing grade to estimate pre-development runoff conditions.

Priority Development Projects - New development and redevelopment projects defined under Provision E.3.b of Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100.

Rainy Season (aka Wet Season) –October 1 to April 30

Receiving Waters – Waters of the United States.

Receiving Water Limitations - Waste discharge requirements issued by the San Diego Water Board typically include both: (1) "Effluent Limitations" (or "Discharge Limitations") that specify the technology-based or water-quality-based effluent limitations; and (2) "Receiving Water Limitations" that specify the water quality objectives in the Basin Plan as well as any other limitations necessary to attain those objectives. In summary, the "Receiving Water Limitations" provision is the provision used to implement the requirements of CWA section 402(p)(3)(B).

Redevelopment - The creation and/or replacement of impervious surface on an already developed site. Examples include the expansion of a building footprint, road widening, the addition to or replacement of a structure. Replacement of impervious surfaces includes any activity where impervious material(s) are removed, exposing underlying soil during construction. Redevelopment does not include routine maintenance activities, such as trenching and resurfacing associated with utility work; pavement grinding; resurfacing existing roadways, sidewalks, pedestrian ramps, or bike lanes on existing roads; and routine replacement of damaged pavement, such as pothole repair.

Regional Clearinghouse – A central location for the collection and distribution of information developed and maintained by the Copermittees including, but not limited to, plans, reports, manuals, data, contact information, and/or links to such documents and information.

Rehabilitation - Remedial measures or activities for the purpose of improving or restoring the beneficial uses of streams, channels or river systems. Techniques may vary from in-stream restoration techniques to off-line storm water management practices installed in the system corridor or upland areas, or a combination of in-stream and out of stream techniques. Rehabilitation techniques may include, but are not limited to the following: riparian zone restoration, constructed wetlands, channel modifications that improve habitat and stability, and daylighting of drainage systems.

Reporting Period – The period of information that is reported in the Water Quality Improvement Plan Annual Report. The reporting period consists of two components: 1) July 1 to June 30, consistent with the fiscal year, for the implementation of the jurisdictional runoff management programs, and 2) October 1 to September 30, consistent with the monitoring year for the monitoring and assessment programs. Together, these two time periods constitute the reporting year for the Water Quality Improvement Plan Annual Report due January 31 following the end of the monitoring year.

Retain – Keep or hold in a particular place, condition, or position without discharge to surface waters.

Retrofitting – Storm water management practice put into place after development has occurred in watersheds where the practices previously did not exist or are ineffective. Retrofitting of developed areas is intended to improve water quality, protect downstream channels, reduce flooding, or meet other specific objectives. Retrofitting developed areas may include, but is not limited to replacing roofs with green roofs, disconnecting downspouts or impervious surfaces to drain to pervious surfaces, replacing impervious surfaces with pervious surfaces, installing rain barrels, installing rain gardens, and trash area enclosures.

Runoff - All flows in a storm water conveyance system that consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water including dry weather flows.

San Diego Water Board – As used in this document the term "San Diego Water Board" is synonymous with the term "Regional Board" as defined in Water Code section 13050(b) and is intended to refer to the California Regional Water Quality Control Board for the San Diego Region as specified in Water Code Section 13200.

Sediment - Soil, sand, and minerals washed from land into water. Sediment resulting from anthropogenic sources (i.e. human induced land disturbance activities) is considered a pollutant. This Order regulates only the discharges of sediment from anthropogenic sources and does not regulate naturally occurring sources of sediment. Sediment can destroy fish-nesting areas, clog animal habitats, and cloud waters so that sunlight does not reach aquatic plants.

Source Control BMP – Land use or site planning practices, or structural or nonstructural measures that aim to prevent runoff pollution by reducing the potential for contamination at the source of pollution. Source control BMPs minimize the contact between pollutants and runoff.

Storm Water – Per 40 CFR 122.26(b)(13), means storm water runoff, snowmelt runoff and surface runoff and drainage. Surface runoff and drainage pertains to runoff and drainage resulting from precipitation events.

Structural BMPs - A subset of BMPs which detains, retains, filters, removes, or prevents the release of pollutants to surface waters from development projects in perpetuity, after construction of a project is completed.

Test of Significant Toxicity (TST) - A statistical approach used to analyze toxicity test data. The TST incorporates a restated null hypothesis, Welch's t-test, and biological effect thresholds for chronic and acute toxicity.

Total Maximum Daily Load (TMDL) - The maximum amount of a pollutant that can be discharged into a water body from all sources (point and non-point) and still maintain water quality standards. Under CWA section 303(d), TMDLs must be developed for all water bodies that do not meet water quality standards after application of technology-based controls.

Toxicity - Adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies. The water quality objectives for toxicity provided in the Basin Plan, state in part..."All waters shall be

free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life....The survival of aquatic life in surface waters subjected to a waste discharge or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge."

Toxicity Identification Evaluation (TIE) - A set of procedures for identifying the specific chemical(s) responsible for toxicity. These procedures are performed in three phases (characterization, identification, and confirmation) using aquatic organism toxicity tests.

Toxicity Reduction Evaluation (TRE) - A study conducted in a step-wise process designed to identify the causative agents of effluent or ambient toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in toxicity. The first steps of the TRE consist of the collection of data relevant to the toxicity, including additional toxicity testing, and an evaluation of facility operations and maintenance practices, and best management practices. A Toxicity Identification Evaluation (TIE) may be required as part of the TRE, if appropriate.

Treatment Control BMP – Any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

Unpaved Road – Any long, narrow stretch without pavement used for traveling by motor passenger vehicles between two or more points. Unpaved roads are generally constructed of dirt, gravel, aggregate or macadam and may be improved or unimproved.

Waste - As defined in CWC Section 13050(d), "waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

Article 2 of CCR Title 23, Chapter 15 (Chapter 15) contains a waste classification system that applies to solid and semi-solid waste, which cannot be discharged directly or indirectly to water of the state and which therefore must be discharged to land for treatment, storage, or disposal in accordance with Chapter 15. There are four classifications of waste (listed in order of highest to lowest threat to water quality): hazardous waste, designated waste, non-hazardous solid waste, and inert waste.

Water Quality Objective - Numerical or narrative limits on constituents or characteristics of water designated to protect designated beneficial uses of the water. [California Water Code Section 13050 (h)]. California's water quality objectives are established by the State and Regional Water Boards in the Water Quality Control Plans. Numeric or narrative limits for pollutants or characteristics of water designed to protect the beneficial uses of the water. In other words, a water quality objective is the maximum concentration of a pollutant that can exist in a receiving water and still generally ensure that the beneficial uses of the receiving water remain protected (i.e., not impaired). Since water quality objectives are designed specifically to protect the beneficial uses, when the objectives are violated the beneficial uses are, by definition, no longer protected and become impaired. This is a fundamental concept under the Porter Cologne Act. Equally fundamental is Porter Cologne's definition of pollution. A condition of pollution exists when the water quality needed to support designated beneficial uses has

become unreasonably affected or impaired; in other words, when the water quality objectives have been violated. These underlying definitions (regarding beneficial use protection) are the reason why all waste discharge requirements implementing the federal NPDES regulations require compliance with water quality objectives. (Water quality objectives are also called water quality criteria in the CWA.)

Water Quality Standards - Water quality standards, as defined in Clean Water Act section 303(c) consist of the beneficial uses (e.g., swimming, fishing, municipal drinking water supply, etc.,) of a water body and criteria (referred to as water quality objectives in the California Water Code) necessary to protect those uses. Under the Water Code, the water boards establish beneficial uses and water quality objectives in water quality control or basin plans. Together with an anti-degradation policy, these beneficial uses and water quality objectives serve as water quality standards under the Clean Water Act. In Clean Water Act parlance, state beneficial uses are called "designated uses" and state water quality objectives are called "criteria." Throughout this Order, the relevant term is used depending on the statutory scheme.

Waters of the State - Any water, surface or underground, including saline waters within the boundaries of the State [CWC section 13050 (e)]. The definition of the Waters of the State is broader than that for the Waters of the United States in that all water in the State is considered to be a Waters of the State regardless of circumstances or condition.

Waters of the United States - As defined in the 40 CFR 122.2, the Waters of the U.S. are defined as: "(a) All waters, which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters, including interstate "wetlands;" (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition: (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA."

Watershed - That geographical area which drains to a specified point on a water course, usually a confluence of streams or rivers (also known as drainage area, catchment, or river basin).

Wet Season (aka Rainy Season) – October 1 to April 30

Wet Weather – Weather is considered wet up to 72 hours after a storm event of 0.1 inches and greater, unless otherwise defined by another regulatory mechanism (e.g. a TMDL).

ATTACHMENT D

JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM ANNUAL REPORT FORM

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JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM ANNUAL REPORT FORM

FY _____

I. COPERMITTEE INFORMATION			
Copermittee Name:			
Copermittee Primary Contact Name:			
Copermittee Primary Contact Information: Address: City:	County:	State:	Zip:
Telephone:	Fax:	Email:	

II. LEGAL AUTHORITY	
Has the Copermittee established adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 that complies with Order No. R9-2013-0001?	YES ☐ NO ☐
A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority?	YES ☐ NO ☐

III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE	
Was an update of the jurisdictional runoff management program document required or recommended by the San Diego Water Board?	YES ☐ NO ☐
If YES to the question above, did the Copermittee update its jurisdictional runoff management program document and make it available on the Regional Clearinghouse?	YES ☐ NO ☐

IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM	
Has the Copermittee implemented a program to actively detect and eliminate illicit discharges and connections to its MS4 that complies with Order No. R9-2013-0001?	YES ☐ NO ☐

Number of non-storm water discharges reported by the public	
Number of non-storm water discharges detected by Copermittee staff or contractors	
Number of non-storm water discharges investigated by the Copermittee	
Number of sources of non-storm water discharges identified	
Number of non-storm water discharges eliminated	
Number of sources of illicit discharges or connections identified	
Number of illicit discharges or connections eliminated	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	

V. DEVELOPMENT PLANNING PROGRAM	
Has the Copermittee implemented a development planning program that complies with Order No. R9-2013-0001?	YES ☐ NO ☐
Was an update to the BMP Design Manual required or recommended by the San Diego Water Board?	YES ☐ NO ☐
If YES to the question above, did the Copermittee update its BMP Design Manual and make it available on the Regional Clearinghouse?	YES ☐ NO ☐

Number of proposed development projects in review	
Number of Priority Development Projects in review	
Number of Priority Development Projects approved	
Number of approved Priority Development Projects exempt from any BMP requirements	
Number of approved Priority Development Projects allowed alternative compliance	
Number of Priority Development Projects granted occupancy	

Number of completed Priority Development Projects in inventory	
Number of high priority Priority Development Project structural BMP inspections	
Number of Priority Development Project structural BMP violations	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	

JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM
ANNUAL REPORT FORM

FY _____

VI. CONSTRUCTION MANAGEMENT PROGRAM

Has the Copermittee implemented a construction management program that complies with Order No. R9-2013-0001?	YES ☐ NO ☐
Number of construction sites in inventory	
Number of active construction sites in inventory	
Number of inactive construction sites in inventory	
Number of construction sites closed/completed during reporting period	
Number of construction site inspections	
Number of construction site violations	
Number of enforcement actions issued	
Number of escalated enforcement actions issued	

VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM

Has the Copermittee implemented an existing development management program that complies with Order No. R9-2013-0001?	YES ☐ NO ☐

	Municipal	Commercial	Industrial	Residential
Number of facilities or areas in inventory				
Number of existing development inspections				
Number of follow-up inspections				
Number of violations				
Number of enforcement actions issued				
Number of escalated enforcement actions issued				

VIII. PUBLIC EDUCATION AND PARTICIPATION

Has the Copermittee implemented a public education program component that complies with Order No. R9-2013-0001?	YES ☐ NO ☐
Has the Copermittee implemented a public participation program component that complies with Order No. R9-2013-0001?	YES ☐ NO ☐

IX. FISCAL ANALYSIS

Has the Copermittee attached to this form a summary of its fiscal analysis that complies with Order No. R9-2013-0001?	YES ☐ NO ☐

X. CERTIFICATION

I [☐ Principal Executive Officer ☐ Ranking Elected Official ☐ Duly Authorized Representative] certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

Signature	Date
Print Name	Title
Telephone Number	Email

ATTACHMENT E

SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS APPLICABLE TO ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100

These provisions implement load allocations (LAs) and wasteload allocations (WLAs) of the Total Maximum Daily Loads (TMDLs) established by the San Diego Water Board or USEPA under Clean Water Act section 303(c), applicable to discharges regulated under this Order. The provisions and schedules for implementation of the TMDLs described below must be incorporated into the Water Quality Improvement Plans, required pursuant to Provision B of this Order, for the specified Watershed Management Areas.

1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed
2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin
3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed
4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek
5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay
6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)
7. Total Maximum Daily Load for Sediment in Los Peñasquitos Lagoon

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1. Total Maximum Daily Load for Diazinon in Chollas Creek Watershed

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2002-0123

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	August 14, 2002
State Water Board Approval Date:	July 16, 2003
Office of Administrative Law Approval Date:	September 11, 2003
US EPA Approval Date:	November 3, 2003

(3) TMDL Effective Date: September 11, 2003

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Chollas Creek

(6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final diazinon TMDL compliance requirements for Chollas Creek consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittees must be in compliance with the final TMDL compliance requirements as of December 31, 2010.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

Table 1.1
Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Diazinon	Acute	0.08 µg/L	1 hour
	Chronic	0.05 µg/L	4 days

(b) Final Effluent Limitations

Discharges from the MS4s containing concentrations that do not exceed the following effluent limitations will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 1.b.(2)(a):

Table 1.2
Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Chollas Creek

Constituent	Exposure Duration	Effluent Limitation	Averaging Period
Diazinon	Acute	0.072 µg/L	1 hour
	Chronic	0.045 µg/L	4 days

(c) Best Management Practices

The following BMPs for Chollas Creek must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area and implemented by the Responsible Copermittees:

(i) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b) for Chollas Creek.

(ii) The Responsible Copermittees must implement the Diazinon Toxicity Control Plan and Diazinon Public Outreach/Education Program as described in the report titled, *Technical Report for Total Maximum Daily Load for Diazinon in Chollas Creek Watershed, San Diego County*, dated August 14, 2002, including subsequent modifications, in order to achieve the receiving water limitations under Specific Provision 1.b.(2)(a) and/or the effluent limitations under Specific Provision 1.b.(2)(b).

(iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 1.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 1.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR

(d) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 1.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 1.b.(2)(c) achieves compliance with Specific Provisions 1.b.(3)(a), 1.b.(3)(b) and/or 1.b.(3)(c),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 1.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 1.d, to demonstrate compliance with Specific Provisions 1.b.(3)(a), 1.b.(3)(b) and/or 1.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The Responsible Copermittees must be in compliance with the final diazinon TMDL compliance requirements as of December 31, 2010.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls for diazinon within the Chollas Creek watershed, and calculate or estimate the annual diazinon loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.b.(2) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment

Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 1.b.(2)(b), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

2. Total Maximum Daily Loads for Dissolved Copper in Shelter Island Yacht Basin

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0019

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	September 22, 2005
Office of Administrative Law Approval Date:	December 2, 2005
US EPA Approval Date:	February 8, 2006

(3) TMDL Effective Date: December 2, 2005

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Shelter Island Yacht Basin

(6) Responsible Copermittee: City of San Diego

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper TMDL compliance requirements for Shelter Island Yacht Basin consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittee must be in compliance with the final TMDL compliance requirements as of December 2, 2005.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations:

Table 2.1
Final Receiving Water Limitations Expressed as Concentrations in Shelter Island Yacht Basin

Constituent	Exposure Duration	Receiving Water Limitation	Averaging Period
Dissolved Copper	Acute	4.8 µg/L x WER*	1 hour
	Chronic	3.1 µg/L x WER*	4 days

Notes:
* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 2.b.(2)(a):

Table 2.2
Final Effluent Limitations as Expressed as Annual Loads in MS4 Discharges to Shelter Island Yacht Basin

Constituent	Effluent Limitation
Dissolved Copper	30 kg/yr*

* If the water quality objectives for dissolved copper in Shelter Island Yacht Basin are changed in the future, then the margin of safety (MOS), TMDL and allocations will be recalculated using the *Method for Recalculation of the Total Maximum Daily Load for Dissolved Copper in the Shelter Island Yacht Basin, San Diego Bay* in the Basin Plan (p. 7-14).

(c) Best Management Practices

The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 2.b.(2)(a) and/or the effluent limitations under Specific Provision 2.b.(2)(b) for Shelter Island Yacht Basin. The BMPs must be incorporated into the Water Quality Improvement Plan for the San Diego Bay Watershed Management Area.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 2.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 2.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR

(d) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 2.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 2.b.(2)(c) achieves compliance with Specific Provisions 2.b.(3)(a), 2.b.(3)(b) and/or 2.b.(3)(c),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 2.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 2.d, to demonstrate compliance with Specific Provisions 2.b.(3)(a), 2.b.(3)(b) and/or 2.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The Responsible Copermittees must be in compliance with the final dissolved copper TMDL compliance requirements as of December 2, 2005.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

The Responsible Copermittee must monitor the effluent of its MS4 outfalls for dissolved copper, and calculate or estimate the monthly and annual dissolved copper loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.(b)(2)of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

3. Total Maximum Daily Loads for Total Nitrogen and Total Phosphorus in Rainbow Creek Watershed

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2005-0036

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 9, 2005
State Water Board Approval Date:	November 16, 2005
Office of Administrative Law Approval Date:	February 1, 2006
US EPA Approval Date:	March 22, 2006

(3) TMDL Effective Date: February 1, 2006

(4) Watershed Management Area: Santa Margarita River

(5) Water Body: Rainbow Creek

(6) Responsible Copermittee: County of San Diego

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following

(1) Final TMDL Compliance Date

The Responsible Copermittee must comply with final TMDL compliance requirements by December 31, 2021.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision 3.b.(1):

Table 3.1
Final Receiving Water Limitations Expressed as Concentrations in Rainbow Creek

Constituent	Receiving Water Limitation
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

(b) Final Effluent Limitations

(i) Discharges from the MS4s containing concentrations that do not exceed the following effluent limitations by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

Table 3.2
Final Effluent Limitations Expressed as Concentrations in MS4 Discharges to Rainbow Creek

Constituent	Effluent Limitation
Nitrate (as N)	10 mg/L
Total Nitrogen	1 mg/L
Total Phosphorus	0.1 mg/L

(ii) Annual pollutant loads from given land uses discharging to and from the MS4s that do not exceed the following annual loads by the compliance date under Specific Provision 3.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 3.b.(2)(a):

Table 3.3
Final Effluent Limitations Expressed as Annual Loads in MS4 Discharges to Rainbow Creek

Land Use	Total N	Total P
Commercial nurseries	116 kg/yr	3 kg/yr
Park	3 kg/yr	0.1 kg/yr
Residential areas	149 kg/yr	12 kg/yr
Urban areas	27 kg/yr	6 kg/yr

(c) Best Management Practices

(i) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 3.b.(2)(a) and/or the effluent limitations under Specific Provision 3.b.(2)(b) for Rainbow Creek.

(ii) The Responsible Copermittee should coordinate any BMPs implemented to address this TMDL with Caltrans and other sources as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR

(e) The Responsible Copermittee develops and implements the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 3.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Specific Provision 3.b.(2)(c) achieves compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 3.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 3.d, to demonstrate compliance with Specific Provisions 3.b.(3)(a), 3.b.(3)(b), 3.b.(3)(c) and/or 3.b.(3)(d).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim total nitrogen and total phosphorus TMDL compliance requirements for Rainbow Creek consist of the following:

(1) Interim Compliance Dates and WQBELs

The Responsible Copermittee must comply with the interim WQBELs, expressed as annual loads, by December 31 of the interim compliance year given in Table 3.4.

Table 3.4
Interim Water Quality Based Effluent Limitations Expressed as Annual Loads in MS4 Discharges from Specific Land Uses to Rainbow Creek

	Total N Interim Effluent Limitations (kg/yr)			Total P Interim Effluent Limitations (kg/yr)		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commercial nurseries	390	299	196	20	16	10
Park	5	3	3	0.15	0.10	0.10
Residential areas	507	390	260	99	74	47
Urban areas	40	27	27	9	6	6

(2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 3.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 3.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the final effluent limitations under Specific Provision 3.b.(2)(b)(ii); OR

(e) The annual pollutant loads from given land uses discharging to and from the MS4s do not exceed the interim effluent limitations under Specific Provision 3.c.(1); OR

(f) The Responsible Copermittee has submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

d. Specific Monitoring and Assessment Requirements

(1) The Responsible Copermittee must incorporate into the Water Quality Improvement Plan and implement the Sampling and Analysis Plan for Rainbow Creek Nutrient Reduction TMDL Implementation Water Quality Monitoring, dated January 2010.

(2) The results of any monitoring conducted during the reporting period, and assessment of whether the interim and final TMDL compliance requirements have been achieved must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 3.b.(2)(b)(i), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

4. Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2007-0043

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 13, 2007
State Water Board Approval Date:	July 15, 2008
Office of Administrative Law Approval Date:	October 22, 2008
US EPA Approval Date:	December 18, 2008

(3) TMDL Effective Date: October 22, 2008

(4) Watershed Management Area: San Diego Bay

(5) Water Body: Chollas Creek

(6) Responsible Copermittees: City of La Mesa, City of Lemon Grove, City of San Diego, County of San Diego, San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittees must comply with the final TMDL compliance requirements by October 22, 2028.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance date under Specific Provision 4.b.(1):

Table 4.1
Final Receiving Water Limitations Expressed as Concentrations in Chollas Creek

Constituent	Exposure Duration	Receiving Water Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$(0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$(0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$[1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$(0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$(0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:
* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations by the compliance date under Specific Provision 4.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 4.b.(2)(a):

Table 4.2
Final Effluent Limitations as Expressed Concentrations in MS4 Discharges to Chollas Creek

Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
Dissolved Copper	Acute	$90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
Dissolved Lead	Acute	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
Dissolved Zinc	Acute	$90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
	Chronic	$90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:
* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(c) Best Management Practices

(i) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 4.b.(2)(a) and/or the effluent limitations under Specific Provision 4.b.(2)(b) for Chollas Creek.

(ii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans and the U.S. Navy as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 4.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 4.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR

(d) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 4.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 4.b.(2)(c) achieves compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 4.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 4.d, to demonstrate compliance with Specific Provisions 4.b.(3)(a), 4.b.(3)(b) and/or 4.b.(3)(c).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim dissolved copper, lead, and zinc TMDL compliance requirements for Chollas Creek consist of the following:

(1) Interim Compliance Date and WQBELs

The Responsible Copermittee must comply with the interim WQBELs, expressed as concentrations, by the interim compliance date given in Table 4.3:

Table 4.3
Interim Water Quality Based Effluent Limitations Expressed as Concentrations in MS4 Discharges to Chollas Creek

Interim Compliance Date	Constituent	Exposure Duration	Effluent Limitation (µg/L)	Averaging Period
October 22, 2018	Dissolved Copper	Acute	$1.2 \times 90\% \times (0.96) \times e^{[0.9422 \times \ln(\text{hardness}) - 1.700]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.96) \times e^{[0.8545 \times \ln(\text{hardness}) - 1.702]} \times \text{WER}^*$	4 days
	Dissolved Lead	Acute	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 1.460]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times [1.46203 - 0.145712 \times \ln(\text{hardness})] \times e^{[1.273 \times \ln(\text{hardness}) - 4.705]} \times \text{WER}^*$	4 days
	Dissolved Zinc	Acute	$1.2 \times 90\% \times (0.978) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	1 hour
		Chronic	$1.2 \times 90\% \times (0.986) \times e^{[0.8473 \times \ln(\text{hardness}) + 0.884]} \times \text{WER}^*$	4 days

Notes:
* The Water Effect Ratio (WER) is assumed to be 1.0 unless there is a site-specific and chemical-specific WER provided in the Basin Plan.

(2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance date, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the applicable receiving water limitations under Specific Provision 4.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 4.b.(2)(b) at the Responsible Copermittee's MS4 outfalls; OR

(d) There are no exceedances of the interim effluent limitations under Specific Provision 4.c.(1) at the Responsible Copermittee's MS4 outfalls; OR

(e) The Responsible Copermittees have submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance date.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) The Responsible Copermittees must implement the monitoring and assessment requirements issued under Investigation Order No. R9-2004-0277, *California Department of Transportation and San Diego Municipal Separate Storm Sewer System Copermittees Responsible for the Discharge of Diazinon into the Chollas Creek Watershed*, when it is amended to include monitoring requirements for the Total Maximum Daily Loads for Dissolved Copper, Lead, and Zinc in Chollas Creek. The monitoring reports required under Investigation Order No. R9-2004-0277 must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(2) The Responsible Copermittees must monitor the effluent of the MS4 outfalls discharging to Chollas Creek for dissolved copper, lead, and zinc, and calculate or estimate the monthly and annual dissolved copper, lead, and zinc loads, in accordance with the requirements of Provisions D.2, D.4.b.(1), and D.4.b.(2) of this Order. The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(3) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 4.b.(2)(b) or 4.c.(1), dry and wet weather discharge concentrations may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

5. Total Maximum Daily Loads for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2008-0027

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 11, 2008
State Water Board Approval Date:	June 16, 2009
Office of Administrative Law Approval Date:	September 15, 2009
US EPA Approval Date:	October 26, 2009

(3) TMDL Effective Date: September 15, 2009

(4) Watershed Management Areas: See Table 5.0

(5) Water Bodies: See Table 5.0

(6) Responsible Copermittees: See Table 5.0

Table 5.0
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay

Watershed Management Area	Water Body	Segment or Area	Responsible Copermittees
South Orange County	Dana Point Harbor	Baby Beach	-City of Dana Point -County of Orange
San Diego Bay	San Diego Bay	Shelter Island Shoreline Park	- San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in Table 5.0 consist of the following:

(1) Final TMDL Compliance Dates

(a) Baby Beach in Dana Point Harbor

The Responsible Copermittees for MS4 discharges to Baby Beach must be in compliance with the final TMDL compliance requirements according to the following compliance dates:

Table 5.1
Compliance Dates to Achieve Final TMDL Compliance Requirements For Baby Beach in Dana Point Harbor

Constituent	Dry Weather WLA Compliance Date	Wet Weather WLA Compliance Date
Total Coliform	September 15, 2014	September 15, 2009
Fecal Coliform		September 15, 2009
Enterococcus		September 15, 2019

(b) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final TMDL compliance requirements as of December 31, 2012.

(2) Final Water Quality Based Effluent Water Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 5.b.(1):

Table 5.2
Final Receiving Water Limitations Expressed as Bacteria Densities in the Water Body

Constituent	Receiving Water Limitations	
	Single Sample Maximum[1,2]	30-Day Geometric Mean[2]
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
Enterococcus	104 MPN/100mL	35 MPN/100mL

Notes:
1. During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.

(b) Final Effluent Limitations

(i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.3a
Final Effluent Limitations as Expressed as Bacteria Densities in MS4 Discharges to the Water Body

	Effluent Limitations	
Constituent	Single Sample Maximum[1,2]	30-Day Geometric Mean[2]
Total Coliform	10,000 MPN/100mL	1,000 MPN/100mL
Fecal Coliform	400 MPN/100mL	200 MPN/100mL
Enterococcus	104 MPN/100mL	35 MPN/100mL

Notes:
1. During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
2. During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.

(ii) Discharges from the MS4s containing indicator bacteria loads that do not exceed the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.4a
Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Baby Beach in Dana Point Harbor

Constituent	Dry Weather Final Effluent Limitation	Wet Weather Final Effluent Limitation
Total Coliform	0.86×10^9 MPN/day	$3{,}254 \times 10^9$ MPN/30days
Fecal Coliform	0.17×10^9 MPN/day	112×10^9 MPN/30days
Enterococcus	0.03×10^9 MPN/day	114×10^9 MPN/30days

Table 5.4b
Final Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to the Shelter Island Shoreline Park in San Diego Bay

Constituent	Dry Weather Final Effluent Limitation	Wet Weather Final Effluent Limitation
Total Coliform	0 MPN/day	198×10^9 MPN/30days
Fecal Coliform	0 MPN/day	8×10^9 MPN/30days
Enterococcus	0 MPN/day	26×10^9 MPN/30days

(iii) Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision 5.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 5.b.(2)(a):

Table 5.5a
Final Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Dry Weather Final Effluent Limitation	Wet Weather Final Effluent Limitation
Total Coliform	90.4%	0%
Fecal Coliform	82.7%	0%
Enterococcus	96.2%	62.2%

Notes:
* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittees' MS4s must not exceed the loads in Table 5.4a, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the water body.

Table 5.5b
*Final Effluent Limitations Expressed as Percent Load Reductions** in MS4 Discharges to Shelter Island Shoreline Park in San Diego Bay*

Constituent	Dry Weather Final Effluent Limitation	Wet Weather Final Effluent Limitation
Total Coliform	0%	0%
Fecal Coliform	0%	0%
Enterococcus	0%	0%

Notes:
* The percent load reductions are relative to data collected between 1999-2004. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittee's MS4s must not exceed the loads in Table 5.4b, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the water body.

(c) Best Management Practices

(i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 5.0 must incorporate the Bacteria Load Reduction Plan (BLRP) required to be developed pursuant to Resolution No. R9-2008-0027.

(ii) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 5.b.(2)(a) and/or the effluent limitations under Specific Provision 5.b.(2)(b) for the segments or areas of the water bodies listed in Table 5.0

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance dates, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 5.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision 5.b.(2)(b)(ii); OR

(e) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 5.b.(2)(b)(iii); OR

(f) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR

(g) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 5.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 5.b.(2)(c) achieves compliance with Specific Provisions 5.b.(3)(a), 5.b.(3)(b), 5.b.(3)(c), 5.b.(3)(d), 5.b.(3)(e) and/or 5.b.(3)(f),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 5.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 5.d, to demonstrate compliance with Specific Provisions 5.b.(3)(a), 5.b.(3)(b), 5.b.(3)(c), 5.b.(3)(d), 5.b.(3)(e) and/or 5.b.(3)(f).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim indicator bacteria TMDL compliance requirements for segments or areas of the water bodies listed in Table 5.0 consist of the following:

(1) Baby Beach in Dana Point Harbor

(a) Interim TMDL Compliance Dates and WQBELs

The Responsible Copermittees for MS4 discharges to Baby Beach must comply with the following interim WQBELs by the interim compliance dates given in Tables 5.6a and/or 5.6b:

Table 5.6a
Interim Water Quality Based Effluent Limitations Expressed as Bacteria Loads in MS4 Discharges to Baby Beach in Dana Point Harbor

Constituent	Interim Compliance Dates	Dry Weather Interim Effluent Limitation	Wet Weather Interim Effluent Limitation
Total Coliform	September 15, 2012	4.93×10^9 MPN/day	$3{,}254 \times 10^9$ MPN/30days*
Fecal Coliform	September 15, 2012	0.59×10^9 MPN/day	112×10^9 MPN/30days*
Enterococcus	September 15, 2012	0.42×10^9 MPN/day	301×10^9 MPN/30days
	September 15, 2016	0.03×10^9 MPN/day *	207×10^9 MPN/30days

Notes:
* Same as the final effluent limitations in Table 5.4a.

Table 5.6b
Interim Water Quality Based Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to Baby Beach in Dana Point Harbor*

Constituent	Interim Compliance Dates	Dry Weather Interim Effluent Limitation	Wet Weather Interim Effluent Limitation
Total Coliform	September 15, 2012	45.2%	0%**
Fecal Coliform	September 15, 2012	41.4%	0%**
Enterococcus	September 15, 2012	48.1%	0%
	September 15, 2016	96.2%**	31.1%

Notes:
* The percent load reductions are relative to data collected between 1996-2002. For pollutant load reductions of 0%, pollutant loads discharged from the Responsible Copermittees' MS4s must not exceed the loads in Table 5.6a, unless an updated model or analysis, accepted by the San Diego Water Board, identifies a different allowable pollutant load that can be discharged from the Responsible Copermittee's MS4s to the waterbody.
** Same as the final effluent limitations in Table 5.5a.

(b) Interim Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

(i) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(ii) There are no exceedances of the final receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(iii) There are no exceedances of the final effluent limitations under Specific Provision 5.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(iv) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the final effluent limitations under Specific Provision 5.b(2)(b)(ii); OR

(v) The Responsible Copermittees can demonstrate that exceedances of the applicable receiving water limitations under Specific Provision 5.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR

(vi) The pollutant loads discharging from the Responsible Copermittees' MS4 outfalls do not exceed the interim effluent limitations under Table 5.6a of Specific Provision 5.c.(1)(a); OR

(vii) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the interim effluent limitations under Table 5.6b of Specific Provision 5.c.(1)(a); OR

(viii) The Responsible Copermittees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

(2) Shelter Island Shoreline Park in San Diego Bay

The Responsible Copermittee for MS4 discharges to Shelter Island Shoreline Park must be in compliance with the final indicator bacteria TMDL requirements as of December 31, 2012.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Monitoring Stations

Monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.[38] If discharges of bacteria from the MS4 exceed the applicable interim or final WQBELs, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(2) Monitoring Procedures

(a) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) The Responsible Copermittees must collect wet weather monitoring samples within the first 24 hours of a storm event[39] of the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.

(c) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.

[38] Commonly referred to as AB 411 monitoring

[39] Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

(3) Assessment and Reporting Requirements

(a) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final WQBELs have been achieved.

(b) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 5.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

(c) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to correlate elevated bacteria levels with known or suspected sewage spills from wastewater collection systems and treatment plants or boats.

(d) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2010-0001

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	February 10, 2010
State Water Board Approval Date:	December 14, 2010
Office of Administrative Law Approval Date:	April 4, 2011
US EPA Approval Date:	June 22, 2011

(3) TMDL Effective Date: April 4, 2011

(4) Watershed Management Areas: See Table 6.0

(5) Water Bodies: See Table 6.0

(6) Responsible Copermittees: See Table 6.0

Table 6.0
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
South Orange County San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	-City of Laguna Beach -County of Orange -Orange County Flood Control District
		at Heisler Park - North	
		at Main Laguna Beach	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Woods -County of Orange -Orange County Flood Control District
		Laguna Beach at Ocean Avenue	
		Laguna Beach at Cleo Street	
		Arch Cove at Bluebird Canyon Road	
		Laguna Beach at Dumond Drive	
South Orange County Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	-City of Aliso Viejo -City of Laguna Beach -City of Laguna Hills -City of Laguna Niguel -City of Laguna Woods -City of Lake Forest -City of Mission Viejo -County of Orange -Orange County Flood Control District
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	
	Aliso Creek Mouth	at mouth	

Table 6.0 (Cont'd)
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
South Orange County Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	-City of Dana Point -City of Laguna Beach -City of Laguna Niguel -County of Orange -Orange County Flood Control District
		Aliso Beach at Table Rock Drive	
		100 Steps Beach at Pacific Coast Hwy at hospital (9th Avenue)	
		at Salt Creek (large outlet)	
		Salt Creek Beach at Salt Creek service road	
		Salt Creek Beach at Strand Road	
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	-City of Dana Point -City of Laguna Hills -City of Laguna Niguel -City of Mission Viejo -City of Rancho Santa Margarita -City of San Juan Capistrano -County of Orange -Orange County Flood Control District
	San Juan Creek	lower 1 mile	
	San Juan Creek Mouth	at mouth	
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	-City of Dana Point -City of San Clemente -County of Orange -Orange County Flood Control District
		Ole Hanson Beach Club Beach at Pico Drain	
		San Clemente City Beach at El Portal Street Stairs	
		San Clemente City Beach at Mariposa Street	
		San Clemente City Beach at Linda Lane	
		San Clemente City Beach at South Linda Lane	
		San Clemente City Beach at Lifeguard Headquarters	
		under San Clemente Municipal Pier	
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	
		San Clemente State Beach at Riviera Beach	
		Can Clemente State Beach at Cypress Shores	

Table 6.0 (Cont'd)
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Project I - Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	-City of Oceanside -City of Vista -County of San Diego
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	-City of Carlsbad -City of Encinitas -City of Escondido -City of San Marcos -County of San Diego
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	-City of Del Mar -City of Escondido -City of Poway -City of San Diego -City of Solana Beach -County of San Diego
Penasquitos Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	-City of Del Mar -City of Poway -City of San Diego -County of San Diego
Mission Bay Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	-City of San Diego
		La Jolla Shores Beach at Caminito del Oro	
		La Jolla Shores Beach at Vallecitos	
		La Jolla Shores Beach at Avenida de la Playa	
		at Casa Beach, Children's Pool	
		South Casa Beach at Coast Boulevard	
		Whispering Sands Beach at Ravina Street	
		Windansea Beach at Vista de la Playa	
		Windansea Beach at Bonair Street	
		Windansea Beach at Playa del Norte	
		Windansea Beach at Palomar Avenue	
		at Tourmaline Surf Park	
		Pacific Beach at Grand Avenue	
Mission Bay Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	

Table 6.0 (Cont'd)
Applicability of Total Maximum Daily Loads for Indicator Bacteria
Project I- Twenty Beaches and Creeks in the San Diego Region (including Tecolote Creek)

Watershed Management Area and Watershed	Water Body	Segment or Area	Responsible Copermittees
San Diego River Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek	lower 1 mile	-City of El Cajon -City of Santee -County of San Diego
	San Diego River	lower 6 miles	-City of El Cajon -City of La Mesa -City of San Diego -City of Santee -County of San Diego
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	
San Diego Bay Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	-City of La Mesa -City of Lemon Grove -City of San Diego -County of San Diego - San Diego Unified Port District

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final indicator bacteria TMDL compliance requirements for the water bodies listed in Table 6.0 consist of the following:

(1) Final TMDL Compliance Dates

The Responsible Copermittees for MS4 discharges to the water bodies listed in Table 6.0 must be in compliance with the final TMDL compliance requirements according to the following compliance dates:

Table 6.1
Compliance Dates to Achieve Final TMDL Compliance Requirements

Constituent	Dry Weather TMDL Compliance Date	Wet Weather TMDL Compliance Date*
Total Coliform	April 4, 2021	April 4, 2031 (April 4, 2021)
Fecal Coliform		
Enterococcus		

* The Wet Weather TMDL Compliance Date in parenthesis applies if the applicable Water Quality Improvement Plan does not include load reduction programs for other constituents (e.g. metals, pesticides, trash, nutrients, sediment, etc.) together with bacteria load reduction requirements of these TMDLs.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not cause or contribute to the exceedance of the following receiving water limitations by the compliance dates under Specific Provision 6.b.(1):

Table 6.2a
Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Beaches

	Wet Weather Days		Dry Weather Days	
Constituent	Single Sample Maximum[a,b] (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency[c]	30-Day Geometric Mean[b] (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
Enterococcus	104	22%	35	0%

Notes:
a. During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
b. During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
c. The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan.

Table 6.2b
Final Receiving Water Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies for Creeks

	Wet Weather Days		Dry Weather Days	
Constituent	Single Sample Maximum[a,b] (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency[c]	30-Day Geometric Mean[b] (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Fecal Coliform	400	22%	200	0%
Enterococcus	61 (104)	22%	33	0%

Notes:
a. During wet weather days, only the single sample maximum receiving water limitations are required to be achieved.
b. During dry weather days, the single sample maximum and 30-day geometric mean receiving water limitations are required to be achieved.
c. The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Basin Plan.
d. A single sample maximum of 104 MPN/100ml for *Enterococcus* may be applied as a receiving water limitation for creeks, instead of 61 MPN/100mL, if one or more of the creeks addressed by these TMDLs (San Juan Creek, Aliso Creek, Tecolote Creek, Forrester Creek, San Diego River, and/or Chollas Creek) is designated with a "moderately to lightly used area" or less frequent usage frequency in the Basin Plan. Otherwise, the single sample maximum of 61 MPN/100mL for *Enterococcus* must be used to assess compliance with the allowable exceedance frequency.

(b) Final Effluent Limitations

(i) Discharges from the MS4s containing indicator bacteria densities that do not exceed the following effluent limitations by the compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

Table 6.2c
Final Effluent Limitations Expressed as Bacteria Densities and Allowable Exceedance Frequencies in MS4 Discharges to the Water Body

	Concentration-Based Effluent Limitations			
Constituent	Single Sample Maximum[a,b] (MPN/100mL)	Single Sample Maximum Allowable Exceedance Frequency[c]	30-Day Geometric Mean[b] (MPN/100mL)	30-Day Geometric Mean Allowable Exceedance Frequency
Total Coliform[d]	10,000	22%	1,000	0%
Fecal Coliform	400	22%	200	0%
Enterococcus	104[e] / 61[f]	22%	35[e] / 33[f]	0%

Notes:
a. During wet weather days, only the single sample maximum effluent limitations are required to be achieved.
b. During dry weather days, the single sample maximum and 30-day geometric mean effluent limitations are required to be achieved.
c. The 22% single sample maximum allowable exceedance frequency only applies to wet weather days. For dry weather days, the dry weather bacteria densities must be consistent with the single sample maximum REC-1 water quality objectives in the Ocean Plan for discharges to beaches, and the Basin Plan for discharges to creeks and creek mouths.
d. Total coliform effluent limitations only apply to MS4 outfalls that discharge to the Pacific Ocean Shorelines and creek mouths listed in Table 6.0.
e. This *Enterococcus* effluent limitation applies to MS4 discharges to segments of areas of Pacific Ocean Shoreline listed in Table 6.0.
f. This *Enterococcus* effluent limitation applies to MS4 discharges to segments or areas of creeks or creek mouths listed in Table 6.0.

(ii) Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the compliance dates under Specific Provision 6.b.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.b.(2)(a):

Table 6.3
Final Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	*Watershed and Water Bodies*	*Load-Based Effluent Limitations*					
		Dry Weather			*Wet Weather*		
		Total Coliform	*Fecal Coliform*	*Entero-coccus*	*Total Coliform*	*Fecal Coliform*	*Entero-coccus*
South Orange County	**San Joaquin Hills HSA** (901.11) and **Laguna Hills HSA** (901.12) -Pacific Ocean Shoreline	91.78%	91.72%	98.28%	46.85%	52.07%	51.26%
	Aliso HSA (901.13) -Pacific Ocean Shoreline -Aliso Creek -Aliso Creek mouth	95.47%	95.58%	99.13%	25.29%	26.62%	27.52% (27.37%)**
	Dana Point HSA (901.14) -Pacific Ocean Shoreline	95.04%	95.03%	98.98%	13.15%	14.86%	15.16%
	Lower San Juan HSA (901.27) -Pacific Ocean Shoreline -San Juan Creek -San Juan Creek mouth	72.96%	74.21%	94.94%	19.21%	12.82%	27.12% (26.90%)**
	San Clemente HA (901.30) -Pacific Ocean Shoreline	94.28%	94.23%	98.83%	23.85%	24.58%	25.26%
San Luis Rey River	**San Luis Rey HU** (903.00) -Pacific Ocean Shoreline	38.13%	39.09%	87.38%	5.62%	3.12%	11.69%

Table 6.3 (Cont'd)
Final Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	Watershed and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Entero-coccus	Total Coliform	Fecal Coliform	Entero-coccus
Carlsbad	**San Marcos HA** (904.50) -Pacific Ocean Shoreline	82.82%	82.55%	96.03%	18.47%	18.98%	20.19%
San Dieguito River	**San Dieguito HU** (905.00) -Pacific Ocean Shoreline	14.39%	20.72%	83.48%	4.29%	1.46%	7.72%
Penasquitos	**Miramar Reservoir HA** (906.10) -Pacific Ocean Shoreline	96.50%	96.59%	99.42%	1.61%	1.99%	1.93%
Mission Bay	**Scripps HA** (906.30) -Pacific Ocean Shoreline	96.44%	96.42%	99.25%	16.32%	21.14%	18.82%
	Tecolote HA (906.50) -Tecolote Creek	94.51%	94.59%	98.94%	16.51%	20.47%	18.15% (18.08%)**
San Diego River	**Mission San Diego HSA** (907.11) and **Santee HSA** (907.12) -Pacific Ocean Shoreline -Forrester Creek (lower 1 mile) -San Diego River (lower 6 miles)	74.03%	69.44%	93.96%	38.14%	53.22%	42.74% (42.47%)**
San Diego Bay	**Chollas HSA** (908.22) -Chollas Creek	92.06%	92.15%	98.46%	17.82%	24.84%	21.46% (21.36%)**

Notes:
* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.
** The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

(c) Best Management Practices

(i) The Water Quality Improvement Plans for the applicable Watershed Management Areas in Table 6.0 must incorporate the Bacteria Load Reduction Plans (BLRPs) or Comprehensive Load Reduction Plans (CLRPs) required to be developed pursuant to Resolution No. R9-2010-0001.

(ii) The Responsible Copermittee must implement BMPs to achieve the receiving water limitations under Specific Provision 6.b.(2)(a) and/or the effluent limitations under Specific Provision 6.b.(2)(b) for the segments or areas of the water bodies listed in Table 6.0.

(iii) The Responsible Copermittees should coordinate any BMPs implemented to address this TMDL with Caltrans, owners/operators of small MS4s, and agricultural dischargers as possible.

(3) Final TMDL Compliance Determination

Compliance with the final WQBELs, on or after the final TMDL compliance dates, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 6.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR

(e) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR

(f) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 6.b.(2)(c) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 6.b.(2)(c) achieves compliance with Specific Provisions 6.b.(3)(a), 6.b.(3)(b), 6.b.(3)(c), 6.b.(3)(d), and/or 6.b.(3)(e),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 6.b.(2)(c), AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 6.d, to demonstrate compliance with Specific Provisions 6.b.(3)(a), 6.b.(3)(b), 6.b.(3)(c), 6.b.(3)(d), 6.b.(3)(e) and/or 6.b.(3)(f).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim indicator bacteria TMDL compliance requirements for the water bodies listed in Table 6.0 consist of the following:

(1) Interim TMDL Compliance Dates

The Responsible Copermittees must achieve compliance with the interim TMDL compliance requirements, as determined in accordance with Specific Provision 6.c.(3), by the interim compliance dates given in Table 6.4, unless alternative interim compliance dates are accepted by the San Diego Water Board Executive Officer as part of the Water Quality Improvement Plan.

Table 6.4
Interim Compliance Dates to Achieve Interim TMDL Compliance Requirements

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*
South Orange County San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	April 4, 2016	April 4, 2021 (April 4, 2016)
		at Heisler Park - North		
		at Main Laguna Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		Laguna Beach at Ocean Avenue		
		Laguna Beach at Cleo Street		
		Arch Cove at Bluebird Canyon Road		
		Laguna Beach at Dumond Drive		
South Orange County Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	April 4, 2018	April 4, 2021 (April 4, 2018)
	Aliso Creek Mouth	at mouth	April 4, 2018	April 4, 2021 (April 4, 2018)
South Orange County Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	April 4, 2016	April 4, 2021 (April 4, 2016)
		Aliso Beach at Table Rock Drive		
		100 Steps Beach at Pacific Coast Hwy at hospital (9th Avenue)		
		at Salt Creek (large outlet)		
		Salt Creek Beach at Salt Creek service road	April 4, 2017	April 4, 2021 (April 4, 2017)
		Salt Creek Beach at Strand Road	April 4, 2017	April 4, 2021 (April 4, 2017)

Table 6.4 (Cont'd)
Interim Compliance Dates to Achieve Interim WQBELs

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	April 4, 2016	April 4, 2021 (April 4, 2016)
	San Juan Creek	lower 1 mile	April 4, 2018	April 4, 2021 (April 4, 2018)
	San Juan Creek Mouth	at mouth	April 4, 2016	April 4, 2021 (April 4, 2016)
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		Ole Hanson Beach Club Beach at Pico Drain	April 4, 2016	April 4, 2021 (April 4, 2016)
		San Clemente City Beach at El Portal Street Stairs	April 4, 2017	April 4, 2021 (April 4, 2017)
		San Clemente City Beach at Mariposa Street		
		San Clemente City Beach at Linda Lane	April 4, 2016	April 4, 2021 (April 4, 2016)
		San Clemente City Beach at South Linda Lane	April 4, 2018	April 4, 2021 (April 4, 2018)
		San Clemente City Beach at Lifeguard Headquarters	April 4, 2017	April 4, 2021 (April 4, 2017)
		under San Clemente Municipal Pier		
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)	April 4, 2018	April 4, 2021 (April 4, 2018)
		San Clemente State Beach at Riviera Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
		Can Clemente State Beach at Cypress Shores	April 4, 2017	April 4, 2021 (April 4, 2017)
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	April 4, 2017	April 4, 2021 (April 4, 2017)
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	April 4, 2016	April 4, 2021 (April 4, 2016)
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	April 4, 2016	April 4, 2021 (April 4, 2016)

Table 6.4 (Cont'd)
Interim Compliance Dates to Achieve Interim WQBELs

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Compliance Dates	
			Interim Dry Weather WQBELs	Interim Wet Weather WQBELs*
Penasquitos Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	April 4, 2016	April 4, 2021 (April 4, 2016)
Mission Bay Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	April 4, 2016	April 4, 2021 (April 4, 2016)
		La Jolla Shores Beach at Caminito del Oro		
		La Jolla Shores Beach at Vallecitos		
		La Jolla Shores Beach at Avenida de la Playa		
		at Casa Beach, Children's Pool		
		South Casa Beach at Coast Boulevard		
		Whispering Sands Beach at Ravina Street		
		Windansea Beach at Vista de la Playa		
		Windansea Beach at Bonair Street		
		Windansea Beach at Playa del Norte		
		Windansea Beach at Palomar Avenue		
		at Tourmaline Surf Park		
		Pacific Beach at Grand Avenue		
Mission Bay Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries		
San Diego River Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek	lower 1 mile	April 4, 2018	April 4, 2021 (April 4, 2018)
	San Diego River	lower 6 miles		
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach		
San Diego Bay Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	April 4, 2018	April 4, 2021 (April 4, 2018)

* The Interim Compliance Dates to achieve the Interim Wet Weather WQBELs in parenthesis apply if the applicable Water Quality Improvement Plan does not include load reduction programs for other constituents (e.g. metals, pesticides, trash, nutrients, sediment, etc.) together with bacteria load reduction requirements of these TMDLs.

(2) Interim Water Quality Based Effluent Limitations

The Responsible Copermittees for discharges to the water bodies in Table 6.0 must comply with the following interim WQBELs by the interim compliance dates given in Specific Provision 6.c.(1):

(a) Interim Receiving Water Limitations

(i) *Interim Dry Weather Receiving Water Limitations*

The Responsible Copermittee must calculate the "existing" exceedance frequencies of the 30-day geometric mean water quality objectives for each of the indicator bacteria by analyzing the available monitoring data collected between January 1, 1996 and December 31, 2002. "Existing" exceedance frequencies may be calculated by water body and/or by Watershed Management Area listed in Table 6.0. Separate "existing" exceedance frequencies must be calculated for beaches and creeks/creek mouths.

The Responsible Copermittees must achieve a 50 percent reduction in the "existing" exceedance frequency of the 30-day geometric mean WQBELs for the water bodies listed in Table 6.0 by the interim compliance dates given in Table 6.4. A 50 percent reduction in the "existing" exceedance frequency is equivalent to half of the "existing" exceedance frequency of the 30-day geometric mean WQBELs.

The "existing" exceedance frequencies and the interim dry weather allowable exceedance frequencies (i.e. interim dry weather receiving water limitations) calculated by the Responsible Copermittees must be included in the Water Quality Improvement Plans for the applicable Watershed Management Areas.

(ii) *Interim Wet Weather Receiving Water Limitations*

The Responsible Copermittees must achieve the interim wet weather receiving water limitations in Table 6.5, expressed as interim wet weather allowable exceedance frequencies, by the interim compliance dates given in Table 6.4.

Table 6.5
Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	*Entero-coccus*
South Orange County San Joaquin Hills HSA (901.11) and Laguna Beach HSA (901.12)	Pacific Ocean Shoreline	Cameo Cove at Irvine Cove Drive – Riviera Way	38%	37%	39%
		at Heisler Park - North			
	Pacific Ocean Shoreline	at Main Laguna Beach			
		Laguna Beach at Ocean Avenue			
		Laguna Beach at Cleo Street			
		Arch Cove at Bluebird Canyon Road			
		Laguna Beach at Dumond Drive			
South Orange County Aliso HSA (901.13)	Pacific Ocean Shoreline	Laguna Beach at Lagunita Place / Blue Lagoon Place at Aliso Beach	41%	41%	42%
	Aliso Creek	Entire reach (7.2 miles) and associated tributaries: - Aliso Hills Channel - English Canyon Creek - Dairy Fork Creek - Sulfur Creek - Wood Canyon Creek	41%	41%	42%
	Aliso Creek Mouth	at mouth	41%	41%	42%
South Orange County Dana Point HSA (901.14)	Pacific Ocean Shoreline	Aliso Beach at West Street	36%	36%	36%
		Aliso Beach at Table Rock Drive			
		100 Steps Beach at Pacific Coast Hwy at hospital (9th Avenue)			
		at Salt Creek (large outlet)			
		Salt Creek Beach at Salt Creek service road			
		Salt Creek Beach at Strand Road			

Table 6.5 (Cont'd)
Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	*Entero-coccus*
South Orange County Lower San Juan HSA (901.27)	Pacific Ocean Shoreline	at San Juan Creek	44%	44%	48%
	San Juan Creek	lower 1 mile	44%	44%	47%
	San Juan Creek Mouth	at mouth	44%	44%	47%
South Orange County San Clemente HA (901.30)	Pacific Ocean Shoreline	at Poche Beach	35%	35%	36%
		Ole Hanson Beach Club Beach at Pico Drain			
		San Clemente City Beach at El Portal Street Stairs			
		San Clemente City Beach at Mariposa Street			
		San Clemente City Beach at Linda Lane			
		San Clemente City Beach at South Linda Lane			
		San Clemente City Beach at Lifeguard Headquarters			
		under San Clemente Municipal Pier			
		San Clemente City Beach at Trafalgar Canyon (Trafalgar Lane)			
		San Clemente State Beach at Riviera Beach			
		Can Clemente State Beach at Cypress Shores			
San Luis Rey River San Luis Rey HU (903.00)	Pacific Ocean Shoreline	at San Luis Rey River mouth	45%	44%	47%
Carlsbad San Marcos HA (904.50)	Pacific Ocean Shoreline	at Moonlight State Beach	40%	40%	41%
San Dieguito River San Dieguito HU (905.00)	Pacific Ocean Shoreline	at San Dieguito Lagoon mouth	33%	33%	36%

Table 6.5 (Cont'd)
Interim Wet Weather Receiving Water Limitations Expressed as Interim Wet Weather Allowable Exceedance Frequencies

Watershed Management Area and Watershed	Water Body	Segment or Area	Interim Wet Weather Allowable Exceedance Frequencies		
			Total Coliform	Fecal Coliform	*Entero-coccus*
Penasquitos Miramar Reservoir HA (906.10)	Pacific Ocean Shoreline	Torrey Pines State Beach at Del Mar (Anderson Canyon)	26%	26%	26%
Mission Bay Scripps HA (906.30)	Pacific Ocean Shoreline	La Jolla Shores Beach at El Paseo Grande	37%	37%	37%
		La Jolla Shores Beach at Caminito del Oro			
		La Jolla Shores Beach at Vallecitos			
		La Jolla Shores Beach at Avenida de la Playa			
		at Casa Beach, Children's Pool			
		South Casa Beach at Coast Boulevard			
		Whispering Sands Beach at Ravina Street			
		Windansea Beach at Vista de la Playa			
		Windansea Beach at Bonair Street			
		Windansea Beach at Playa del Norte			
		Windansea Beach at Palomar Avenue			
		at Tourmaline Surf Park			
		Pacific Beach at Grand Avenue			
Mission Bay Tecolote HA (906.50)	Tecolote Creek	Entire reach and tributaries	49%	49%	51%
San Diego River Mission San Diego HSA (907.11) and Santee HSA (907.12)	Forrester Creek	lower 1 mile	46%	43%	49%
	San Diego River	lower 6 miles	46%	43%	49%
	Pacific Ocean Shoreline	at San Diego River mouth at Dog Beach	46%	43%	51%
San Diego Bay Chollas HSA (908.22)	Chollas Creek	lower 1.2 miles	41%	41%	43%

(b) Interim Effluent Limitations

Indicator bacteria percent load reductions from the Responsible Copermittees' MS4s that are greater than or equal to the following effluent limitations by the interim compliance dates under Specific Provision 6.c.(1) will not cause or contribute to exceedances of the receiving water limitations under Specific Provision 6.c.(2)(a):

Table 6.6
Interim Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Entero-coccus	Total Coliform	Fecal Coliform	Entero-coccus
South Orange County	**San Joaquin Hills HSA** (901.11) and **Laguna Hills HSA** (901.12) - Pacific Ocean Shoreline	45.89%	45.86%	49.14%	23.43%	26.04%	25.63%
	Aliso HSA (901.13) - Pacific Ocean Shoreline - Aliso Creek - Aliso Creek mouth	47.74%	47.79%	49.57%	12.65%	13.31%	13.76% (13.69%)**
	Dana Point HSA (901.14) - Pacific Ocean Shoreline	47.52%	47.52%	49.49%	6.58%	7.43%	7.58%
	Lower San Juan HSA (901.27) - Pacific Ocean Shoreline - San Juan Creek - San Juan Creek mouth	36.48%	37.11%	47.47%	9.61%	6.41%	13.56% (13.45%)**
	San Clemente HA (901.30) - Pacific Ocean Shoreline	47.14%	47.12%	49.42%	11.93%	12.29%	12.63%
San Luis Rey River	**San Luis Rey HU** (903.00) - Pacific Ocean Shoreline	19.07%	19.55%	43.69%	2.81%	1.56%	5.85%
Carlsbad	**San Marcos HA** (904.50) - Pacific Ocean Shoreline	41.41%	41.28%	48.02%	9.24%	9.49%	10.10%

Table 6.6 (Cont'd)
Interim Effluent Limitations Expressed as Percent Load Reductions in MS4 Discharges to the Water Body*

Watershed Management Areas	Watersheds and Water Bodies	Load-Based Effluent Limitations					
		Dry Weather			Wet Weather		
		Total Coliform	Fecal Coliform	Entero-coccus	Total Coliform	Fecal Coliform	Entero-coccus
San Dieguito River	**San Dieguito HU** (905.00) - Pacific Ocean Shoreline	7.20%	10.36%	41.74%	2.15%	0.73%	3.86%
Penasquitos	**Miramar Reservoir HA** (906.10) - Pacific Ocean Shoreline	48.25%	48.30%	49.71%	0.81%	1.00%	0.97%
Mission Bay	**Scripps HA** (906.30) - Pacific Ocean Shoreline	48.22%	48.21%	49.63%	8.16%	10.57%	9.41%
	Tecolote HA (906.50) - Tecolote Creek	47.26%	47.30%	49.47%	8.26%	10.24%	9.08% (9.04%)**
San Diego River	**Mission San Diego HSA** (907.11) and **Santee HSA** (907.12) - Pacific Ocean Shoreline - Forrester Creek (lower 1 mile) - San Diego River (lower 6 miles)	37.02%	34.72%	46.98%	19.07%	26.61%	21.37% (21.24%)**
San Diego Bay	**Chollas HSA** (908.22) - Chollas Creek	46.03%	46.08%	49.23%	8.91%	12.42%	10.73% (10.68%)**

Notes:
* The percent load reductions are based on reducing loads compared to pollutant loads from 2001 to 2002.
** The alternative *Enterococcus* percent load reduction was calculated based on a numeric target of 104 MPN/100mL instead of 61 MPN/100mL, protective of the REC-1 "moderately to lightly used area" usage frequency that is protective of freshwater creeks and downstream beaches. Acceptable evidence that impaired freshwater creeks can be considered "moderately to lightly used areas" must be provided before these alternative pollutant load reductions can be utilized.

(3) Interim TMDL Compliance Determination

Compliance with the interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, or downstream of the Responsible Copermittee's MS4 outfalls; OR

(c) There are no exceedances of the final effluent limitations under Specific Provision 6.b.(2)(b)(i) at the Responsible Copermittee's MS4 outfalls; OR

(d) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the final effluent limitations under Specific Provision 6.b.(2)(b)(ii); OR

(e) The Responsible Copermittees can demonstrate that exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water are due to loads from natural sources, AND pollutant loads from the Copermittees' MS4s are not causing or contributing to the exceedances; OR

(f) There are no exceedances of the interim receiving water limitations under Specific Provision 6.c.(2)(a) in the receiving water at, or downstream of the Responsible Copermittees' MS4 outfalls; OR

(g) The pollutant load reductions for discharges from the Responsible Copermittees' MS4 outfalls are greater than or equal to the interim effluent limitations under Specific Provision 6.c.(2)(b); OR

(h) The Responsible Copermittees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the interim TMDL compliance requirements will be achieved by the interim compliance dates.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Monitoring and Assessment Requirements for Beaches

(a) Monitoring Stations

For beaches addressed by the TMDL, monitoring locations should consist of, at a minimum, the same locations used to collect data required pursuant to Order Nos. R9-2007-0001 and R9-2009-0002, and beach monitoring for Health and Safety Code section 115880.[40] If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source

[40] Commonly referred to as AB 411 monitoring

identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified anthropogenic sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) Monitoring Procedures

(i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations at least monthly. Dry weather samples collected from additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.

(ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations at least once within the first 24 hours of the end of a storm event[41] during the rainy season (i.e. October 1 through April 30). Wet weather samples collected from receiving water stations and any additional monitoring stations established to identify sources must be collected at an appropriate frequency to demonstrate bacteria loads from the identified sources have been addressed and are no longer in exceedance of the allowable exceedance frequencies in the receiving waters.

(iii) Samples must be analyzed for total coliform, fecal coliform, and *Enterococcus* indicator bacteria.

(iv) For Pacific Ocean Shoreline segments or areas listed in Table 6.0 that have been de-listed from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions F.1 and F.2.c of the Order.

[41] Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

(c) Assessment and Reporting Requirements

(i) The Responsible Copermittees must analyze the dry weather and wet weather monitoring data to assess whether the interim and final WQBELs for the Pacific Ocean Shoreline segments or areas listed in Table 6.0 have been achieved.

(ii) Dry weather exceedance frequencies must be calculated as follows:

[a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segments or areas for each water body listed in Table 6.0;
[b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Ocean Plan;
[c] Where there are multiple segments or areas associated with a water body listed in Table 6.0, the Copermittees may calculate geometric means for each segment or area, or combine the dry weather monitoring data from all the segments or areas to calculate geometric means for the water body;
[d] The exceedance frequency must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the dry season.

(iii) Wet weather exceedance frequencies must be calculated as follows:

[a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
[b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;
[c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each storm event sampled; and
[d] The single sample maximum exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in Table 6.2 by the total number of wet weather days during the rainy season.
[e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-

day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the wet season.

(iv) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 6.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

(v) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

(2) Monitoring and Assessment Requirements for Creeks and Creek Mouths

(a) Monitoring Stations

For creeks addressed by the TMDL, monitoring locations should consist of, at a minimum, a location at or near the mouth of the creek (e.g. Mass Loading Station or Mass Emission Station) and one or more locations upstream of the mouth (e.g. Watershed Assessment Station). If exceedances of the applicable interim or final receiving water limitations are observed in the monitoring data, additional monitoring locations and/or other source identification methods must be implemented to identify the sources causing the exceedances. The additional monitoring locations must also be used to demonstrate that the bacteria loads from the identified sources have been addressed and are no longer causing exceedances in the receiving waters.

(b) Monitoring Procedures

(i) The Responsible Copermittees must collect dry weather monitoring samples from the receiving water monitoring stations in accordance with the requirements of Provision D.

(ii) The Responsible Copermittees must collect wet weather monitoring samples from the receiving water monitoring stations within the first 24 hours of the end of a storm event[42] during the rainy season (i.e. October 1 through April 30).

[42] Wet weather days are defined by the TMDL as storm events of 0.2 inches or greater and the following 72 hours. The Responsible Copermittees may choose to limit their wet weather sampling requirements to

(iii) Samples collected from receiving water monitoring stations must be analyzed for fecal coliform and *Enterococcus* indicator bacteria.

(iv) For creeks or creek mouths listed in Table 6.0 that have been de-listed from the Clean Water Act Section 303(d) List, the Responsible Copermittees may propose alternative monitoring procedures to demonstrate that the water bodies continue to remain in compliance with water quality standards under wet weather and dry weather conditions. The alternative monitoring procedures must be submitted as a part of the Water Quality Improvement Plans or any updates required under Provisions F.1 and F.2.c of the Order.

(c) Assessment and Reporting Requirements

(i) The Responsible Copermittees must analyze the receiving water monitoring data to assess whether the interim and final receiving water WQBELs for the creeks and creek mouths listed in Table 6.0 have been achieved.

(ii) Dry weather exceedance frequencies must be calculated as follows:

[a] 30-day geometric means must be calculated from the results of any dry weather samples collected from the segment or area for each water body listed in Table 6.0;
[b] The method and number of samples need for calculating the 30-day geometric means must be consistent with the number of samples required by the Basin Plan;
[c] The exceedance frequency must be calculated by dividing the number of 30-day geometric means that exceed the 30-day geometric mean receiving water limitations in Table 6.2 by the total number of 30-day geometric means calculated from samples collected during the dry season.

(iii) Wet weather exceedance frequencies must be calculated as follows:

[a] If only one sample is collected for a storm event, the bacteria density for every wet weather day associated with that storm event must be assumed to be equal to the results from the one sample collected;
[b] If more than one sample is collected for a storm event, but not on a daily basis, the bacteria density for all wet weather days of the storm event not sampled must be assumed to be equal to the highest bacteria density result reported from the samples collected;

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storm events of 0.2 inches or greater, or also include storm events of 0.1 inches or greater as defined by the federal regulations [40CFR122.26(d)(2)(iii)(A)(2)].

[c] If there are any storm events not sampled, the bacteria density for every wet weather day of those storm events must be assumed to be equal to the average of the highest bacteria densities reported from each of the storm events sampled; and

[d] The exceedance frequency must be calculated by dividing the number of wet weather days that exceed the single sample maximum receiving water limitations in Table 6.2 by the total number of wet weather days during the rainy season.

[e] The data collected for dry weather must be used in addition to the data collected for wet weather to calculate the wet weather 30-day geometric means. The exceedance frequency of the wet weather 30-day geometric means must be calculated by dividing the number of geometric means that exceed the geometric mean receiving water limitations in Table 6.2 by the total number of geometric means calculated from samples collected during the wet season.

(iv) The Responsible Copermittee must identify and incorporate additional MS4 outfall and receiving water monitoring stations and/or adjust monitoring frequencies to identify sources causing exceedances of the receiving water WQBELs.

(v) For assessing and determining compliance with the concentration-based effluent limitations under Specific Provision 6.b.(2)(b)(i), dry and wet weather discharge bacteria densities may be calculated based on a flow-weighted average across all major MS4 outfalls along a water body segment or within a jurisdiction if samples are collected within a similar time period.

(vi) The monitoring and assessment results must be submitted as part of the Transitional Monitoring and Assessment Program and Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

7. Total Maximum Daily Loads for Sediment in Los Peñasquitos Lagoon

a. APPLICABILITY

(1) TMDL Basin Plan Amendment: Resolution No. R9-2012-0033

(2) TMDL Adoption and Approval Dates:

San Diego Water Board Adoption Date:	June 13, 2012
State Water Board Approval Date:	January 21, 2014
Office of Administrative Law Approval Date:	July 14, 2014
US EPA Approval Date:	October 30, 2014

(3) TMDL Effective Date: July 14, 2014

(4) Watershed Management Area: Peñasquitos

(5) Water Body: Los Peñasquitos Lagoon

(6) Responsible Copermittees: County of San Diego, City of San Diego, City of Del Mar, and City of Poway

b. FINAL TMDL COMPLIANCE REQUIREMENTS

The final sediment TMDL compliance requirements for Los Peñasquitos Lagoon consist of the following:

(1) Final TMDL Compliance Date

The Responsible Copermittees must be in compliance with the final TMDL compliance requirements by December 31, 2034.

(2) Final Water Quality Based Effluent Limitations

(a) Final Receiving Water Limitations

Discharges from the MS4s must not prohibit the sustainable restoration of tidal and non-tidal saltmarsh vegetation of at least 346 acres.

(b) Final Effluent Limitations

Discharges from the MS4s containing pollutant loads that do not exceed the following effluent limitations by the compliance date under Provision 7.b(1) will not cause or contribute to a failure of the receiving water condition specified under Specific Provision 7.b.(2)(a):

Table 7.1
*Final Effluent Limitations as Expressed as Wet Season Loads in MS4 Discharges to Los Peñasquitos Lagoon**

Constituent	Effluent Limitation
Sediment	2,580 tons/wet season

* Final effluent limitations are to be achieved by the following Responsible Parties: County of San Diego, City of San Diego, City of Del Mar, City of Poway, Phase II MS4 permittees, Caltrans, general construction storm water NPDES permittees, and general industrial storm water NPDES permittees.

(c) Best Management Practices

(i) The Water Quality Improvement Plan for the Los Peñasquitos Watershed Management Area must incorporate the Sediment Load Reduction Plan required to be developed pursuant to Resolution No. R9-2012-0033.

(ii) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 7.b.(2)(a) and/or the Copermittee's portion of the effluent limitations under Specific Provision 7.b.(2)(b) for Los Peñasquitos Lagoon.

(3) Final TMDL Compliance Determination

Compliance determination with the final WQBELs, on or after the final TMDL compliance date, may be demonstrated via one of the following methods:

(a) Successful restoration of 80 percent of the 1973 acreage of tidal and non-tidal lagoon salt marsh (346 acres) as described in Attachment A of Resolution No. R9-2010-0033; OR

(b) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(i) Incorporate the BMPs required under Specific Provision 7.b.(2)(c)(ii) and/or other implementation actions to achieve compliance with Specific Provision 7.b.(3)(a) as part of the Water Quality Improvement Plan,

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 7.b.(2)(c)(ii) or other implementation actions to achieve compliance with Specific Provision 7.b.(3)(a),

(iii) The results of the analysis must be accepted by the San Diego Water Board as part of the Water Quality Improvement Plan,

(iv) The Responsible Copermittees continue to implement the BMPs required under Specific Provision 7.b.(2)(c)(ii) or other implementation actions, AND

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 7.d to demonstrate compliance with Specific Provision 7.b.(3)(a).

c. INTERIM TMDL COMPLIANCE REQUIREMENTS

The interim sediment TMDL compliance requirements for Los Penasquitos Lagoon consist of the following:

(1) Interim Compliance Dates and WQBELs

The Responsible Copermittees must comply with the interim WQBELs, expressed as wet season loads, by December 31 of the interim compliance year set forth in Table 7.2.

Table 7.2
*Interim Water Quality Based Effluent Limitations Expressed as Wet Season Loads in MS4 Discharges**

Interim Compliance Date	Interim Effluent Limitations (tons/wet season)
December 31, 2019	6,691
December 31, 2023	5,663
December 31, 2027	4,636
December 31, 2029	3,608

* Interim effluent limitations are to be achieved by the following Responsible Parties: County of San Diego, City of San Diego, City of Del Mar, City of Poway, Phase II MS4 permittees, Caltrans, general construction storm water NPDES permittees, and general industrial storm water NPDES permittees.

(2) Interim TMDL Compliance Determination

Compliance with interim WQBELs, on or after the interim TMDL compliance dates, may be demonstrated via one of the following methods:

(a) There is no direct or indirect discharge from the Responsible Copermittee's MS4s to the receiving water; OR

(b) The final receiving water limitation under Specific Provision 7.b.(2)(a) is met; OR

(c) There are no exceedances of the Copermittee's portion of interim effluent limitations under Table 7.2 at the Responsible Copermittee's MS4 outfalls; OR

(d) The Responsible Copermittees have submitted and is fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the Copermittee's portion of the interim TMDL compliance requirements described in Attachment A of Resolution No. R9-2010-0033 will be achieved by the interim compliance date.

d. SPECIFIC MONITORING AND ASSESSMENT REQUIREMENTS

(1) Watershed Monitoring

The Responsible Copermittees must conduct suspended sediment, bed load, and flow monitoring to calculate total sediment loading to the Los Peñasquitos Lagoon for each wet season (October 1 thru April 30) as set forth below:

(a) The Responsible Copermittees must monitor enough storm events throughout the season to quantify sediment loading over each wet season, and

(b) The Responsible Copermittees must monitor at least 3 stations to quantify cumulative sediment loading into Los Peñasquitos Lagoon. Stations must be located within the Los Peñasquitos, Carroll Canyon, and Carmel Creek tributaries prior to discharging into Los Peñasquitos Lagoon.

(2) Lagoon Monitoring

The Responsible Copermittees must monitor Los Peñasquitos Lagoon each Fall for changes in the extent of the vegetation types as set forth below:

(a) The Responsible Copermittees must acquire aerial photos of Los Peñasquitos Lagoon and digitize them at an approximate scale of 1:2,500,

(b) The Responsible Copermittees must appropriately interpret the vegetation and classify the various types as saltmarsh, non-tidal saltmarsh, freshwater marsh, non-tidal saltmarsh –*Lolium perrene* infested, southern willow scrub/mulefat scrub, herbaceous wetland, or upland land cover.

(3) Assessment and Reporting Requirements

(a) The Responsible Copermittees must analyze the monitoring data collected under Specific Provision 7.d(1) and 7.d(2) to assess whether the interim and final WQBELs have been achieved.

(b) For assessing and determining compliance with the final receiving water limitations under Specific Provision 7.b.(2)(a), the Responsible Copermittees must use the data acquired under Specific Provision 7.d.(2) to estimate the acreage of tidal and non-tidal saltmarsh actually restored.

(c) For assessing and determining compliance with the final effluent limitations under Specific Provision 7.b.(2)(b), the Responsible Copermittees must use the data acquired under Specific Provision 7.d.(1) to estimate sediment loading into Los Peñasquitos Lagoon. Sediment loading must be evaluated using a 3-year, weighted rolling average. The first reported average shall be calculated using data collected in the year, 2015-2016, 2016-2017, and 2017-2018 wet seasons.

(d) The monitoring and assessment results must be submitted as part of the Water Quality Improvement Plan Annual Reports required under Provision F.3.b of this Order.

ATTACHMENT F

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

FACT SHEET / TECHNICAL REPORT

FOR

ORDER NO. R9-2013-0001
AS AMENDED BY ORDER NOS. R9-2015-0001 AND R9-2015-0100
NPDES NO. CAS0109266

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT AND WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION

May 8, 2013
Amended February 11, 2015
and November 18, 2015

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I. FACT SHEET FORMAT

This Fact Sheet briefly sets forth the principal facts and the significant factual, legal, methodological, and policy questions that the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) considered in preparing Order No. R9-2013-0001 (Order), as amended by Order Nos. R9-2015-0001 and R9-2015-0100. In accordance with the Code of Federal Regulations (CFR) Title 40 Parts 124.8 and 124.56 (40 CFR 124.8 and 40 CFR 124.56), this Fact Sheet includes, but is not limited to, the following information:

1. Contact information
2. Public process and notification procedures
3. Background of municipal storm water permits
4. Regional MS4 Permit approach
5. Economic considerations
6. Applicable statutes, regulations, plans and policies
7. Discussion of the provisions in the Order

Tentative Order No. R9-2013-0001 was distributed for public review on October 31, 2012. The San Diego Water Board accepted written comments on Tentative Order No. R9-2013-0001 until January 11, 2013. A public hearing was subsequently held on April 10 and 11, 2013, that was continued to May 8, 2013 to receive oral comments from interested persons. The San Diego Water Board adopted Order No. R9-2013-0001 on May 8, 2013.

Tentative Order No. R9-2015-0001, an Order amending Order No. R9-2013-0001, was distributed for public review on September 19, 2014. The San Diego Water Board accepted written comments on Tentative Order No. R9-2015-0001 until November 19, 2014. A public hearing was held on February 11, 2015, to receive oral comments from Copermittees and interested persons. The San Diego Water Board adopted Order No. R9-2015-0001 amending Order No. R9-2013-0001 on February 11, 2015. Order No. R9-2015-0001 amended the findings and provisions of Order No. R9-2013-0001 to:

a. Enroll the County of Orange, the Orange County Flood Control District and the south Orange County Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano as Copermittees responsible for compliance with the terms and conditions of Order No. R9-2013-0001, as amended by Order No. R9-2015-0001;

b. Designate the San Diego Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the Cities of Laguna Woods and Laguna Hills and agree to the designation of the Santa Ana Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the City of Lake Forest, subject to the

terms of the February 10, 2015 agreement between San Diego Water Board and the Santa Ana Water Board described in Finding 29 of this Order, upon the later effective date of Order No. R9-2015-0001 or Order No. R8-2015-0001 (superseding Order No. R8-2009-0030);

c. Establish interim exceptions to land development requirements for those priority development projects that discharge to engineered channels and large river reaches as described in Provision E.3.c.(2)(e) of this Order;

d. Incorporate the amended requirements of the State Water Resources Control Board's (State Water Board) General Exception to require that pollutant reductions be achieved within 6 years for storm water and nonpoint source discharges to ASBS within the Region;

e. Incorporate applicable requirements of the Los Peñasquitos Lagoon Sediment TMDL; and

f. Require the Orange County Copermittees to implement the "*Workgroup Recommendation for a Unified Beach Water Quality Monitoring and Assessment Program in South Orange County*," dated October 2014, made effective in the Monitoring and Reporting Program/Order issued pursuant to California Water Code section 13383 in the December 5, 2014 San Diego Water Board Letter Directive and subject to future revisions by the Executive Officer after appropriate public input.

Tentative Order No. R9-2015-0100, an Order amending Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, was distributed for public review on July 31, 2015. The San Diego Water Board accepted written comments on Tentative Order No. R9-2015-0100 until September 14, 2015. A public hearing was held on November 18, 2015, to receive oral comments from Copermittees and interested persons. The San Diego Water Board adopted Order No. R9-2015-0100 amending Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, on November 18, 2015. Order No. R9-2015-0100 amended the findings and provisions of Order No. R9-2013-0001 as amended by Order No. R9-2015-0001 to:

a. Enroll the County of Riverside, the Cities of Murrieta, Temecula, and Wildomar, and the Riverside County Flood Control and Water Conservation District as Copermittees responsible for compliance with the terms and conditions of Order No. R9-2013-0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100;

b. Continue designation of the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Murrieta and Wildomar, including areas within the Santa Ana Region; and, agree to continue designation of the Santa Ana Water Board to regulate all Phase I MS4 discharges within the jurisdiction of the City of Menifee, including areas within

the San Diego Region, subject to the terms of the October 26, 2015 agreement between San Diego Water Board and the Santa Ana Water Board described in Finding 29 of this Order;

d. Incorporate Provision B.3.c, which provides an option that allows a Copermittee to utilize the watershed-based Water Quality Improvement Plan to be deemed in compliance with the prohibitions and limitations of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b;

e. Incorporate minor revisions to Provisions E.2.a.(1) and E.2.a.(2) to include San Diego Water Board Order No. R9-2015-0013 and State Water Board Order 2014-0194-DWQ into the requirements for addressing non-storm water discharges to a Copermittee's MS4;

e. Incorporate minor revisions to Provision E.3.b.(1) to correct inconsistencies in the definition of a Priority Development Project as compared to the definitions in Order No. R9-2009-0002 (Fourth Term Orange County MS4 Permit) and Order No. R9-2010-0016 (Fourth Term Riverside County MS4 Permit), and requirements for incorporating the corrected definitions into the BMP Design Manual;

f. Incorporate revisions to Provision E.3.e.(1)(a) to provide additional clarity on when the structural BMP performance requirements of Provision E.3.c are applicable to Priority Development Projects;

e. Incorporate minor revisions to the Revised TMDLs for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region and the TMDLs for Sediment in Los Peñasquitos Lagoon in Attachment E to the Order to make the requirements consistent with the Basin Plan amendments adopted by the San Diego Water Board; and

f. Remove provisions related to allowing the Riverside County Copermittees to apply for early coverage under the Regional MS4 Permit.

The San Diego Water Board files applicable to the issuance of Order No. R9-2013-0001 and amendments thereto are incorporated into the administrative record in support of the findings and requirements of the Order.

II. CONTACT INFORMATION

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The Order and other related documents can be downloaded from the San Diego Water Board website at

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/index.shtml

The documents referenced in this Fact Sheet and in Order No. R9-2013-0001 and amendments thereto are available for public review at the San Diego Water Board office, located at the address listed above. Public records are available for inspection during regular business hours, from 8:00 am to 5:00 pm Monday through Friday. To schedule an appointment to inspect public records, contact the San Diego Water Board Records Management Officer at 619-516-1990.

COPERMITTEES

Orange County Copermittees

- County of Orange
- City of Aliso Viejo
- City of Dana Point
- City of Laguna Beach
- City of Laguna Hills
- City of Laguna Niguel
- City of Laguna Woods
- City of Lake Forest *
- City of Mission Viejo
- City of Ranch Santa Margarita
- City of San Clemente
- City of San Juan Capistrano
- Orange County Flood Control District

* While not listed in the above table, the City of Lake Forest remains a Copermittee under this Order until the later effective date of this Order or Santa Ana Water Board Tentative Order No. R8-2015-0001. Thereafter, the City of Lake Forest will no longer be considered a Copermittee under this Order because its Phase I MS4 discharges will be regulated by the Santa Ana Water Board pursuant to Water Code section 13328 designation. The requirements of this Order that apply to the City of Lake Forest for the duration of this Order, consistent with the Water Code section 13228 agreement dated February 10, 2015, are described in Finding 29 and Footnote 2 to Table B-1.

Riverside County Copermittees

- County of Riverside
- City of Menifee**
- City of Murrieta
- City of Temecula
- City of Wildomar
- Riverside County Flood Control and Water Conservation District

** The City of Menifee is not regulated as a Copermittee under this Order because its Phase I MS4 discharges are regulated by Santa Ana Water Board Order No. R8-2010-0033 as it may be amended or issued pursuant to Water Code section 13228 designation. The requirements of this Order that apply to the City of Menifee for the duration of this Order, consistent with the Water Code section 13228 written agreement dated October 26, 2015, are described in Finding 29 and Footnote 3 to Table B-1.

San Diego County Copermittees

- County of San Diego
- City of Carlsbad
- City of Chula Vista
- City of Coronado
- City of Del Mar
- City of El Cajon
- City of Encinitas
- City of Escondido
- City of Imperial Beach
- City of La Mesa
- City of Lemon Grove
- City of National City
- City of Oceanside
- City of Poway
- City of San Diego
- City of San Marcos
- City of Santee
- City of Solana Beach
- City of Vista
- San Diego County Regional Airport Authority
- San Diego Unified Port District

III. PUBLIC PROCESS AND NOTIFICATION PROCEDURES

The San Diego Water Board followed the schedule listed below for the preparation of Order No. R9-2013-0001 and amendments thereto:

San Diego County Copermittee Permit Reissuance Process

1. On February 8, 2011, the San Diego Water Board met with the San Diego County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No. R9-2007-0001.

2. Between February and May 2011, the San Diego Water Board met with select San Diego County, Orange County, and Riverside County Copermittees, as well as representatives of the environmental community to discuss concepts and receive recommendations for elements to be incorporated in a Regional Municipal Separate Storm Sewer System Permit (Regional MS4 Permit).

3. On June 27, 2011 the San Diego Water Board received the Report of Waste Discharge from the San Diego County Copermittees for the renewal of their NPDES permit, Order No. R9-2007-0001.

4. On April 9, 2012, the San Diego Water Board released an administrative draft of Tentative Order No. R9-2013-0001 for preliminary informal comments and feedback.

5. On April 25, 2012, the San Diego Water Board held an informal public workshop to present the administrative draft of Tentative Order No. R9-2013-0001 and receive verbal comments.

6. Between June and August 2012, the San Diego Water Board held four (4) focused meetings with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community, and USEPA) to discuss and receive preliminary comments and feedback about specific elements in the administrative draft of Tentative Order No. R9-2013-0001.

7. On September 5, 2012, the San Diego Water Board held an informal public workshop to present the modifications that were expected to be incorporated into the Tentative Order based on the preliminary comments and feedback received during the focused meetings held between June and August 2012.

8. Informal written comments on the administrative draft of Tentative Order No. R9-2013-0001 were accepted until September 14, 2012.

9. On October 12, 2012, the San Diego Water Board released a revised administrative draft of Tentative Order No. R9-2013-0001.

10. On October 24, 2012, the San Diego Water Board held a focused meeting with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community, and USEPA) to discuss modifications incorporated into the administrative draft of Tentative Order No. R9-2013-0001.

11. On October 31, 2012, the San Diego Water Board released Tentative Order No. R9-2013-0001 for formal public review and comment.

12. On November 13, 2012 and December 12, 2012, the San Diego Water Board held a formal public Board workshop to present the public draft of Tentative Order No. R9-2013-0001 and receive verbal comments.

13. Formal written comments on the public draft of Tentative Order No. R9-2013-0001 were accepted until January 11, 2013.

14. A public hearing of Tentative Order No. R9-2013-0001 was conducted on April 10 and 11, 2013, that was continued to May 8, 2013.

Orange County Copermittee Permit Reissuance Process

15. On May 20, 2014 the San Diego Water Board received the Report of Waste Discharge from the Orange County Copermittees for the renewal of their MS4 NPDES permit, Order No. R9-2009-0002.

16. On June 24, 2014, the San Diego Water Board met with the Orange County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No.R9-2009-0002 and the process for enrollment as Copermittees under Regional MS4 Permit Order No. R9-2013-0001.

17. On July 1, 2014, the San Diego Water Board held a public meeting to discuss the Orange County Report of Waste Discharge and receive comments on potential modifications to Order No. R9-2013-0001. Based on comments received from the Orange County Copermittees and other interested persons at this meeting, the San Diego Water Board determined that additional public meetings were not needed prior to release of Tentative Order No. R9-2015-0001, amending Order No. R9-2013-0001 in redlined – strikeout format for public review and comment.

18. On September 19, 2014, the San Diego Water Board released Tentative Order No. R9-2015-0001 for a 60 day public review and comment period.

19. On October 8, 2014, the San Diego Water Board held a formal public workshop at a regular board meeting to receive information and discuss the proposed amendments to Order No. R9-2013-0001 described in Tentative Order No. R9-2015-0001.

20. In accordance with State and federal laws and regulations, the San Diego Water Board notified San Diego County, Orange County and Riverside County Copermittees, and all known interested agencies and persons of its intent to adopt Tentative Order No. R9-2015-0001 and provided them with an opportunity to submit their written comments and recommendations. Written comments and recommendations on Tentative Order No. R9-2015-0001 were accepted until November 19, 2014.

21. The San Diego Water Board held a public workshop on October 8, 2014, and a public hearing on February 11, 2015, and heard and considered all comments pertaining to the adoption of Tentative Order No. R9-2015-0001 on February 11, 2015.

Riverside County Copermittee Permit Reissuance Process

22. Between April and June 2015, the San Diego Water Board held three (3) public workshops with representatives of the principal stakeholders (the Copermittees, the environmental community, the development/business community) to discuss and receive comments and feedback about amending Order No. R9-2013-0001 to incorporate a definition of prior lawful approval for Priority Development Projects, and an alternative compliance pathway for prohibitions and limitations in Provision A of the Order. A San Diego Water Board member attended the April and May 2015 public workshops, but no actions or voting took place.

23. On April 15, 2015, the San Diego Water Board met with the Riverside County Copermittees to discuss the Report of Waste Discharge required pursuant to Order No.R9-2010-0016 and the process for enrollment as Copermittees under Order No. R9-2013-0001 (Regional MS4 Permit).

24. On May 8, 2015 the San Diego Water Board received a Report of Waste Discharge from the Riverside County Copermittees for the renewal of their MS4 NPDES permit, Order No. R9-2010-0016.

25. On July 31, 2015, the San Diego Water Board released Tentative Order No. R9-2015-0100 for a formal public review and comment period.

26. Formal written comments on the public draft of Tentative Order No. R9-2015-0100 were accepted until September 14, 2015, a formal public written comment period of 46 days.

27. A public hearing to receive oral comments on Tentative Order No. R9-2015-0100 was conducted on November 18, 2015.

IV. BACKGROUND OF THE SAN DIEGO REGION MUNICIPAL STORM WATER PERMITS

In developed and developing areas, storm water runoff is commonly transported through municipal separate storm sewer systems (MS4s) and discharged into local receiving water bodies. As the storm water runs off and flows over the land or impervious surfaces (e.g., paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment, and other pollutants that can adversely affect receiving water quality if discharged untreated. The United States Environmental Protection Agency (USEPA) recognizes wet weather flows from urban areas as the number one source of estuarine pollution in coastal communities,[1] such as those within the San Diego Region.

The federal Clean Water Act (CWA) was amended in 1987 to address and regulate discharges of storm water associated with industrial activities and from municipal storm sewers. With the amendments, many municipalities throughout the United States were obligated for the first time to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges of storm water from their MS4s.

In response to the CWA 1987 amendment, as well as the pending federal NPDES regulations which would implement the amendment, the San Diego Water Board issued "early" MS4 permits. The San Diego Water Board adopted and issued Order Nos. 90-38, 90-42, and 90-46 to regulate storm water discharges from the MS4s in Orange County, San Diego County, and Riverside County, respectively, within the San Diego Region on July 16, 1990.

The "early" MS4 permits, or First Term Permits, were issued prior to the November 1990 promulgation of the final federal NPDES storm water regulations. By issuing these First Term Permits before the federal regulations took effect, the San Diego Water Board was able to provide the Copermittees additional flexibility in addressing and managing storm water discharges. The First Term Permits contained the essentials of the 1990 regulations, and required the Copermittees to develop and implement runoff management programs, but provided little specificity about what was required to be included in or actually achieved by those programs.

The flexibility provided in the First Term Permits was generally continued through the Second Term Permits. The combination of the lack of specificity in the First and Second Term Permits, a general lack of meaningful action by the Copermittees and a general lack of corresponding reaction (i.e. enforcement) by the San Diego Water Board during the first ten years of the storm water program, resulted in few substantive steps towards achieving improvements in the quality of receiving waters or storm water discharges from the MS4s.

[1] US EPA. 1999. 40 CFR Parts 9, 122, 123, and 124. National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule. 64 FR 68727.

From 2001, the regulatory approach incorporated into Third Term Permits was a significant departure from the regulatory approach of the First and Second Term Permits. The Third Term Permits issued by the San Diego Water Board included more detailed requirements that outlined the minimum level of implementation required for the Copermittees' programs to meet the maximum extent practicable (MEP) standard for storm water. The Third Term Permits included more detail to emphasize and enhance the jurisdictional runoff management programs developed by the Copermittees and introduced requirements for developing and implementing watershed-based programs.

The Third Term Permits also incorporated two precedent setting decisions by the State Water Board. In Order WQ 99-05, the State Water Board established receiving water limitation language to be included in all MS4 permits. The State Water Board's precedential language clarified that municipal storm water permits must include provisions requiring discharges to be controlled to attain water quality standards in receiving waters. Unlike previously adopted versions of the receiving water limitation language in the First and Second Term Permits, the language no longer stated that "*violations of water quality standards are not violations of the municipal storm water permit under certain conditions.*" In addition, the receiving water limitation language no longer indicated that the "*implementation of best management practices is the 'functional equivalent' of meeting water quality standards.*" State Water Board Order WQ 99-05 specifically requires language in MS4 permits for the Copermittees to comply with water quality standards based discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions to reduce pollutants in discharges. (See State Water Board Order WQ 99-05 (*Environmental Health Coalition*)).

In Order WQ 2000-11, also a precedential decision, the State Water Board addressed design standards for structural post-construction best management practices (BMPs) for new development and significant redevelopment. The State Water Board found that the design standards, which require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. State Water Board Order WQ 2000-11 also found that the post-construction BMP provisions, or Standard Storm Water Mitigation Plan (SSMP) provisions, constitute MEP for addressing storm water pollutant discharges resulting from specific development categories.

The Third Term San Diego County and Orange County Permits (Order Nos. 2001-01 and R9-2002-0001, respectively) were appealed to the State Water Board. Minor modifications were made by the State Water Board, but the requirements were largely upheld. In State Water Board Order WQ 2001-15, the State Water Board upheld the Third Term San Diego County Permit requirements with certain modifications. The State Water Board removed the prohibition of storm water discharges *into* the MS4 that cause or contribute to exceedances of water quality objectives. The revision allows for treatment of pollutants in storm water runoff after the pollutants have entered the MS4.

State Water Board Order WQ 2001-15 otherwise upheld all the other requirements of the permit.

In addition to the modification to the discharge prohibition in Order WQ 2001-15, the State Water Board refined Order WQ 99-05 by making clear that the Copermittees may use an iterative approach to achieving compliance with water quality standards that involves ongoing assessments and revisions. Thus, the language for the discharge prohibitions and receiving water limitations was revised to explicitly require the Copermittees to implement an iterative process of assessments and revisions to comply with the discharge prohibitions and receiving water limitations. The San Diego Water Board retained the authority to enforce receiving water limitations and discharge prohibitions even if the Copermittee is engaged in the iterative process.

The Third Term San Diego County Permit was subsequently challenged in the Superior Court of the State of California and the Court of Appeal, Fourth Appellate District. The Court of Appeal, Fourth Appellate District, found that the approach of the Third Term San Diego County Permit to regulating discharges into the MS4 was appropriate (*Building Industry Ass'n. v. State Water Resources Control Bd., et al.,* 124 Cal.App.4th 866 (2004)). The State of California Supreme Court denied review sought by the Building Industry Association in March 2005.

The Fourth Term Permits began with the adoption of Order No. R9-2007-0001 issued to the Copermittees of San Diego County in January 2007. Order Nos. R9-2009-0002 and R9-2010-0016 were subsequently issued to the Copermittees of Orange County and Riverside County. The Fourth Term Permits continued to include more detailed requirements to be implemented by each Copermittee's jurisdictional runoff management program. The Fourth Term Permits also included requirements to further emphasize a watershed management approach and for more coordination among jurisdictional runoff management programs. In addition, the Fourth Term Permits included more requirements for assessing the effectiveness of the runoff management programs being implemented by the Copermittees. The intent of the inclusion of additional requirements was to enhance and better define elements of the permit that were expected to be incorporated into the iterative process for managing runoff from each Copermittee's jurisdiction and within the watersheds of the San Diego Region.

The Fourth Term Permits included several new and emerging approaches for managing storm water runoff and discharges. Low impact development (LID) requirements are included for development and significant redevelopment to reduce pollutants in storm water runoff from sites through more natural processes such as infiltration and biofiltration closer to the source, rather than utilizing conventional mechanical end-of-pipe treatment systems. Hydrograph modification (hydromodification) management requirements also are included to mitigate the potential for increased erosion in receiving waters due to increased runoff rates and durations often caused by development and increased impervious surfaces. The Fourth Term Orange County and Riverside County Permits introduced requirements to identify areas of existing

development where retrofitting with LID projects would be feasible and could be implemented to reduce storm water runoff and pollutants in storm water discharges.

The Fourth Term Orange County and Riverside County Permits included a clearer distinction between storm water and non-storm water discharges. The term "urban runoff" was completely removed, and a distinction between storm water (wet weather) runoff and non-storm water (dry weather) runoff was emphasized. This clarification was made to prevent any potential misunderstanding that regulation under the MS4 permits is limited only to urbanized areas, and to prevent non-storm water runoff from being managed in the same manner as storm water runoff. The term "urban runoff" is not defined in the Code of Federal Regulations (CFR) or Federal Register (FR) in the regulation of MS4 discharges. According to the CWA 402(p)(3)(B)(ii), MS4 permits must include a requirement to effectively prohibit non-storm water discharges into the MS4s.

Finally, for the Fourth Term Orange County and Riverside County Permits the San Diego Water Board found that non-storm water discharges to the MS4 from over application of irrigation water are sources of pollutants. The San Diego Water Board found that non-storm water discharges resulting from over-irrigation must be prohibited from entering the MS4 in accordance with the requirements of the CWA and pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1).

The requirements of the Fourth Term Permits issued to the Copermittees in each county within the San Diego Region now have substantively the same core requirements such as discharge prohibitions, receiving water limitations, jurisdictional runoff management program components, and monitoring program requirements. There are, however, several inconsistencies that exist among the three Fourth Term Permits which complicate oversight and implementation of the permits by the San Diego Water Board.

The Fourth Term San Diego County Permit expired in January 2012. The Fourth Term Orange County permit expired in December 2014 and the Fourth Term Riverside County Permit expired in November 2015. Issuing the Fifth Term Permits within five years for three counties under three different permits would have required the San Diego Water Board to expend significant time and resources for the issuance of the permits through three separate public proceedings, thereby greatly reducing the time and resources available to oversee implementation and compliance. Multiple permits also create confusion for determining compliance among regulated entities, especially for the land development community.

The San Diego Water Board acknowledged that issuing a single MS4 permit for all the Copermittees in the San Diego Region can and is expected to result in more consistent implementation, improve communication among agencies within watersheds crossing multiple jurisdictions, and minimize resources spent with each permit renewal process. Within the findings of the Fourth Term Riverside County Permit issued in November 2010, the San Diego Water Board notified the public of its intent to develop and issue a single Regional MS4 Permit.

V. REGIONAL MS4 PERMIT APPROACH

The Fifth Term Permit, or Regional MS4 Permit, shifts the focus of the permit requirements from a minimum level of actions to be implemented by the Copermittees to identifying outcomes to be achieved by those actions. Order No. R9-2013-0001 represents an important paradigm shift in the approach for MS4 permits within the San Diego Region.

Historical Permitting Approach

The First and Second Term Permits were very broad and provided little specificity about what was required to be developed and implemented by the Copermittees. The Third Term Permits began to become more specific about the minimum level of implementation required by the Copermittees. The Fourth Term Permits subsequently increased in specificity. The MS4 permits have progressively become more detailed and focused on specifying the minimum level of actions expected to be implemented by the Copermittees. As detailed and specific as the MS4 permits have become, however, they include very little detail about what the desired outcomes of the required actions are expected to achieve. Compliance with the permit requirements has essentially been tracking numbers of actions and reporting, not tracking progress or actual improvements in the quality of receiving waters or discharges from the MS4s. The result has been an increase in actions being implemented by the Copermittees with little or no ability or expectations to determine whether or not improvements in water quality are being achieved.

The Fourth Term Permits result in significant resource expenditure by the Copermittees to report permit compliance information to the San Diego Water Board in the form of annual jurisdictional runoff management program, watershed program, and monitoring program reports. The San Diego Water Board was required to expend much of its limited resources on reviewing more than 50 voluminous reports submitted annually by the Copermittees. The information reported by the Copermittees was of limited value when trying to measure progress toward achieving improvements in the quality of receiving waters or discharges from the MS4s. Oversight of the MS4 permits was further complicated by the inconsistencies among the requirements issued to the Orange County, San Diego County, and Riverside County Copermittees under three separate MS4 permits.

Under the Fourth Term Permits, the Copermittees were required to expend a significant portion of their limited resources collecting data of limited value, and putting together reports to submit that information to the San Diego Water Board. Likewise, the San Diego Water Board was required to expend most of its limited resources reviewing reports, and developing permits instead of working directly with the Copermittees to identify solutions to problems causing impacts to water quality. This was an unsustainable course that would have continued to demand more resources

from the Copermittees and the San Diego Water Board, and would have continued to result in unknown water quality benefits.

New Permitting Approach

The goal of the Regional MS4 Permit is twofold: 1) bring a consistent set of MS4 permit requirements to all of the Copermittees within the San Diego Region; and, 2) provide an MS4 permit with requirements that will allow the Copermittees to focus their efforts and resources on achieving goals and desired outcomes toward the improvement of water quality rather than completing specific actions.

The overall approach included in the Regional MS4 Permit with respect to the jurisdictional runoff management programs will not differ significantly from the current permits. The general requirements for the jurisdictional runoff management program components and compliance with those requirements will remain and be applied consistently throughout the San Diego Region under the Regional MS4 Permit.

The most significant difference in the new permitting approach is the specific manner of implementation for those jurisdictional runoff management programs. Implementation will be based on decisions made by the Copermittees in accordance with what they have identified as their highest priority water quality conditions. In other words, the Copermittees will have significant control in how to implement the jurisdictional runoff management programs to best utilize their available resources in addressing a specific set of priorities effectively, instead of trying to address all the water quality priorities ineffectively.

The Copermittees are given the responsibility of identifying their highest priority water quality conditions that they intend to address. The Copermittees will develop goals that can be used to measure and demonstrate progress or improvements toward addressing those priorities. In addition to the goals, the Copermittees will provide a schedule for achieving the goals for those highest priorities. The measurement of progress toward achieving the goals for those highest priorities requires a better defined and more focused program of monitoring and assessment than under the Fourth Term Permits.

The monitoring and assessment program must be designed to inform the Copermittees of their progress, and the need for modifications in their jurisdictional runoff management programs and schedules to achieve their goals to improve water quality. The monitoring and assessment program requirements will have a more central role in the Regional MS4 Permit than in earlier permits. The monitoring and assessment requirements must also be designed to enable the Copermittees to focus and direct their efforts in implementing their jurisdictional runoff management programs toward their stated desired outcomes to improve the quality of receiving waters and/or discharges from the MS4s.

By providing an MS4 permit that allows the Copermittees to make more decisions about how to utilize and focus their resources, along with a better defined monitoring and assessment program to inform their water quality management decisions, the Copermittees have the opportunity to:

1) *Plan strategically*. The Copermittees must have the ability to identify their available resources and develop and implement long term plans that can organize, collect, and use those resources in the most strategically advantageous and efficient manner possible. This ability to develop long term plans will allow the Copermittees to focus and utilize their resources in a more concerted way over the short term and long term to address specific water quality priorities through stated desired outcomes.

2) *Manage adaptively*. The Copermittees must be given the ability to modify their plans as additional information and data are collected from the monitoring and assessment programs. The Copermittees' plans may require modifications to the programs, priorities, goals, strategies, and/or schedules in order for the Copermittees to achieve a stated desired outcome.

3) *Identify synergies*. The Copermittees must be given more flexibility to identify efficiencies within and among their jurisdictional runoff management programs as the strategies are developed and implemented to increase the Copermittees' collective effectiveness. The Copermittees must also be able to identify and utilize resources available from other agencies and entities to further augment and enhance their jurisdictional runoff management programs and/or to collectively work with those other agencies and entities toward achieving a stated desired outcome.

The Regional MS4 Permit requirements provide the Copermittees the flexibility and responsibility to decide what actions will be necessary to achieve an outcome that is tailored and designed by the Copermittees to improve specific prioritized water quality conditions. The San Diego Water Board expects the approach of the Regional MS4 Permit to give the Copermittees a greater sense of ownership for restoring the quality of receiving waters in the San Diego Region by becoming an integral part of the decision making process in identifying water quality conditions to be addressed, as well as determining the best use of their resources.

VI. ECONOMIC CONSIDERATIONS

Statutory Considerations

California Water Code (CWC) section 13241 requires the San Diego Water Board to consider certain factors, including economic considerations, in the adoption of water quality objectives. CWC section 13263 requires the San Diego Water Board to take into consideration the provisions of CWC section 13241 in adopting waste discharge requirements.

In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, the California Supreme Court considered whether Regional Water Boards must comply with CWC section 13241 when issuing waste discharge requirements under CWC section 13263(a) by taking into account the costs a permittee will incur in complying with the permit requirements. The Court concluded that whether it is necessary to consider such cost information "*depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act.*" (*Id.* at p. 627.) The Court ruled that Regional Water Boards may not consider the factors in CWC section 13241, including economics, to justify imposing pollutant restrictions that are less stringent than applicable federal law requires. (*Id.* At pp. 618, 626-627 ["*[Water Code section 13377 specifies that [ ] discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act...Because CWC section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a [ ] discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.*"]). However, when pollutant restrictions in an NPDES permit are more stringent than federal law requires, CWC section 13263 requires that the Regional Water Boards consider the factors described in CWC section 13241 as they apply to those specific restrictions.

As discussed in Section VII.F, Unfunded State Mandates, the San Diego Water Board finds that the requirements in this Order are not more stringent than the minimum federal requirements. Among other requirements, federal law requires MS4 permits to include requirements to effectively prohibit non-storm water discharges into the MS4s, in addition to requiring controls to reduce the discharge of pollutants in storm water to the MEP, and other provisions as USEPA or the State determines are appropriate for the control of pollutants in MS4 discharges.

The requirements in this Order may be more specific or detailed than those enumerated in federal regulations under 40 CFR 122.26 or in the USEPA guidance. However, the requirements have been designed to be consistent with and within the federal statutory mandates described in CWA section 402(p)(3)(B)(ii) and (iii) and the related federal regulations and guidance. Consistent with federal law, all of the

conditions in this Order could have been included in a permit adopted by USEPA in the absence of the in lieu authority of California to issue NPDES permits.

Moreover, the inclusion of numeric WQBELs in this Order does not cause this Order to be more stringent than federal law. Federal law authorizes both narrative and numeric effluent limitations to meet state water quality standards. The inclusion of WQBELs as discharge specifications in an NPDES permit in order to achieve compliance with water quality standards is not a more stringent requirement than the inclusion of BMP based permit limitations to achieve water quality standards (State Water Board Order No. WQ 2006-0012 (*Boeing*)). Therefore, consideration of the factors set forth in CWC section 13241 is not required for permit requirements to implement the effective prohibition on the discharge of non-storm water discharges into the MS4 or for controls to reduce the discharge of pollutants in storm water to the MEP, or other provisions that the San Diego Water Board has determine appropriate to control such pollutants, as those requirements are mandated by federal law.

Included in the provisions of the Order are monitoring and reporting requirements that are designed to demonstrate that the Copermittees are implementing programs to comply with the CWA municipal storm water requirements. CWA section 308(a) and 40 CFR 122.41(h), (j)-(l), 122.44(i) and 122.48 require that all NPDES permits specify monitoring and reporting requirements. Federal regulations applicable to large and medium MS4s (40 CFR 122.26(d)(1)(iv)(D), 122.26(d)(1)(v)(B), 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)(D), 122.26(d)(2)(iv)(B)(2) and 122.42(c)) also specify additional monitoring and reporting requirements. In addition to the federal requirements of the CWA, the San Diego Water Board also has the authority in CWC 13383 to establish monitoring, reporting, and recordkeeping requirements that implement federal and state laws and regulations through NPDES permits.

The monitoring and assessment information that will be reported to the San Diego Water Board is necessary to determine if the Copermittees are making progress toward achieving compliance with the discharge prohibitions, receiving water limitations, and effluent limitations under Provision A of the Order. The monitoring and assessment information that will be reported is also expected to be key to the iterative approach and adaptive management process that is required to be implemented by the Copermittees if they cannot meet the discharge prohibitions and receiving water limitations under the present conditions, which is also part of the requirements under Provision A of the Order.

Notwithstanding the above, the San Diego Water Board has considered cost information in issuing this Order, as discussed below. The San Diego Water Board has also considered all of the evidence that has been presented to the San Diego Water Board regarding the CWC section 13241 factors in adopting this Order. The San Diego Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan and the economic information related to costs of compliance and other CWC section 13241 factors are not sufficient to justify failing to protect those beneficial uses. Where appropriate, the

San Diego Water Board has provided or will consider providing the Copermittees with additional time to implement control measures to achieve final WQBELs and/or water quality standards.

Cost Information

Discussions of the financial and economic ramifications of municipal storm water management programs tend to focus on the significant costs incurred by municipalities in developing and implementing the programs. When considering the cost of implementing the programs, however, it is also important to consider the alternative costs that are incurred when programs are not fully implemented, as well as the economic benefits which result from effective program implementation.

The recent financial and economic conditions have amplified the concerns about the costs incurred by the municipalities in developing and implementing their programs. The reduction in resources resulting from the recent financial and economic conditions has been cited by many of the Copermittees as a justification for reducing the requirements that must be met by their programs. While the recent conditions are a cause for concern in the short term, these programs also have an opportunity to identify and implement improvements and efficiencies before the next period of growth and development, resulting in more effective and sustainable programs over the long term.

In addition, it is very difficult to ascertain the true cost of implementation of the Copermittees' management programs because of inconsistencies in reporting by the Copermittees. Reported costs of compliance for the same program element can vary widely from city to city, often by a very wide margin that is not easily explained.[2] Despite these problems, efforts have been made to identify management program costs, which can be helpful in understanding the costs of program implementation.

The San Diego Water Board recognizes that the Copermittees will incur costs in implementing this Order, potentially above and beyond the costs from the Copermittees' prior permits. The San Diego Water Board also recognizes that, due to California's current economic condition, many Copermittees currently have limited staff and resources to implement actions to address its MS4 discharges. Based on the economic considerations below, the San Diego Water Board has provided the Copermittees a significant amount of flexibility to choose how to implement the requirements of the Order.

The Order also allows the Copermittees to customize their plans, programs, and monitoring requirements. In the end, it is up to the Copermittees to determine the effective BMPs and measures necessary to comply with this Order. The Copermittees can choose to implement the least expensive measures that are effective in meeting

[2] Los Angeles Water Board, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.

the requirements of this Order. This Order also does not require the Copermittees to fully implement all requirements within a single permit term. Where appropriate, the Board has provided the Copermittees with additional time outside of the permit term to implement control measures to achieve final WQBELs and/or water quality standards.

The San Diego Water Board has considered available cost information associated with compliance with this Order. It is not possible to predict accurately the cost impact of the requirements that involve an unknown level of implementation or that depend on environmental variables that are as yet undefined. Only general conclusions can be drawn from this information.

Estimated Municipal Storm Water Program Implementation Costs

The USEPA, the State Water Board, and the California Regional Water Quality Control Boards (Regional Water Boards) have attempted to evaluate the costs of implementing municipal storm water programs. The assessments have demonstrated that the true costs are difficult to ascertain and reported costs vary widely. In addition, reported fiscal analyses tend to neglect the costs incurred to municipalities when storm water and non-storm water runoff is not effectively managed, which are incurred as a result of pollution, contamination, nuisance, and damage to ecosystems, property, and human health. Nonetheless, they provide a useful context for considering the costs of requirements within Order No. R9-2013-0001.

In 1999, the USEPA reported on multiple studies it conducted to determine the cost of management programs. A study of Phase II municipalities determined that the annual cost of the Phase II program was expected to be $9.16 per household. The USEPA also studied 35 Phase I municipalities, finding costs to be $9.08 per household annually, similar to those anticipated for Phase II municipalities.[3]

The State Water Board commissioned a study by the California State University, Sacramento to assess costs of the Phase I MS4 program. This study includes an assessment of costs incurred by Phase I MS4s throughout the state to implement their programs. Annual cost per household in the study ranged from $18 to $46, with the Fresno-Clovis Metropolitan Area representing the lower end of the range, and the City of Encinitas (in San Diego County) representing the upper end of the range.[4]

A study on Phase I MS4 program costs was also conducted by the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board), where program costs reported in the municipalities' annual reports were assessed. The Los

[3] Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791-68792.
[4] State Water Board, 2005. NPDES Stormwater Cost Survey. P. ii.

Angeles Water Board estimated that average per household cost to implement the MS4 program in Los Angeles County was $12.50.[5]

It is important to note that reported program costs are not all attributable to solely complying with MS4 permits. Many program components, and their associated costs, existed before any MS4 permits were ever issued. For example, street sweeping and trash collection costs cannot be solely or even principally attributable to MS4 permit compliance, since these practices have long been expected from and implemented by municipalities.

Therefore, true program cost resulting from MS4 permit requirements is some fraction of reported costs. The California State University, Sacramento study found that only 38 percent of program costs are new costs fully attributable to MS4 permits. The remainder of the program costs was either pre-existing or resulted from enhancement of pre-existing programs.[6] In 2000, the County of Orange found that even lower amounts of program costs are solely attributable to MS4 permit compliance, reporting that the amount attributable to implement the County or Orange Drainage Area Management Plan (DAMP), was less than 20 percent of the total budget. The remaining 80 percent was attributable to pre-existing programs.[7] More current data from the County of Orange is not used in this discussion because the County of Orange no longer reports such information.

Estimated Value of Healthy Water Quality

Economic considerations of municipal storm water management programs cannot be limited only to program costs. Evaluation of programs must also consider information on the benefits derived from environmental protection and improvement.[8] Attention is often focused on municipal storm water management program costs, but the programs must also be viewed in terms of their value to the public.

Placing a value on healthy receiving waters is very difficult. Often the value of receiving waters with good water quality manifests in other forms, such as tourism, recreational opportunities, and/or increased property values. When surface water bodies are degraded, thereby degrading the habitat within and adjacent to the water bodies, the public loses the value and benefits associated with being able to use the area in and around the water bodies. Surface waters that are able to support the beneficial uses designated in the Basin Plan can sustain plants and wildlife that can attract visitors and residents, providing aesthetic, recreational, as well as monetary value to the public. At this time, however, there have been no studies for the San

[5] Los Angeles Water Board, 2003. Review and Analysis of Budget Data Submitted by the Permittees for Fiscal Years 2000-2003. P. 2.
[6] State Water Board, 2005. NPDES Stormwater Cost Survey. P. 58.
[7] County of Orange, 2000. A NPDES Annual Progress Report. P. 60.
[8] Ribaudo M.O. and D. Heelerstein. 1992, *Estimating Water Quality Benefits: Theoretical and Methodological Issues.* U.S. Department of Agriculture. Technical Bulletin No. 1808.

Diego Region to quantify the added value that surface waters with healthy water quality can provide.

USEPA has estimated that household willingness to pay for improvements in fresh water quality for fishing and boating is approximately $158-$210.[9] This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. Another study conducted by California State University, Sacramento reported that the annual household willingness to pay for statewide clean water is approximately $180.[10]

A study conducted by the University of Southern California and University of California, Los Angeles assessed the costs and benefits of implementing various approaches for achieving compliance with the MS4 permits in the Los Angeles region. The study found that non-structural systems would cost $2.8 billion but provide $5.6 billion in benefit. If structural systems were determined to be needed, the study found that total costs would be $5.7 to $7.4 billion, while benefits could reach $18 billion.[11] Costs are anticipated to be borne over many years, probably at least ten years.

As can be seen, the benefits of the municipal storm water management programs are expected to considerably exceed their costs. Such findings are corroborated by USEPA, which found that the benefits of implementation of its Phase II storm water rule would also outweigh the costs.[12]

[9] Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68793.
[10] State Water Board, 2005. NPDES Stormwater Cost Survey. P. iv.
[11] Los Angeles Water Board, 2004. Alternative Approaches to Stormwater Control.
[12] Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. P. 68791.

VII. APPLICABLE STATUTES, REGULATIONS, PLANS AND POLICIES

A. Legal Authorities – Federal Clean Water Act and California Water Code

This Order is issued pursuant to section 402 of the CWA and implementing regulations adopted by the USEPA and chapter 5.5, division 7 of the CWC (commencing with section 13370). This Order serves as an NPDES permit for point source discharges to surface waters. This Order also serves as waste discharge requirements pursuant to article 4, chapter 4, division 7 of the CWC (commencing with section 13260).

The objective of the CWA is "*to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.*" To carry out this objective, the CWA requires the implementation of permit programs to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the U.S. and to regulate the use and disposal of sewage sludge. CWA section 402 provides the legal authority to issue a permit for the discharge of pollutants to waters of the U.S. under the NPDES. The CWA provides that NPDES permits may be issued by states which are authorized to implement the provisions of that act. California became authorized to implement the NPDES permit program on May 14, 1973.

The Porter-Cologne Water Quality Control Act (Division 7, commencing with CWC section 13000) established the State Water Resources Control Board (State Water Board) and nine Regional Water Quality Control Boards (Regional Water Boards) as the principal state agencies with primary responsibility for the coordination and control of water quality. CWC section 13200(f) established the San Diego Water Board, which has the primary responsibility for the coordination and control of water quality in the San Diego Region, which includes all the basins draining into the Pacific Ocean between the southern boundary of the Santa Ana Region and the California-Mexico boundary. The San Diego Water Board implements the CWA through Chapter 5.5 of the CWC, commencing with section 13370. CWC section 13377 provides the San Diego Water Board the legal authority to issue waste discharge requirements to ensure compliance with all applicable provisions of the CWA and acts amendatory thereof or supplementary, thereto, to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.

CWA section 402(p) requires the USEPA or authorized state to issue NPDES permits for storm water discharges from MS4s to waters of the U.S. CWA section 402(p)(3)(B)(ii) requires that NPDES permits for storm water discharges from MS4s "*effectively prohibit non-storm water discharges*" into the MS4s. CWA section 402(p)(3)(B)(iii) requires that NPDES permits for storm water discharges from MS4s to "*require controls to reduce the discharge of pollutants* [in storm water] *to the maximum extent practicable* [MEP], *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.*"

The USEPA published implementing regulations (Code of Federal Regulations [CFR] Title 40, Part 122 [40 CFR 122]), which prescribe permit application requirements for storm water discharges from MS4s pursuant to CWA 402(p), on November 16, 1990. The USEPA published an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems, which provided guidance on permit application requirements for regulated MS4s, on May 17, 1996. The federal regulations in 40 CFR 122 and guidance issued by USEPA serve as the foundation for the provisions of Order No. R9-2013-0001. The legal authorities provided by the above statutes and regulations are included as part of the discussions in Section VIII of this Fact Sheet.

B. Legal Authority for the Permit Issued on a Region-wide Basis

CWA section 402(p)(3)(B) provides the San Diego Water Board the legal authority to issue an NPDES permit for the San Diego Region as compared to separate MS4 permits based upon County- and partial County-wide boundaries as they existed within the San Diego Region. CWA section 402(p)(3)(B) states that "*Permits for discharges from municipal storm sewers- (i) may be issued on a system- or jurisdiction-wide basis* ...." The federal regulations in 40 CFR 122.26(a)(1)(v) also state that the San Diego Water Board "*may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the [San Diego Water Board] may consider the following factors: (A) the location of the discharge with respect to waters of the United States; (B) the size of the discharge; (C) the quantity and nature of the pollutants discharged to waters of the United States; and (D) other relevant factors.*"

More specifically, the federal regulations provide that for large and medium MS4 systems, the San Diego Water Board may issue a regional permit. Specifically, the federal regulation in 40 CFR 122.26(a)(3) provide:

"*(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.*

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either: (A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operator of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system; (B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for

which the operator is responsible; or (C) A regional authority may be responsible for submitting a permit application under the following guidelines....

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one systemwide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system."

Based on these regulations, the San Diego Water Board may issue a region-wide MS4 permit. The regulations also clarify that the permit may include different conditions for separate discharges covered by the permit. This allows the San Diego Water Board to ensure that suitable water quality conditions and provisions are identified for each watershed.

The USEPA's responses to comments in the Final Rule for the above-mentioned regulations also make it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide, permits. In the Final Rule published in the Federal Register and containing the responses to comments, USEPA notes that 40 CFR 122.26(a)(3)(iv) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit.[13] USEPA also states that many commenters wanted to allow the permitting authority broad discretion to establish system-wide permits, and that EPA believes that paragraphs 40 CFR 122.26 (a)(1)(v) and (a)(3)(ii) allow for such broad discretion.[14]

This Order creates watershed requirements that apply to multiple counties. The regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall cost savings for the Copermittees. Managing storm water on a regional and watershed basis is expected to result in improved water quality, as the Order focuses on monitoring and management practices necessary to improve each watershed rather than political boundaries. A single permit also allows the San Diego Water Board staff to expend fewer resources developing successive multiple permits and allows more resources to be devoted to working cooperatively with all three current groups of Copermittees to ensure implementation of this Order results in improved water quality.

[13] 55 Federal Register 47990-01, 48042.
[14] Ibid.

C. Federal and California Endangered Species Acts

This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2115.5) or the Federal Endangered Species Act (16 United States Code [USC] sections 1531 to 1544). This Order requires compliance with requirements to protect the beneficial uses of waters of the U.S. The Copermittees are responsible for meeting all requirements of the applicable Endangered Species Act.

D. California Environmental Quality Act

The action to adopt an NPDES Permit is exempt from the provisions of Chapter 3 of the California Environmental Quality Act (CEQA) (Public Resources Code section 21100, et seq.) pursuant to CWC section 13389. (*County of Los Angeles v. Cal. Water Boards* (2006) 143 Cal.App.4th 985.)

E. State and Federal Regulations, Plans and Policies

The legal authority provided by the following regulations, plans, and policies are also included as part of the discussions in Section VIII of this Fact Sheet.

Water Quality Control Plan for the San Diego Basin

The CWA requires the San Diego Water Board to establish water quality standards for each water body in its region. Water quality standards include beneficial uses, water quality objectives and criteria that are established at levels sufficient to protect beneficial uses, and an antidegradation policy to prevent degrading of waters. On September 8, 1994, the San Diego Water Board adopted the *Water Quality Control Plan for the San Diego Basin* (Basin Plan). The Basin Plan designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies to achieve those objectives for all waters in the San Diego Region. The San Diego Water Board has amended the Basin Plan on multiple occasions since 1994. In addition, the Basin Plan implements State Water Board Resolution No. 88-63, which established state policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. Beneficial uses applicable to the surface water bodies that receive discharges from the MS4s within the San Diego Region generally include those listed below:

The Basin Plan identifies the following existing and potential beneficial uses for inland surface waters in the San Diego Region:

- Municipal and Domestic Supply (MUN)
- Agricultural Supply (AGR)
- Industrial Process Supply (PROC)

- Industrial Service Supply (IND)
- Ground Water Recharge (GWR)
- Contact Water Recreation (REC1)
- Non-contact Water Recreation (REC2)
- Warm Freshwater Habitat (WARM)
- Cold Freshwater Habitat (COLD)
- Wildlife Habitat (WILD)
- Rare, Threatened, or Endangered Species (RARE)
- Freshwater Replenishment (FRSH)
- Hydropower Generation (POW)
- Preservation of Biological Habitats of Special Significance (BIOL)

The following additional existing and potential beneficial uses are identified for coastal waters of the San Diego Region:

- Navigation (NAV)
- Commercial and Sport Fishing (COMM)
- Estuarine Habitat (EST)
- Marine Habitat (MAR)
- Aquaculture (AQUA)
- Migration of Aquatic Organisms (MIGR)
- Spawning, Reproduction, and/or Early Development (SPWN)
- Shellfish Harvesting (SHELL)

Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Basin Plan.

Water Quality Control Plan for Ocean Waters of California, California Ocean Plan

In 1972, the State Water Board adopted the Water Quality Control Plan for Ocean Waters of California, California Ocean Plan (Ocean Plan). The State Water Board adopted the most recent amended Ocean Plan on October 16, 2012. The Office of Administrative Law approved it on July 3, 2013. The amended Ocean Plan became effective on August 19, 2013. The Ocean Plan is applicable, in its entirety, to ocean waters of the State. In order to protect beneficial uses, the Ocean Plan establishes water quality objectives and a program of implementation. Pursuant to Water Code sections 13263 and 13377, the requirements of this Order implement the Ocean Plan. The Ocean Plan identifies the beneficial uses of ocean waters of the State to be protected as summarized below:

- Industrial water supply
- Water contact and non-contact recreation, including aesthetic enjoyment; navigation
- Commercial and sport fishing

- Mariculture
- Preservation and enhancement of designated Areas of Special Biological Significance
- Rare and endangered species
- Marine habitat
- Fish spawning and shellfish harvesting

On March 20, 2012, the State Water Board approved Resolution No. 2012-0012 approving an exception to the Ocean Plan prohibition against discharges to Areas of Special Biological Significance (ASBS) for certain nonpoint source discharges and NPDES permitted municipal storm water discharges. On June 19, 2012, the State Water Board adopted Order No. 2012-0031, amending Order No. 2012-0012 to require pollutant load reductions to be achieved within six years for the ASBS Compliance Plans, section A.2.d(2) and ASBS Pollution Prevention Plans, section B.2.b(2). The State Water Board Resolution No. 2012-0012, as amended requires monitoring and testing of marine aquatic life and water quality in several ASBS to protect California's coastline during storms when rain water overflows into coastal waters. Specific terms, prohibitions, and special conditions were adopted to provide special protections for marine aquatic life and natural water quality in ASBS. The City of San Diego's municipal storm water discharges to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach's municipal storm water discharges to the Heisler Park ASBS are subject terms and conditions of State Water Board Resolution No. 2012-0012, as amended. The Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012, as amended, applicable to these discharges, are incorporated in Attachment A of this Order. Requirements of this Order implement the Ocean Plan.

Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality

On September 16, 2008, the State Water Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries – Part 1 Sediment Quality (Sediment Quality Control Plan). The Sediment Quality Control Plan became effective on August 25, 2009. The Sediment Quality Control Plan establishes 1) narrative sediment quality objectives for benthic community protection from exposure to contaminants in sediment and to protect human health, and 2) a program of implementation using a multiple lines of evidence approach to interpret the narrative sediment quality objectives. Requirements of this Order implement the Sediment Quality Control Plan.

Antidegradation Policy

Federal regulations (40 CFR 131.12) require that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). State Water Board Resolution No. 68-16 incorporates the

federal antidegradation policy where the federal policy applies under federal law.

The San Diego Water Board's Basin Plan implements and incorporates by reference both the State and federal antidegradation policies. State Water Board Resolution No. 68-16 and 40 CFR 131.12 require the San Diego Water Board to maintain high quality waters of the State unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The San Diego Water Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR 131.12 and State Water Board Resolution No. 68-16 as set forth below:

1. Many of the waters within the area covered by this Order are impaired for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are listed on the State's CWA Section 303(d) List and the San Diego Water Board has established TMDLs to address the impairments. This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected. This Order requires the Copermittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Provision A and the Copermittees' monitoring and assessment program pursuant to Provision D of this Order, or by implementing Provision B.3.c with a schedule to achieve compliance

with receiving water limitations. This Order includes requirements to develop and implement storm water management programs, achieve WQBELs, and effectively prohibit non-storm water discharges into the MS4. The issuance of this Order does not authorize an increase in the amount of discharge of waste.

2. To the extent that water bodies within the area covered by this Order are high quality waters with regard to some constituents, this Order finds as follows:

   a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

   b. The Order requires the highest statutory and regulatory requirements and requires that the Copermittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Copermittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to the prior Phase I MS4 permits for the San Diego County, Orange County and Riverside County Copermittees. The Order incorporates options to implement Water Quality Improvement Plans that must specify detailed structural and non-structural storm water controls that must be implemented in accordance with an accepted proposed time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

Anti-Backsliding Requirements

CWA sections 402(o) and 303(d)(4) and federal regulations at 40 CFR 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations or conditions may be relaxed. While this Order

allows implementation of an alternative compliance pathway option in Provision B.3.c to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations does not violate the anti-backsliding provisions. The receiving water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 CFR 122.44(l), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the alternative compliance pathway option in Provision B.3.c qualifies for an exception to backsliding as based on new information.

The alternative compliance pathway option in Provision B.3.c of this Order was informed by new information available to the Board from experience and knowledge gained through storm water permitting at the Regional Water Boards in the last ten years. There has been a statewide paradigm shift in storm water management. State Water Board Order WQ 2015-0075 directed all of the Regional Water Boards to consider the Los Angeles Water Board's alternative compliance path to receiving water limitations in all Phase I MS4 permits going forward (State Water Board Order WQ 2015-0075 at page 51), and the Los Angeles Water Board's process of developing over 30 watershed-based TMDLs and implementing several TMDLs since the adoption of the previous permits. In particular, the Los Angeles Water Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Similarly, the San Diego Water Board's experience developing and implementing the Fourth Term MS4 Permits and TMDLs that apply on a region-wide scale (e.g. TMDLs for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region) has resulted in a similar recognition of the need for a watershed-based approach that allows time to plan, design, fund, operate and maintain BMPs to address impaired waters that have been impacted by MS4 discharges. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

Clean Water Act Section 303(d) List

CWA section 303(d)(1) requires each State to identify specific water bodies within its boundaries where water quality standards are not being met or are not expected to be met after implementation of technology-based effluent limitations on point sources. Water bodies that do not meet water quality standards are considered impaired and are placed on the state's "303(d) List." Periodically, USEPA approves the State's 303(d) List.

Most recently, USEPA approved the State's 2010 303(d) List of impaired water bodies on October 11, 2011, which includes certain receiving waters in the San Diego Region. For each listed water body, the state or USEPA is required to establish a TMDL of each pollutant impairing the water quality standards in that water body. A TMDL is a tool for implementing water quality standards and is based on the relationship between pollution sources and in-stream water quality conditions. The TMDL establishes the allowable pollutant loadings for a water body and thereby provides the basis to establish water quality-based controls. These controls should provide the pollution reduction necessary for a water body to meet water quality standards.

A TMDL is the sum of the allowable pollutant loads of a single pollutant from all contributing point sources (the waste load allocations or WLAs) and non-point sources (load allocations of LAs) plus the contribution from background sources and a margin of safety (40 CFR 130.2(i)). MS4 discharges are considered point source discharges. For 303(d)-listed water bodies and pollutants in the San Diego Region, the San Diego Water Board or USEPA develops and adopts TMDLs that specify these requirements.

Since 2002, the San Diego Water Board has established seven (7) TMDLs to remedy water quality impairments in various water bodies within the San Diego Region (see Attachment E to the Order). These TMDLs identify MS4 discharges as a source of pollutants to these water bodies, and, as required, establish WLAs for MS4 discharges to reduce the amount of pollutant discharged to receiving waters. CWA section 402(p)(3)(B)(iii) requires the San Diego Water Board to impose permit conditions, 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.*" (Emphasis added.) CWA section 402(a)(1) also requires states to issue permits with conditions necessary to carry out the provisions of the CWA. Federal regulations also require that NDPES permits contain WQBELs consistent with the assumptions and requirements of all available WLAs (40 CFR 122.44(d)(1)(vii)(B)). CWC section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Therefore, this Order includes WQBELs and other provisions to implement the TMDL WLAs assigned to Copermittees regulated by this Order.

Other Regulations, Plans and Policies

This Order implements all other applicable federal regulations and State regulations, plans and policies, including the California Toxics Rule at 40 CFR 131.38 (Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California Rule [California Toxics Rule or CTR]), and State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP).

F. Unfunded State Mandates

Article XIII B, Section 6(a) of the California Constitution provides that whenever "*any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service.*" The requirements of this Order do not constitute state mandates that are subject to a subvention of funds for several reasons, including, but not limited to, the following.

First, the requirements of this Order do not constitute a new program or a higher level of service as compared to the requirements contained in the previous Fourth Term Permits. The overarching requirement to impose controls to reduce the pollutants in discharges from MS4s is dictated by the CWA and is not new to this permit cycle (33 USC section 1342(p)(3)(B)). The inclusion of new and advanced measures as the MS4 programs evolve and mature over time is anticipated under the CWA (55 FR 47990, 48052 (Nov. 16, 1990)), and to the extent requirements in this Order are interpreted as new advanced measures, they do not constitute a new program or higher level of service.

Second, and more broadly, mandates imposed by federal law, rather than by a state agency, are exempt from the requirement that the local agency's expenditures be reimbursed (Cal. Const., art. XIII B, section 9, subd. (b)). This Order implements federally mandated requirements under the CWA and its requirements are therefore not subject to subvention of funds. This includes federal requirements to effectively prohibit non-storm water discharges, to reduce the discharge of pollutants in storm water to the MEP, and to include such other provisions as the Administrator or the State determines appropriate for the control of such pollutants (33 USC section 1342(p)(3)(B)). Federal cases have held these provisions require the development of permits and permit provisions on a case-by-case basis to satisfy federal requirements. (*Natural Resources Defense Council, Inc., v. USEPA* (9th Cir. 1992) 966 F.2d 1292, 1308, fn. 17.)

The authority exercised under this Order is not reserved state authority under the CWA's savings clause (cf. *Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 627-628 [relying on 33 USC section 1370, which allows a state to develop requirements which are not "less stringent" than federal requirements]), but instead is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions. (See, *City of Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389; *Building Industry Ass'n of San Diego Co. v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883.)

The MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. (*Building Ind. Ass'n., supra,* 124 Cal.App.4th at pp. 873-874, 889.) Such considerations change over time with advances in technology and with experience

gained in storm water management (55 FR 47990, 48052 (Nov. 16, 1990)). Accordingly, a determination of whether the conditions contained in this Order exceed the requirements of federal law cannot be based on a point by point comparison of the permit conditions and the minimum control measures that are required "at a minimum" to reduce pollutants to the maximum extent practicable and to protect water quality (40 CFR 122.34). Rather, the appropriate focus is whether the permit conditions, as a whole, exceed the MEP standard.

In recent months, the County of Los Angeles and County of Sacramento Superior Courts have granted writs setting aside decisions of the Commission on State Mandates that held certain requirements in Phase I permits constituted unfunded mandates. In both cases, the courts have found that the correct analysis in determining whether an MS4 permit constituted a state mandate was to evaluate whether the permit as a whole exceeds the MEP standard. (*State of Cal. v. Comm. on State Mandates* (Super. Ct. Sacramento County, 2012, No. 34-2010-80000604), *State of California v. County of Los Angeles* (Super. Ct. Los Angeles County, 2011, No. BS130730.) Both cases are currently pending appeal.

The requirements of the Order, taken as a whole rather than individually, are necessary to reduce the discharge of pollutants to the MEP and to protect water quality. The San Diego Water Board finds that the requirements of the Order are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate. These findings are the expert conclusions of the principal state agency charged with implementing the NPDES program in California (CWC sections 13001, 13370).

It should also be noted that the provisions in this Order to effectively prohibit non-storm water discharges are also mandated by the CWA (33 USC section 1342(p)(3)(B)(ii)). Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards (33 USC section 1313(d)). Once the USEPA or a state establishes or adopts a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions and requirements of any applicable waste load allocation in a TMDL (40 CFR 122.44(d)(1)(vii)(B)).

Third, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental dischargers who are issued NPDES permits for storm water discharges. With a few inapplicable exceptions, the CWA regulates the discharge of pollutants from point sources (33 USC section 1342) and the Porter-Cologne Act regulates the discharge of waste (CWC section 13263), both without regard to the source of the pollutant or waste. As a result, the "costs incurred by local agencies" to protect water quality reflect an overarching regulatory scheme that places similar requirements on governmental and non-governmental dischargers. (See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 [finding comprehensive workers' compensation scheme did not create a cost for local agencies that was subject to state subvention].)

The CWA and the Porter-Cologne Act largely regulate storm water with an even hand, but to the extent there is any relaxation of this even-handed regulation, it is in favor of the local agencies. Generally, the CWA requires point source dischargers, including dischargers of storm water associated with industrial or construction activity, to comply strictly with water quality standards (33 USC section 1311(b)(1)(C); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1164-1165 [noting that industrial discharges must strictly comply with water quality standards]). As discussed in prior State Water Board decisions, certain provisions of this Order do not require strict compliance with water quality standards (State Water Board Order No. WQ 2001-0015, p. 7). Those provisions of this Order regulate the discharge of waste in municipal storm water under the CWA's MEP standard, not the BAT/BCT standard that applies to other types of discharges. These provisions, therefore, regulate the discharge of waste in municipal storm water more leniently than the discharge of waste from non-governmental sources.

Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA section 301(a) (33 USC section 1311(a)). To the extent that the local agency Copermittees have voluntarily availed themselves of the permit, the program is not a state mandate. (Accord, *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 107-108.)

Fifth, the local agency Copermittees' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under state law predates the enactment of Article XIIIB, Section (6) of the California Constitution.

Finally, even if any of the permit provisions could be considered unfunded mandates, under Government Code section 17556, subdivision (d), a state mandate is not subject to reimbursement if the local agency has the authority to charge a fee. The local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order, subject to certain voting requirements contained in the California Constitution. (See Cal. Const., Art. XIII D, section 6, subd. (c); see also *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.) The Fact Sheet demonstrates that numerous activities contribute to the pollutant loading in the MS4. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., *Apartment Ass'n of Los Angeles County, Inc., v. City of Los Angeles* (2001(24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The authority and ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (*Clovis Unified School Dist. V. Chiang* (2010) 188 Cal.App.4th 794, 812, citing *Connell v. Sup. Ct.* (1997) 59 Cal.App.4th 382, 401; *County of Fresno v. State of California* (1991) 53 Cal. 3d. 482, 487-488.)

VIII. PROVISIONS

The provisions (i.e. NPDES permit requirements) of the Order are discussed below.

A. Prohibitions and Limitations

Purpose: Provision A includes the prohibitions and limitations requirements that are the foundation of all the subsequent requirements included in the Order. Compliance with the prohibitions and limitations will restore and protect receiving waters from impacts that may be caused by discharges into and from the Copermittees' MS4s and ultimately achieve the objective of the CWA.

In meeting the requirements set forth in the Order, the Copermittees must be cognizant that the prohibitions and limitations exist and will be the standard by which the San Diego Water Board will be measuring the progress and success of their implementation of the NPDES permit requirements.

Discussion: The objective of the CWA is to "*restore and maintain the chemical, physical, and biological integrity of the Nation's waters*." The CWA requires the implementation of NPDES permit programs to regulate discharges of pollutants and dredged or fill material to the navigable waters of the U.S. For discharges into and from MS4s, the CWA requires the NPDES permits to "*effectively prohibit non-stormwater discharges into the storm sewers*" and "*require controls to reduce the discharge of pollutants* [in storm water] *to the maximum extent practicable*."

Provision A includes limitations, consistent with the requirements of the CWA for discharges from MS4s. Provision A expresses these limitations as discharge prohibitions, receiving water limitations, and effluent limitations. Compliance with the discharge prohibitions and receiving water limitations is also explicitly described, in conformance with precedential State Water Board Orders.

More specific and detailed discussions of the requirements of Provision A are provided below.

Provision A.1 (Discharge Prohibitions) prohibits the discharge of specific types of waste into and/or from the Copermittees' MS4s.

Provision A.1.a restates and reiterates Basin Plan Waste Discharge Prohibition 1, by prohibiting discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the

state. The terms pollution,[15] contamination,[16] and nuisance[17] are defined under CWC 13050. Provision A.1.c incorporates all the waste discharge prohibitions of the Basin Plan into the requirements of the Order. The waste discharge prohibitions from the Basin Plan have been reproduced and provided in Attachment A to the Order.

Provision A.1.b requires non-storm water discharges into the MS4s to be effectively prohibited, consistent with the requirements of the CWA for MS4 permits to "*effectively prohibit non-stormwater discharges into the storm sewers.*" The effective prohibition is required to be implemented by each Copermittee within its jurisdiction through the illicit discharge detection and elimination requirements under Provision E.2. The prohibition does not apply to NPDES permitted discharges into the Copermittees' MS4s.

The CWA employs the strategy of prohibiting the discharge of any pollutant from a point source into waters of the United States unless the discharger of the pollutant(s) obtains an NPDES permit pursuant to CWA Section 402. The 1987 amendment to the CWA includes provision 402(p) that specifically addresses NPDES permitting requirements for storm water discharges from MS4s. CWA section 402(p) prohibits the discharge of pollutants from specified MS4s to waters of the U.S. except as authorized by an NPDES permit and identifies two substantive standards for MS4 storm water permits. MS4 permits (1) "*shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers*" and (2) "*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 State determines appropriate for the control of such pollutants.*" (CWA section 402(p)(3)(B)(ii)-(iii).)

In November 1990, the USEPA published regulations addressing storm water discharges from MS4s (55 FR 47990 and following (Nov. 16, 1990) (Phase I Final Rule)). The regulations establish minimum requirements for MS4 permits, and generally focus on the requirement that MS4s implement programs to reduce the amount of pollutants found in storm water discharges to the MEP. The CWA's municipal storm water MEP standard does not require storm water discharges to strictly meet water quality standards, as is required for other NPDES permitted

[15] CWC 13050(l): "(1) 'Pollution' means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects either of the following: (A) The water for beneficial uses. (B) Facilities which serve beneficial uses. (2) 'Pollution' may include 'contamination.'

[16] CWC 13050(k): "Contamination' means an impairment of the quality of waters of the state by waste to a degree which creates a hazard to public health through poisoning or through the spread of disease. 'Contamination' includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected."

[17] CWC 13050(m): 'Nuisance' means anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes."

discharges. Compliance is achieved through an iterative approach of continuous implementation of improved BMPs. This distinction reflects Congress's recognition that variability in flow and intensity of storm events render difficult strict compliance with water quality standards by MS4 permittees. In describing the controls that permits must include to reduce pollutants in storm water discharges to the MEP, the statute (CWA section 402(p)(3)(B)(iii)) states that the controls shall include: "*management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants.*"

In contrast, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits are subject to requirements under the NPDES program, including discharge prohibitions, technology based effluent limitations and water quality-based effluent limitations (40 CFR 122.44). The regulations also require the Copermittee's program to include an element to detect and remove illicit discharges and improper disposal into the storm sewer (40 CFR 122.26(d)(2)(iv)(B)).

While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations (at 40 CFR 122.26(b)(2)) define "*illicit discharge*" as *"any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities)*." This definition is the most closely applicable definition of "non-storm water" contained in federal law. As stated in the Phase I Final Rule, USEPA added the illicit discharge program requirement to begin implementation of the 'effective prohibition' requirement to detect and control non-storm water discharges to their municipal system.

Thus, federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the MEP yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4. "Effectively" prohibit does not mean that non-storm water discharges are authorized to be discharged into and from the Copermittees' MS4s. The Phase I Final Rule clarifies what "effectively prohibit" means (55 FR 47995):

> "*Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer)*" [Emphasis added].

Consistent with federal law, unless non-storm water discharges to the MS4 are authorized by a separate NPDES permit, non-storm water discharges are

appropriately subject to the effective prohibition requirement in the CWA and Regional Water Boards are not limited by the iterative MEP approach to storm water regulation in crafting appropriate regulations for non-storm water discharges.

The federal regulations (40CFR122.26(d)(2)(i)(B)) require the Copermittees to establish the legal authority which authorizes or enables the Copermittees to prohibit illicit discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(2)(vi)(B)(1)) require the Copermittees to "*implement and enforce an ordinance, order or similar means*" to prevent non-storm water discharges to their MS4s. Thus, the Copermittees are required to "*effectively*" prohibit non-storm water discharges to their MS4s through enforcing their legal authority established under "*ordinance, order or similar means*" and either remove those discharges to their MS4s, or require those discharges to obtain coverage under a separate NPDES permit. More detail about the program that must be implemented to "*effectively*" prohibit non-storm water discharges to the Copermittees' MS4s is provided under the discussion for Provision E.2.

Provision A.1.d was included to be consistent with Resolution No. 2012-0012, adopted by the State Water Board on March 20, 2012. Provision A.1.d prohibits discharges from MS4s to Areas of Special Biological Significance (ASBS), except for storm water discharges from the City of San Diego's MS4 to the San Diego Marine Life Refuge in La Jolla, and the City of Laguna Beach to the Heisler Park ASBS subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012. The pertinent Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 are provided in Attachment A to the Order.

Provision A.2 (Receiving Water Limitations) specifies the condition of the receiving waters that must be achieved when there are discharges from the Copermittees' MS4s. Receiving water limitations are included in all NPDES permits issued pursuant to the CWA section 402. CWA section 402(p)(3)(B)(iii) authorizes the inclusion of "*such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*" This requirement gives USEPA or the State permitting authority, in this case the San Diego Water Board, discretion to determine what permit conditions are necessary to control pollutants.

In its Phase I Final Rule (see 55 FR 47990, 47994 (Nov. 16, 1990)), USEPA elaborated on these requirements, stating that, "*permits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls.*" USEPA reiterated in its Phase II Final Rule (64 FR 68722, 68737), that MS4 "*permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.*" CWC section 13377 also requires that NPDES permits include limitations necessary to implement water quality control plans. Both the State Water Board and the San Diego Water Board have previously concluded that discharges from the MS4 contain pollutants that have

the reasonable potential to cause or contribute to excursions above water quality standards. As such, inclusion of receiving water limitations is appropriate to control MS4 discharges.

The inclusion of receiving water limitations is also consistent with the Ninth Circuit Court of Appeals' ruling in *Defenders of Wildlife v. Browner* (191 F.3d 1159, 1166 (1999)) that the permitting authority has discretion regarding the nature and timing of requirements that it includes as MS4 permit conditions to attain water quality standards. The Ninth Circuit Court of Appeals recently explained that, "*[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels.*" (*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 886 (revd. On other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013)))

The receiving water limitations included in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan or in water quality control plans or policies adopted by the State Water Board, including State Water Board Resolution No. 68-16, or in federal regulations, including but not limited to 40 CFR 131.12 and 131.38. The water quality objectives in the Basin Plan and other State Water Board plans and policies have been approved by USEPA and combined with designated beneficial uses constitute the water quality standards required under federal law.

Provision A.2.a requires that discharges from the Copermittees' MS4s must not cause or contribute to the violation of water quality standards in receiving waters. The water quality standards of the receiving waters must be protected from the impacts that may be caused by the Copermittees' MS4 discharges. Water quality standards applicable to the surface waters in the San Diego Region must be achieved through meeting the technology based standard of MEP through an iterative process of improved management actions. Provision A.2.a is also consistent with State Water Board Order WQ 99-05 precedent-setting language requiring discharges from MS4s to attain receiving water quality standards. The water quality control plans and policies with water quality standards applicable to the waters in the San Diego Region are included under Provision A.2.a.

Provisions A.2.b was included to be consistent with the requirements of State Water Board Resolution No. 2012-0012, adopted on March 20, 2012.

Provision A.3 (Effluent Limitations) specifies the condition of the discharges from the Copermittees' MS4s that must be achieved if and when there are discharges.

Consistent with CWA section 301(b)(1)(A) and 40 CFR 122.44(a), Provision A.3.a includes the technology-based effluent limitations that must be included in the Order. The technology-based effluent limits, representing the minimum level of control that must be imposed in a permit under CWA section 402, requires that pollutants in discharges of storm water from the Copermittees' MS4s be reduced to the MEP. This provision applies specifically to storm water discharges. Non-storm water discharges must be effectively prohibited, as required under Provision A.1.b. Non-storm water (dry weather) discharges from the MS4 are not considered storm water (wet weather) discharges and therefore are not subject to the MEP standard.

The technology-based MEP standard is an ever-evolving, flexible, and advancing concept. Neither Congress nor USEPA has specifically defined the term "maximum extent practicable." Congress established this flexible MEP standard so that the administrative bodies would have "*the tools to meet the fundamental goals of the Clean Water Act in the context of storm water pollution.*" (*Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 884.) As knowledge about controlling storm water runoff and discharges continues to evolve, so does the knowledge which constitutes MEP. Reducing the discharge of pollutants in storm water from the MS4 to the MEP requires the Copermittees to assess each program component and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP.

The San Diego Water Board or the State Water Board ultimately define MEP, and may include requirements that provide specific guidance on what is expected to demonstrate MEP. It is the responsibility of the Copermittees to propose actions that implement BMPs to reduce storm water pollution to the MEP. In other words, the Copermittees' runoff management programs developed and implemented under the Order are the Copermittees' proposals for achieving MEP. Their total collective and individual activities conducted pursuant to their runoff management programs become their proposal for achieving MEP as it applies both to their overall effort, as well as to specific activities. Provisions B through E of the Order provides a minimum framework to guide the Copermittees in achieving the MEP standard for discharges of pollutants in storm water.

Provision A.3.b incorporates any water quality based effluent limitations (WQBELs) applicable to the MS4s established for TMDLs adopted and approved for the San Diego Region and requires the Copermittees to comply with those WQBELs. This is consistent with 40 CFR 122.44(d)(1)(vii)(B), which requires that NPDES permits to incorporate WQBELs "*developed to protect a narrative water quality criterion, a numeric water quality criterion, or both…consistent with the assumptions and requirements of any available wasteload allocation for the discharge...*"

Pursuant to CWA section 303(d), for surface water bodies identified as impaired by one or more pollutants, the San Diego Water Board is required to establish TMDLs "*at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge*

concerning the relationship between effluent limitations and water quality." The TMDLs identify sources of the pollutants causing the impairments and assign portions of the TMDL as WLAs to point sources, which include MS4s.

WLAs must be expressed in NPDES permits as WQBELs, which may include one or more numeric components such as numeric effluent limits, and/or receiving water limitations, and/or BMP requirements. Because numeric targets for TMDLs typically include a component that will be protective of water quality standards, a TMDL will likely include one or more numeric receiving water limitations and/or effluent limitations as part of the assumptions or requirements of the TMDL. Any numeric receiving water limitations and/or effluent limitations developed as part of the assumptions or requirements of a TMDL must be incorporated and included as part of WQBELs for the MS4s.

Because the development and approval of new TMDLs, or modification of existing TMDLs, may occur during the term of this Order, the specific provisions of those TMDLs, including effluent limitations applicable to MS4s are provided within Attachment E to the Order. Attachment E will be updated with new TMDLs and modifications to existing TMDLs in a timely manner as they occur.

Provision A.4 (Compliance with Discharge Prohibitions and Receiving Water Limitations) describes the process required to be implemented by the Copermittees if compliance with the discharge prohibitions of Provisions A.1.a and A.1.c and receiving water limitations of Provision A.2.a are not being achieved under current conditions.

In its Phase II Stormwater Regulations, Final Rule, USEPA states that MS4 "*permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.*"[18] In a series of comment letters on MS4 permits issued by various Regional Water Boards, USEPA has also reiterated that MS4 discharges must meet water quality standards.[19] In addition, the Ninth Circuit Court of Appeals explained in a recent ruling that, *"[w]ater quality standards are used as a supplementary basis for effluent limitations [guidelines] so that numerous dischargers, despite their individual compliance with technology based effluent limitations, can be regulated to prevent water quality from falling below acceptable levels.*"[20]

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[18] Phase II Stormwater Regulations, Final Rule, 64 Fed. Reg. 68722, 68737.
[19] Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.
[20] NRDC v. County of Los Angeles (9th Cir. 2011), 673 F.3d 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))). See also, *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 884-886, citing *Defenders of Wildlife v. Browning,* (9th Cir. 1999) 191 F.3d 1159.)

Water quality standards for the San Diego Region are established in the Basin Plan. The water quality standards of the Basin Plan are incorporated into this Order as the discharge prohibitions under Provisions A.1.a and A.1.c and receiving water limitations under Provision A.2.a. The discharge prohibitions and receiving water limitations in this Order consist of all applicable numeric or narrative water quality objectives or criteria, or limitations or prohibitions to implement the applicable water quality objectives or criteria, for receiving waters as contained in the Basin Plan, water quality control plans or policies adopted by the State Water Board, including Resolution No. 68-16, or federal regulations, including but not limited to, 40 CFR 131.12 and 131.38. The waste discharge prohibitions and water quality objectives in the Basin Plan have been approved by USEPA and combined with the designated beneficial uses constitute the water quality standards required under federal law.

Under federal law (CWA section 402(p)(3)(B)(iii)), an MS4 permit must include "*controls to reduce the discharge of pollutants to the maximum extent practicable...and such other provision as...the State determines appropriate for control of such pollutants.*" The State Water Board has previously determined that limitations necessary to meet water quality standards are appropriate for the control of pollutants discharged by MS4s and must be included in MS4 permits. (State Water Board Orders WQ 91-03, 98-01, 99-05, 2001-15; see also *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) This Order prohibits discharges that cause or contribute to violations of water quality standards.

The discharge prohibitions under Provisions A.1.a and A.1.c and receiving water limitations under Provision A.2.a are included in this Order to ensure that discharges from the MS4s do not cause or contribute to exceedances of water quality objectives necessary to protect the beneficial uses of the receiving waters.

Provision A.4 is consistent with the precedent-setting language in State Water Board Order WQ 99-05 required to be included in municipal storm water permits. State Water Board Order WQ 2001-15 refined Order WQ 99-05 by requiring an iterative approach to compliance with water quality standards involving ongoing assessments and revisions, referred to as the "iterative process." The "iterative process" is a fundamental NPDES requirement for municipal storm water permits to achieve the objectives of the CWA.

The State Water Board and Regional Water Boards have stated that the provisions under Provisions A.1.a, A.1.c, A.2.a, and A.4 are independently applicable, meaning that compliance with one provision does not provide a "safe harbor" where there is non-compliance with another provision (i.e., compliance with the Provision A.4 does not shield a Copermittee who may have violated Provision A.1.a, A.1.c, or A.2.a from an enforcement action). The intent of Provision A.4 is to ensure that the Copermittees have the necessary storm water management programs and controls in place, and that they are modified by the Copermittees in a timely fashion when necessary, so that compliance with Provisions A.1.a, A.1.c, and/or A.2.a is achieved as soon as possible. USEPA expressed the importance of this independent applicability in a series of

comment letters on MS4 permits proposed by various Regional Water Boards. At that time, USEPA expressly objected to certain MS4 permits that included language stating, *"permittees will not be in violation of this [receiving water limitation] provision ... [if certain steps are taken to evaluate and improve the effectiveness of the jurisdictional runoff management programs],"* concluding that this phrase would not comply with the CWA.[21]

The Ninth Circuit held in *Natural Resources Defense Council v. County of Los Angeles* (2011) 673 F3d. 880, 886 (revd. on other grounds and remanded by *Los Angeles County Flood Control District v. Natural Resources Defense Council* (133 S.Ct. 710 (2013))) that engagement in the iterative process does not provide a safe harbor from liability for violations of permit terms prohibiting exceedances of water quality standards. The Ninth Circuit holding is consistent with the position of the State and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Water Boards or through a citizen suit. While the Water Boards have generally directed dischargers to achieve compliance by improving control measures through the iterative process, the San Diego Water Board retains the discretion to take other appropriate enforcement and the iterative process does not shield dischargers from citizen suits under the CWA.

The requirements of Provision A.4, therefore, are required to be implemented until the water quality standards expressed under Provisions A.1.a, A.1.c, and A.2.a are achieved. The CWA requires MS4 permits to "*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.*" The requirements of this Order have been deemed or determined to be "appropriate" to achieve water quality standards in receiving waters.

Part of the "*controls*" required by the Order is the process described in Provision A.4. Provision A.4 includes the process that is ultimately expected to achieve compliance with the requirement that discharges from the MS4 do not cause or contribute to violations of water quality standards in the receiving waters. The implementation of Provision A.4 is required when the Copermittees or the San Diego Water Board have determined that discharges from the MS4 are causing or contributing to violations of water quality standards in the receiving waters.

The Copermittees must effectively prohibit non-storm water discharges into the MS4s, reduce the discharge of pollutants in storm water from the MS4s to the MEP, and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermittees have effectively prohibited non-storm water

[21] Letter from Alexis Strauss, Acting Director, Water Division, USEPA Region IX, to Walt Pettit, Executive Director, State Water Board, re: SWRCB/OCC File A-1041 for Orange County, dated January 21, 1998.

discharges and reduced storm water pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, Provision A.4 provides a clear "iterative process" for the Copermittees to follow.

Provision A.4 essentially requires the Copermittees to implement additional BMPs until MS4 discharges no longer cause or contribute to a violation of water quality standards.

In assessing compliance and potential enforcement actions, the San Diego Water Board looks at the Copermittees' efforts in total to meet the requirements of Provisions A.1.a, A.1.c, A.2.a and Provision A.4. The Copermittees need to demonstrate that they are making improvements to their programs and making progress toward achieving the discharge prohibitions and receiving water limitations in Provisions A.1.a, A.1.c, and A.2.a by implementing the requirements of Provision A.4. The San Diego Water Board would consider these efforts prior to strictly enforcing the requirements of Provisions A.1.a, A.1.c, and A.2.a. Causes of exceedances of the receiving water limitations can often be more difficult to identify and attribute solely to the Copermittees' MS4s. The intent of the Order is to provide the Copermittees more clarity and flexibility in addressing these exceedances through the iterative approach and adaptive management process until the requirements under Provisions A.1.a, A.1.c, and A.2.a are fully achieved.

An exception to the iterative approach and adaptive management process would be in receiving waters subject to adopted and approved TMDLs. For TMDLs that are incorporated into the Order, there is a specific date for compliance to be achieved, after which the iterative approach and adaptive management process required under Provision A.4 no longer provides the flexibility to achieve compliance. Where compliance dates for a TMDL have passed, compliance with the WQBELs incorporated into the Order established by a TMDL in Attachment E to protect water quality standards is required. Thus, after the interim or final compliance dates for a TMDL have passed, if the discharges from the Copermittees' MS4s are causing or contributing to a violation of WQBELs, exceedances of WQBELs must be strictly enforced by the San Diego Water Board. In the meantime, however, the Copermittees are in compliance with the interim or final TMDL requirements in Attachment E as long as the interim or final WQBELs are being achieved in accordance with the interim or final compliance dates.

In addition, this Order includes an optional pathway that incorporates the requirements of Provision A.4 and would allow a Copermittee to be deemed in compliance with the requirements under Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b during implementation of a Water Quality Improvement Plan that incorporates specific additional requirements. This alternative compliance pathway and the additional specific requirements are described below under the discussion for Provision B.3.c.

B. Water Quality Improvement Plans

Purpose: Since 1990, the Copermittees have been developing and implementing programs and BMPs intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water discharges from the MS4s to receiving waters. As a result, several water body / pollutant combinations have been de-listed from the CWA Section 303(d) List, beach closures have been significantly reduced, and public awareness of water quality issues has increased. The Copermittees have been able to achieve improvements in water quality in some respects, but significant improvements to the quality of receiving waters and discharges from the MS4s are still necessary to meet the requirements and objectives of the Clean Water Act.

Provision B includes requirements for the Copermittees to develop and implement Water Quality Improvement Plans to ultimately comply with the prohibitions and limitations under Provision A. The Water Quality Improvement Plans will provide the Copermittees a comprehensive program that can achieve the requirements and further the objectives of the CWA. Implementation of the Water Quality Improvement Plans will also improve the quality of the receiving waters in the San Diego Region.

The Water Quality Improvement Plan is the backbone of the Regional MS4 Permit requirements. Provision B provides the guidance, criteria, and minimum expectations and requirements for the elements of the Water Quality Improvement Plan to be developed and implemented by the Copermittees. The Water Quality Improvement Plans will be implemented in the Watershed Management Area by the Copermittees within their jurisdictions through their jurisdictional runoff management programs.

The Water Quality Improvement Plan also incorporates a program to monitor and assess the progress of the Copermittees' jurisdictional runoff management programs toward improving the quality of discharges from the MS4s, as well as tracking improvements to the quality of receiving waters. A process to adapt and improve the effectiveness of the Water Quality Improvement Plans has also been incorporated into the requirements of Provision B to be consistent with the "iterative approach" required to achieve compliance with discharge prohibitions of Provisions A.1.a and A.1.c and receiving water limitations of Provision A.2.a, pursuant to the requirements of Provision A.4.

The Water Quality Improvement Plans have also been structured to incorporate the requirements of any TMDLs that have been adopted for the San Diego Region. Incorporating the requirements of the TMDLs into the requirements of Provision B allows the Copermittees to develop a single plan, instead of separate plans, to coordinate their non-storm water and storm water runoff management programs. The Water Quality Improvement Plans allow the Copermittees to meet the requirements of this Order, as well as fulfill the requirements of the TMDLs.

As an added benefit, if the Copermittees demonstrate that impaired water bodies within the Watershed Management Area listed on the 303(d) List will be addressed with their Water Quality Improvement Plans in a reasonable period of time, the San Diego Water Board may be able to remove the water bodies from the 303(d) List, which would greatly reduce the need for the San Diego Water Board to develop additional TMDLs that would have to be incorporated into the Order and implemented by the Copermittees.

Discussion: The federal NPDES regulations require the Copermittees to develop a proposed management program (40 CFR 122.26(d)(2)(iv)). The proposed management program must include "*a comprehensive planning process*" and "*where necessary intergovernmental coordination*" for the "*duration of the permit.*" The Water Quality Improvement Plan is the Copermittees' "*comprehensive planning process*" document for the proposed management program that will be implemented within a Watershed Management Area. Implementation of the Water Quality Improvement Plan requires "*intergovernmental coordination*" among the Copermittees for at least the "*duration of the permit*," and likely into and beyond the next iteration of the permit.

Developing Water Quality Improvement Plans based upon watersheds is consistent with federal regulations that support the development of permit conditions, as well as implementation of storm water management programs, at a watershed scale (40 CFR 122.26(a)(3)(ii), 122.26(a)(3)(v), and 122.26(d)(2)(iv)). In 2003, USEPA issued a Watershed-Based NPDES Permitting Policy Statement (USEPA, 2003) that defines watershed-based permitting as an approach that produces NPDES permits that are issued to point sources on a geographic or watershed basis. In this policy statement, USEPA explains that "*[t]he utility of this tool relies heavily on a detailed, integrated, and inclusive watershed planning process*." USEPA identifies a number of important benefits of watershed permitting, including more environmentally effective results, the ability to emphasize measuring the effectiveness of targeted actions on improvements in water quality, reduced cost of improving the quality of the nation's waters and more effective implementation of watershed plans, including TMDLs, among others.

An emphasis on watersheds is appropriate at this stage in the San Diego Region's MS4 program to shift the focus to more targeted, water quality driven planning and implementation. Addressing discharges on a watershed scale focuses on water quality results by emphasizing the receiving waters in the watershed. The conditions of the receiving waters drive management actions, which in turn focus measures to address pollutant contributions from MS4 discharges.

The Water Quality Improvement Plan gives the Copermittees the responsibility of developing a comprehensive plan to coordinate the efforts of their jurisdictional runoff management programs for addressing the problems related to MS4 discharges causing impacts to water quality in the Watershed Management Area. The development of the plan provides the Copermittees the opportunity to provide

significant input on how to implement their jurisdictional runoff management programs, and how to best utilize their available resources in addressing a focused set of priorities that they believe will result in measureable improvements to water quality within the Watershed Management Area.

The Copermittees are encouraged to separate the Watershed Management Area into subwatersheds, as appropriate. This allows the Copermittees to identify priorities applicable to a subset of the Copermittees or specific water bodies or areas within the Watershed Management Area.

Included in the requirements for the elements to be included in the Water Quality Improvement Plan are monitoring and assessment requirements that are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order. In addition to the federal requirements of the CWA section 308(a) and 40 CFR 122.26(d), the San Diego Water Board has the authority to establish monitoring, reporting, and recordkeeping requirements for NPDES permits under CWC 13383.

More specific and detailed discussions of the requirements of Provision B are provided below.

Provision B.1 (Watershed Management Areas) requires the Copermittees to develop a Water Quality Improvement Plan for each of the Watershed Management Areas defined by the San Diego Water Board.

Pursuant to 40 CFR 122.26(d)(2)(iv), proposed management programs "*may impose controls on a...watershed basis...*" The Water Quality Improvement Plan is the Copermittees' proposed management program. A Water Quality Improvement Plan must be developed for each Watershed Management Area identified in the Order.

The Watershed Management Areas are identified in Table B-1. Table B-1 establishes ten (10) Watershed Management Areas, and identifies the Copermittees that are responsible for developing and implementing the Water Quality Improvement Plan for each Watershed Management Area.

The Copermittees from each of the three counties within the San Diego Region were phased in as their respective NPDES municipal storm water permits expired. Order No. R9-2007-0001 expired in January 2012, and the San Diego County Copermittees became covered under the Regional MS4 Permit on June 27, 2013, the effective date of the Order. Order No. R9-2009-0002 expired in December 2014, and the Orange County Copermittees became covered under the Regional MS4 Permit on April 1, 2015, the effective date of Order No. R9-2013-0001 as amended by Order No. R9-2015-0001. Order No. R9-2010-0016 expired in November 2015, and the Riverside County Copermittees became covered under the Regional MS4 Permit on January 7, 2016, the effective date of Order No. R9-2013-0001 as amended by Order No. R9-2015-0100.

The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar are located partially within the jurisdictions of both the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) and the San Diego Water Board. Written requests for designation of a single Regional Water Board to regulate matters pertaining to permitting of Phase I MS4 discharges were submitted to the San Diego Water Board and the Santa Ana Water Board by the City of Laguna Woods by letter dated September 8, 2014, the City of Laguna Hills by letter dated March 12, 2014, the City of Murrieta by letter dated June 22, 2015, and the City of Wildomar by letter dated June 23, 2015. The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar requested designation of the San Diego Water Board pursuant to CWC section 13228.

The Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar reported that management and implementation of municipal programs to comply with two different Phase I MS4 permits creates a significant administrative and financial burden and inhibits their ability to contribute to greater overall water quality improvements in either Region. In an effort to address these concerns, the San Diego Water Board and the Santa Ana Water Board have entered into written agreements, whereby the San Diego Water Board is designated to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar including the portions of the jurisdictions within the Santa Ana Region. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated February 10, 2015 to designate the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Laguna Woods and Laguna Hills, including the portions of the jurisdictions within the Santa Ana Region, upon the later effective date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated October 26, 2015 to designate the San Diego Water Board to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Murrieta and Wildomar, including the portions of the jurisdictions within the Santa Ana Region upon the effective date of Order R9-2015-0100.

Under the terms of the agreements, each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Also under the terms of the agreements, any TMDL and associated MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Laguna Woods, Laguna Hills, Murrieta, or Wildomar as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement of the applicable TMDL would remain with the Regional Water Board which has jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDL and Lake Elsinore/Canyon Lake Nutrient TMDLs, and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL.

In conformance with the agreements, footnotes to Table B-1 are included to specify coverage under Order No. R9-2013-0001 for those Phase I MS4 discharges within the jurisdictional boundaries of the Cities of Laguna Woods, Laguna Hills, Murrieta, and Wildomar within the Santa Ana Region. Footnote 1 to Table B-1 specifies that the Cities of Laguna Woods and Laguna Hills are identified as responsible Copermittees in the San Diego Creek/Newport Bay TMDL in the Santa Ana Region and remain obligated to comply with the San Diego Creek/Newport Bay TMDL pursuant to section XVIII of Tentative Order No. R8-2015-0001 (NPDES No. CAS618030) and any reissuance thereof. Footnote 4 to Table B-1 specifies that the Cities of Murrieta and Wildomar are identified as responsible Copermittees in the Lake Elsinore/Canyon Lake Nutrient TMDLs in the Santa Ana Region and remain obligated to comply with the Lake Elsinore/Canyon Lake Nutrient TMDLs pursuant to section VI.D.2 of Order No. R8-2010-0033 (NPDES No. CAS618030) or corresponding section as it may be amended or reissued.

The Cities of Lake Forest and Menifee are located partially within the jurisdictions of both the Santa Ana Water Board and the San Diego Water Board. Written requests for designation of a single Regional Water Board to regulate matters pertaining to permitting of Phase I MS4 discharges were submitted to the San Diego Water Board and the Santa Ana Water Board by the City of Lake Forest by letters dated January 14, 2013 and April 4, 2014, and the City of Menifee by letter dated June 25, 2015. The Cities of Lake Forest and Menifee requested designation of the San Ana Water Board pursuant to CWC section 13228.

The Cities of Lake Forest and Menifee reported that management and implementation of municipal programs to comply with two different Phase I MS4 permits creates a significant administrative and financial burden and inhibits their ability to contribute to greater overall water quality improvements in either Region. In an effort to address these concerns, the San Diego Water Board and the Santa Ana Water Board have entered into written agreements, whereby the Santa Ana Water Board is designated to regulate Phase I MS4 discharges within the jurisdictions of the Cities of Lake Forest and Menifee including the portions of the jurisdictions within the San Diego Region. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated February 10, 2015 to designate the San Ana Water Board to regulate Phase I MS4 discharges within the jurisdiction of the City of Lake Forest, including portions of the jurisdiction within the Santa Diego Region, upon the later date of Order No. R9-2015-0001 or Santa Ana Water Board Tentative Order No. R8-2015-0001. The San Diego Water Board and the Santa Ana Water Board entered into an agreement dated October 26, 2015 to designate the San Ana Water Board to regulate Phase I MS4 discharges within the jurisdiction of the City of Menifee, including portions of the jurisdiction within the San Diego Region, under Order No. R8-2010-0033 (NPDES No. CAS618030) as it may be amended or reissued upon the effective date of Order No. R9-2015-0100.

Under the terms of the agreements, each Regional Water Board retains the authority to enforce provisions of the Phase I MS4 permits issued to each city but compliance will be determined based upon the Phase I MS4 permit in which a particular city is regulated as a Copermittee (Water Code section 13228 (b)). Also under the terms of the agreements, any TMDL and associated Phase I MS4 permit requirements issued by the San Diego Water Board or the Santa Ana Water Board which include the Cities of Lake Forest or Menifee as a responsible party, will be incorporated into the appropriate Phase I MS4 permit by reference. Enforcement authority for the applicable TMDL would remain with the Regional Water Board which has the jurisdiction over the targeted impaired water body. Applicable TMDLs subject to the terms of the agreement include, but are not limited to, the Santa Ana Water Board's San Diego Creek/Newport Bay TMDL and Lake Elsinore/Canyon Lake Nutrient TMDLs, and the San Diego Water Board's Indicator Bacteria Project I Beaches and Creeks TMDL.

In conformance with the agreements, Footnote 2 to Table B-1 has been included to specify that Phase I MS4 discharges within the jurisdictional boundaries of the City of Lake Forest located within the San Diego Region will be regulated under Santa Ana Water Board Order No. R8-2015-0001 (NPDES No. CAS618030) and any reissuance thereof. The footnote specifies that the City of Lake Forest is an identified responsible Copermittee in the Indicator Bacteria Project I Beaches and Creeks TMDL (Bacteria TMDL) in the San Diego Region and remains obligated to comply with the Bacteria TMDL pursuant to Attachment E of Order No. R9-2013-0001 and any reissuance thereto. The City of Lake Forest is also identified as a responsible Copermittee in the San Diego Creek/Newport Bay TMDL established by the Santa Ana Water Board. The City remains obligated to comply with the San Diego Creek/New Port Bay TMDL pursuant to the Santa Ana Water Board's Phase I MS4 Permit (Tentative Order No. R8-2015-0001 (NPDES No. CAS618030), as it may be amended or reissued). Under the terms of the agreement, the City of Lake Forest must retain and continue implementation of the over irrigation prohibition in Title 15, Chapter 15, Section 14.030, List (b) of the City Municipal Code throughout its jurisdiction. Also under the terms of the agreement, the City of Lake Forest must actively participate in the development and implementation of the South Orange County Watershed Management Area Water Quality Improvement Plan required pursuant to Order No. R9-2013-0001, and any reissuance thereof.

Footnote 3 to Table B-1 has been included to specify that Phase I MS4 discharges within the jurisdictional boundaries of the City of Menifee located within the San Diego Region will be regulated under Santa Ana Water Board Order No. R8-2010-0033 (NPDES No. CAS618033) and any reissuance thereof. At this time, the City of Menifee is not identified as a responsible Copermittee for any TMDLs established by the San Diego Water Board. Under the terms of the agreement, the City of Menifee must actively participate in the development and implementation of the Santa Margarita River Watershed Management Area Water Quality Improvement Plan required pursuant to Order No. R9-2013-0001, and any reissuance thereof.

The basis supporting the Cities of Laguna Woods, Laguna Hills, Lake Forest, Menifee, Murrieta, and Wildomar requests to designate a specific Regional Water Board for regulatory oversight of Phase I MS4 discharges may change under future conditions and circumstances, therefore the San Diego Water Board will periodically review the effectiveness of the agreements during each MS4 permit reissuance. Based on this periodic review the San Diego Water Board may terminate one or both of the agreements with the Santa Ana Water Board or otherwise modify the agreements subject to the approval of the Santa Ana Water Board.

Provision B.2 (Priority Water Quality Conditions) requires the Copermittees in each Watershed Management Area to identify the highest priority water quality conditions which will be the focus of the Water Quality Improvement Plan implementation.

Provisions B.2.a and B.2.b provide the criteria that must be assessed when characterizing the receiving water quality and potential impacts from MS4 discharges of the receiving waters within the Watershed Management Area. The criteria are based primarily on the requirements in 40 CFR 122.26(d)(1)(iv)(C) and (C)(1)-(9). Characterizing the receiving water quality and identifying the potential impacts caused by MS4 discharges to receiving waters in the Watershed Management Area is necessary to identify the impacts to receiving waters associated with MS4 discharges that are of the most concern to the Copermittees.

Based on the information required to be considered under Provisions B.2.a and B.2.b, Provision B.2.c requires to Copermittees to identify the highest priority water quality conditions related to discharges from the MS4s that will be the primary focus of the Water Quality Improvement Plan in the Watershed Management Area. Addressing and improving these highest priority water quality conditions will become the focus of each Copermittee's jurisdictional runoff management program as the Water Quality Improvement Plan is implemented in the Watershed Management Area. The highest priority water quality conditions are expected to include sources of pollutants and/or stressors, and/or receiving water conditions, that the Copermittees consider the highest threats or most likely to have adverse impacts on the physical, chemical, and biological integrity of receiving waters. Addressing these threats and/or adverse impacts should restore the physical, chemical, and biological integrity of receiving waters, and result in the restoration and protection of the beneficial uses of the receiving waters in the Watershed Management Area.

Provision B.2.d requires the Copermittees to identify known and suspected sources of pollutants and/or stressors contributing to the highest priority water quality conditions. The requirements of Provision B.2.d are based primarily on the requirements in 40 CFR 122.26(d)(1)(iii)(B)(1)-(6). The Copermittees are required to evaluate several factors in the identification of those sources. The Copermittees must consider and evaluate the following: (1) the land uses that may contribute toward impacts to receiving waters, (2) the locations of the Copermittees' MS4s that can convey and discharge runoff and pollutants to receiving waters, (3) other sources that discharge

into the Copermittees' MS4s and receiving waters, and (4) other information and data that can help the Copermittees to evaluate the relative importance of or contribution from those sources toward the highest priority water quality conditions. Identifying the known and suspected sources, and their relative contribution toward the highest priority water quality conditions, will help the Copermittees to focus, direct, and prioritize their resources and implementation efforts within their jurisdictions.

Provision B.2.e requires the Copermittees to identify potential strategies that can result in improvements to water quality in MS4 discharges and/or receiving waters within the Watershed Management Area. Potential water quality improvement strategies will not necessarily be implemented by the Copermittees, but provide a "menu" of options that the Copermittees will consider for implementation. The public participation process that will be implemented during the development of the Water Quality Improvement Plan is where the potential water quality improvement strategies will be identified.

Provision B.3 (Water Quality Improvement Goals, Strategies and Schedules) requires the Copermittees in each Watershed Management Area to identify the goals that the Copermittees' jurisdictional runoff management programs will work toward achieving to address and improve the highest priority water quality conditions identified under Provision B.2.c; the strategies that will be implemented by the Copermittees within their jurisdictions and the Watershed Management Area to achieve the goals; and, the schedules for implementing the strategies and achieving the goals. The element of the Water Quality Improvement Plan required under Provision B.3 is where the "*comprehensive planning*" and "*intergovernmental coordination*" [40 CFR 122.26(d)(2)(iv)] of the Copermittees' actions for the proposed management programs within the Watershed Management Area is required to be described.

Provision B.3.a requires the Copermittees to identify interim and final numeric goals, and schedules to achieve those goals as part of the Water Quality Improvement Plans. Provision B.3.a.(1) requires the Copermittees to identify two types of numeric goals to be achieved:

(1) Final numeric goals in the receiving waters and/or MS4 discharges that will result in the protection of the water quality standards of the receiving waters for the highest priority water quality conditions identified by the Copermittees for Provision B.2.c. These final numeric goals are the ultimate goals for the Water Quality Improvement Plan, and the achievement and maintenance of these final numeric goals will indicate that one or more beneficial uses have been successfully restored and/or protected from MS4 discharges.

(2) Interim numeric goals that can be used by the Copermittees to demonstrate progress toward achieving the final numeric goals in the receiving waters and/or MS4 discharges for the highest priority water quality conditions in the Watershed Management Area. Achievement of the interim numeric goals will demonstrate to the San Diego Water Board that the Copermittees' implementation efforts are progressing toward achieving the final numeric goals.

Provision B.3.a.(1) does not specify what the interim and final numeric goals must be based on, but they essentially must be designed to achieve compliance with water quality standards in the receiving waters. To that end, the interim goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals.

The interim and final numeric goals can be based on the water quality objectives in the Basin Plan. The water quality objectives in the Basin Plan, however, consist of numeric and narrative water quality objectives. Numeric water quality objectives can be directly used as numeric goals. Narrative water quality objectives, on the other hand, will require some interpretation to identify numeric goals. The achievement of multiple numeric goals based on the water quality objectives, used in combination, may be necessary to demonstrate that beneficial uses have been restored and/or protected.

The Copermittees could also propose other numeric goals that are not necessarily water quality objectives from the Basin Plan. For example, the Copermittees could propose a numeric goal that consists of achieving some percent improvement of a measureable indicator, such as acreage of a specific habitat or increase in a specific plant or animal species population. Other examples may include pollutant load reductions, number of impaired waterbodies delisted from the List of Water Quality Impaired Segments, Index of Biological Integrity (IBI) scores, etc.

The Copermittees may choose to develop interim numeric goals based on the final numeric goals they develop, such as incremental steps toward ultimately achieving the final numeric goals. The Copermittees may also choose to develop interim numeric goals that are based on other measureable indicators that can indirectly indicate improvements and progress toward the final numeric goals.

There are no limits to the types of interim numeric goals that could be proposed by the Copermittees, other than the goals must be based on measureable criteria or indicators capable of demonstrating progress toward achieving the numeric goals. Likewise, there are no limits to the types of final numeric goals that could be proposed by the Copermittees, other than the goals must "*restore and protect the water quality standards of the receiving waters.*"

Finally, Provision B.3.a.(2) also requires the Copermittees to develop schedules for measuring progress and achieving the interim and final numeric goals. Several criteria are included for the development of the schedules, but the Copermittees are required to achieve the numeric goals as soon as possible, consistent with federal NPDES regulations (40 CFR 122.47(a)(1)).

The Copermittees are also required to incorporate any compliance schedules for applicable ASBS or TMDL requirements. Applicable ASBS and TMDL compliance schedules are set forth in Attachment A and Attachment E to the Order, respectively.

The information provided by the Copermittees under Provision B.3.a.(2) will be used by the Copermittees and the San Diego Water Board to gauge and track the progress of the Copermittees' efforts in addressing the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Provision B.3.b requires the Copermittees to identify the strategies and schedules to implement those strategies as part of the Water Quality Improvement Plans. Provision B.3.b requires the Copermittees to identify the water quality improvement strategies that will be and may be implemented within the Watershed Management Area to 1) reduce pollutants in storm water discharged from the MS4 to the MEP, 2) effectively prohibit non-storm water discharges from entering the MS4, 3) protect water quality standards in receiving waters by controlling MS4 discharges so that they do not cause or contribute to exceedances of receiving water limitations, and 4) achieve applicable WQBELs that implement TMDLs. The Copermittees will select the strategies to be implemented based on the likely effectiveness and efficiency of the potential water quality improvement strategies identified under Provision B.2.e to effectively prohibit non-storm water discharges to the MS4, reduce pollutants in storm water discharges from the MS4 to the MEP, and/or achieve the interim and final numeric goals identified under Provision B.3.a.

Provision B.3.b.(1) requires each Copermittee to identify the strategies that will be or may be implemented within its jurisdiction. Each Copermittee is required to describe the strategies it is committed to implementing as part of its jurisdictional runoff management requirements under Provisions E.2 through E.7, and the optional jurisdictional strategies that the Copermittee will implement, as necessary, to achieve the numeric goals.

Each Copermittee is expected to implement the optional jurisdictional strategies identified under Provisions B.3.b.(1)(b) when the jurisdictional strategies it has committed to implement under Provision B.3.b.(1)(a) are not making adequate progress toward the interim and final numeric goals in accordance with the schedules established under Provision B.3.a. Provision B.3.b.(1)(b)(v) requires each Copermittee to describe the circumstances necessary to trigger implementation of the optional jurisdictional strategies, in addition to the requirements of Provisions B.3.b.(1)(a).

The San Diego Water Board recognizes that there may be optional jurisdictional strategies that will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation. Thus, Provision B.3.b.(1)(b)(iv) requires each Copermittee to describe the funding and/or resources that are necessary to implement these optional jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional jurisdictional strategies.

Provision B.3.b.(2) requires the Copermittees in the Watershed Management Area to identify the regional or multi-jurisdictional strategies that may be implemented, as necessary, to achieve the numeric goals. Similar to the requirements of Provision B.3.b.(1)(b), these regional or multi-jurisdictional strategies will likely require funding and/or resources for planning, permitting, procurement of labor and materials, and implementation, and San Diego Water Board recognizes that these strategies may be difficult to implement with only Copermittee resources. Thus, Provision B.3.b.(2)(d) requires the Copermittees to describe the funding and/or resources necessary to implement these optional regional or multi-jurisdictional strategies. This information may provide interested groups and members of the public an understanding of the resources that they could provide or assist in obtaining to implement these optional regional or multi-jurisdictional strategies.

Provision B.3.b.(3) requires the Copermittees to develop and include schedules in the Water Quality Improvement Plan for implementing the water quality improvement strategies identified under Provisions B.3.b.(1) and B.3.b.(2). The schedule for implementing the water quality improvement strategies will be used by the Copermittees and San Diego Water Board to measure and demonstrate the progress of the Copermittees' implementation efforts toward reducing pollutants in storm water discharged from the MS4 to the MEP, and eliminating illicit non-storm water discharges from entering the MS4.

Provision B.3.b.(4) provides the Copermittees in each Watershed Management Area the option of implementing watershed-specific structural BMP requirements for Priority Development Projects. Historically, storm water permits have included very specific performance standards for permanent, structural BMPs. These standards describe the expectation for the capture or treatment of pollutants and control of excessive flow before storm water is discharged from a site. The Copermittees were also allowed to develop waiver programs for Priority Development Projects to avoid implementing the structural BMPs; however, the waiver programs were not necessarily tied into any sort of holistic watershed strategy. The result is that implementation of BMP requirements is largely done on a site-by-site basis. This requires proper design on the part of the Priority Development Project and strict oversight on the part of the Copermittee.

Provision B.3.b.(4) promotes the evaluation of multiple strategies for water quality improvement, in addition to the implementation of permanent structural BMPs, on a watershed-scale versus the site-by-site approach. In a report issued by the Southern California Coastal Water Research Project (SCCWRP) and several other research institutions, the report emphasized that a successful hydromodification management program will involve watershed analysis as a first step, and that integrating multiple watershed-based strategies is preferable over a site-by-site approach. Indeed, the report states that the watershed analysis "*...should lead to identification of existing opportunities and constraints that can be used to help prioritize areas of greater concern, areas of restoration potential, infrastructure constraints, and pathways for*

potential cumulative effects."[22] Provision B.3.b.(4) promotes the findings and recommendations of the report by providing a pathway for Copermittees to develop an integrated approach to their land development programs.

Under Provision B.3.b.(4), the Copermittees in a Watershed Management Area must first perform an analysis by gathering as much information pertaining to the physical characteristics of the Watershed Management Area as possible. This includes, for example, identifying potential areas of coarse sediment supply, present and anticipated future land uses, and locations of physical structures within receiving streams and upland areas that affect the watershed hydrology (such as bridges, culverts, and flood management basins). Once this information is collected, the Copermittees must produce GIS layers (maps) that include this information.

From there, the Copermittees must use the results of the Watershed Management Area Analysis to identify and compile a list of candidate projects that could potentially be used as alternative compliance options for Priority Development Projects. Such projects include, for example, opportunities for stream or riparian area rehabilitation, opportunities for retrofitting existing infrastructure to incorporate storm water retention or treatment, and opportunities for regional BMPs, among others. Once these candidate projects are identified, Copermittees may allow Priority Development Projects to fund, partially fund, or completely implement these candidate projects. The Copermittees must first find that implementing such a candidate project would provide greater overall benefit to the watershed than requiring implementation of the structural BMPs onsite, and also enter into a voluntary agreement with the Priority Development Project that authorizes this arrangement. The Copermittees may use Provision B.3.b.(4) as both 1) a mechanism to reach their stated goals of the Water Quality Improvement Plan by using Priority Development Projects to either fund or implement projects that will provide water quality benefit, and 2) an alternative to requiring strict adherence to the structural BMP design standards.

Additionally, Provision B.3.b.(4) allows the Copermittees to use the results of the Watershed Management Area Analysis to identify areas within the Watershed Management Area where it is appropriate to allow Priority Development Projects to be exempt from the hydromodification management BMP performance requirements. Provision E.3.c.(2) already allows exemptions for Priority Development Projects that discharge to a conveyance channel whose bed and bank are concrete lined from the point of discharge to an enclosed embayment or the Pacific Ocean. However, there may be cases where further exemptions are warranted. The Copermittees may identify such cases on a watershed basis and include them in the Watershed Management Area Analysis; however, they must provide the supporting rationale to support all claims for exemptions.

[22] 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

Provision B.3.b.(4) provides an innovative pathway for Copermittees to regulate their land development programs by allowing alternative compliance in lieu of implementing structural BMPs on each and every Priority Development Project. This approach facilitates the integration of watershed-scale solutions for improving overall water quality and assisting Copermittees to achieve their stated goals of the Water Quality Improvement Plan. The San Diego Water Board understands, however, that undertaking this approach, which involves extensive planning, could be resource intensive for the Copermittees. Therefore, the Watershed Management Area Analysis is optional and not a requirement. The Copermittees can choose not to perform the watershed planning and mapping exercise described in Provision B.3.b.(4), and instead choose to require strict implementation of the structural BMPs onsite, pursuant to Provision E.3.c.

Provision B.3.c is included to provide the Copermittees an option that allows the Copermittees to be deemed in compliance with the prohibitions and limitations (receiving water limitations) of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b. One or more Copermittees within a Watershed Management Area can choose to implement this option. This option is only expected to be utilized by a Copermittee that wishes to be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b.

The alternative compliance pathway option included in Provision B.3.c is consistent with the approach described in Order WQ 2015-0075, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4,* adopted by the State Water Board on June 16, 2015. State Water Board Order WQ 2015-0075 directs the Regional Water Boards to consider a watershed-based planning and implementation approach to compliance with receiving water limitations when issuing Phase I MS4 permits going forward. Order WQ 2015-0075 included seven principles that the Regional Water Boards are expected to follow when incorporating an alternative compliance pathway into a MS4 permit. The San Diego Water Board incorporated the seven principles stipulated in State Water Board Order WQ 2015-0075 into the Regional MS4 Permit as follows:

1. Provision A of this Order continues to require compliance with water quality standards in the receiving water and does not deem good faith engagement in the iterative process to constitute compliance with receiving water limitations. Provision A of this Order continues to be consistent with the receiving water limitations provisions from State Water Board Order WQ 99-05.

2. Compliance with Provision B.3.c constitutes compliance with the requirements of the Provision A.3.b, which requires compliance with the WQBELs of the TMDLs in Attachment E to the Order, and is considered compliance with receiving water limitations for those TMDL water body-pollutant combinations.

3. Provision B.3.c is an ambitious, rigorous, and transparent alternative compliance pathway that allows a Copermittee appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during implementation of the compliance alternative.

4. Provision B.3.c requirements are incorporated into a Water Quality Improvement Plan. Water Quality Improvement Plans are a watershed-based planning and implementation approach, which address multiple contaminants, and incorporate TMDL requirements.

5. The strategies required to be included in the Water Quality Improvement Plans promote and incentivize the use of green infrastructure and requires the implementation of low impact development principles.

6. The strategies required to be included in the Water Quality Improvement Plans encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.

7. The alternative compliance pathway of Provision B.3.c includes rigor and accountability. The Copermittee is required, through a transparent public process, to demonstrate that water quality issues in the watershed have been analyzed and prioritized, and that appropriate solutions are proposed. The Copermittee is also required, through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. The Copermittee is required to conduct this type of adaptive management on its own initiative without waiting for direction from the San Diego Water Board.

In order for a Copermittee to utilize this option, the Copermittee is required to include three components in the Water Quality Improvement Plan. The first component is a comprehensive set of numeric goals and schedules that will demonstrate the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b will be achieved within a specified period of time. The criteria provided in the Order will require the Copermittee to demonstrate that the discharges from its MS4s will not cause or contribute to exceedances of water quality objectives in the receiving waters, and/or the receiving waters will be adequately protected from adverse impacts attributable to the Copermittee's MS4 discharges. The Copermittee is also required to specify annual milestones to be achieved each year, which adds rigor, accountability, and transparency to the process. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics, which are expected to build upon previous milestones and lead to the achievement of the final numeric goals.

The second component is an analysis to demonstrate that implementation of the water quality improvement strategies required under Provision B.3.b will achieve the numeric goals within the established schedules required under Provisions B.3.a and B.3.c.(1).

Because the development of the analysis may require significant resources, the Order allows the Copermittees in each Watershed Management Area that choose to implement this option to perform the analysis individually, or pool their resources for the analysis collectively.

The analysis must "reasonably" and "quantitatively" demonstrate that the implementation of the water quality improvement strategies can achieve the numeric goals within the established schedules. However, as more data and information are collected during implementation of the Water Quality Improvement Plan to demonstrate progress toward achieving the numeric goals, the numeric goals, water quality improvement strategies and schedules may need to be modified. If the data and information indicate that modification is needed, the Copermittee must also update the analysis. With the exception of numeric goals and schedules associated with TMDLs from Attachment E to the Order, the modification to the analysis would be allowed as part of the adaptive management process of the Water Quality Improvement Plan. For TMDLs, modification of numeric goals or schedules would likely require an amendment to the Basin Plan and Attachment E to the Order before the analysis and Water Quality Improvement Plan could include such modifications.

Thus, the third component is the key component that allows a Copermittee to demonstrate the implementation of the water quality improvement strategies within its jurisdiction is making progress toward achieving the final numeric goals. Each Copermittee must specify the monitoring and assessments that will be performed to confirm that implementation of the water quality improvement strategies are making progress toward achieving the numeric goals within the established schedules, and whether the interim and final numeric goals have been achieved.

These three components must then be reviewed by the Water Quality Improvement Consultation Panel. The Water Quality Improvement Consultation Panel is required to be formed as part of the public participation process for the development of the Water Quality Improvement Plans. The Water Quality Improvement Consultation Panel is described under Provision F.1.a.(1)(b). Review by the Water Quality Improvement Consultation Panel is included to provide an additional layer of input, support, and accountability for the implementation of this option.

Compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b begins when the Water Quality Improvement Plan, incorporating the requirements of Provision B.3.c.(1), is accepted by the San Diego Water Board. Each Copermittee that chooses to implement and continues to implement this option will be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b as long as the Copermittee continues to implement the strategies, monitoring and assessments as incorporated in the Water Quality Improvement Plan in accordance with Provision B.3.c.(1), and the Copermittee reports the achievement of the annual milestones each year, or provides acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement

strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals. The Copermittee continues to be deemed in compliance with the requirements of Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b during the time the San Diego Water Board reviews the rationale and recommended modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules. If and when the San Diego Water Board determines that it does not accept the rationale or recommendations, the Copermittee will be notified they are no longer deemed in compliance with Provisions A.1.a, A.1.c, A.1.d, A.2, and A.3.b.

Provision B.4 (Water Quality Improvement Monitoring and Assessment) requires the Copermittees to develop an integrated monitoring and assessment program to track the progress of the Water Quality Improvement Plan toward meeting the implementation goals and schedules, and improving the water quality of the Watershed Management Area. Provision B.4 is the part of the Water Quality Improvement Plan where the Copermittees describe the monitoring data that will be collected, which is not only necessary to implement the "iterative approach" required by Provision A.4, but inform the adaptive management and "*comprehensive planning process*" that allows the Copermittees to make adjustments and modifications to the Water Quality Improvement Plans and the jurisdictional runoff management programs.

Provision B.4 requires the Copermittees, at a minimum, to include the requirements of Provision D as part of the water quality improvement monitoring and assessment program for the Water Quality Improvement Plan. The Copermittees, however, are not limited to the requirements of Provision D and may include additional monitoring and assessment methods to track progress toward improving water quality in the Watershed Management Area.

In addition to incorporating the requirements of Provision D, the water quality improvement monitoring and assessment program must incorporate any monitoring and assessment requirements specified for any applicable TMDLs included in Attachment E to the Order, and the monitoring requirements of Attachment B to State Water Board Resolution No. 2012-0012 for Watershed Management Areas with ASBS.

The monitoring and assessments required to be incorporated into the Water Quality Improvement Plan are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

Provision B.5 (Iterative Approach and Adaptive Management Process) requires the Copermittees to implement the iterative approach pursuant to Provision A.4 to adapt the Water Quality Improvement Plan, monitoring and assessment program, and jurisdictional runoff management programs to become more effective toward achieving compliance with Provisions A.1.a, A.1.c and A.2.a.

Provision B.5 requires the Copermittees in each Watershed Management Area to re-evaluate the highest priority water quality conditions and potential water quality

improvement strategies, the water quality improvement goals, strategies and schedules, and the water quality improvement monitoring and assessment program and provide recommendations for modifying those elements to improve the effectiveness of the Water Quality Improvement Plan. The re-evaluation of the Water Quality Improvement Plan is part of the assessment requirements of Provision D.

Provision B.6 (Water Quality Improvement Plan Submittal, Updates, and Implementation) requires to Copermittees to submit, update, and implement the Water Quality Improvement Plans.

The requirements for the process to develop and submit the Water Quality Improvement Plans is described in more detail under the discussion for Provision F.1. The process will include several opportunities for the public to provide input during the development of the Water Quality Improvement Plans. The process for updating the Water Quality Improvement Plans is described in more detail under the discussion for Provision F.3.c. Upon acceptance of the Water Quality Improvement Plan and updates, the Copermittees are required to immediately begin implementing the Water Quality Improvement Plan and subsequent updates.

The Water Quality Improvement Plan is expected to be a dynamic document that will evolve over time. The Water Quality Improvement Plan is also expected to be a long term plan that focuses the Copermittees' efforts and resources on a limited set of priority water quality conditions, with the ultimate goal of protecting all the beneficial uses of the receiving waters within the Watershed Management Area from impacts that may be caused or contributed to by MS4 discharges. As the Copermittees collect data, implement their jurisdictional runoff management programs, and review the results from their water quality improvement monitoring and assessment program, the Water Quality Improvement Plan is expected to be continually reviewed and updated until compliance with Provisions A.1.a, A.1.b, and A.2.a is achieved.

However, in specific cases supported by robust analytical documentation the implementation of the Water Quality Improvement Plans may demonstrate that TMDLs are not necessary for identified impaired water bodies within the Watershed Management Area if the analytical record demonstrates that technology-based effluent limitations required by the CWA, more stringent effluent limitations required by state, local, or federal authority, and/or other pollution control requirements (e.g., best management practices) required by local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time.[23]

The San Diego Water Board submits an Integrated Report to USEPA to comply with the reporting requirements of CWA sections 303(d), 305(b) and 314, which lists the attainment status of water quality standards for water bodies in the San Diego Region.

[23] 40 CFR 130.7(b)(1)

According to USEPA guidance for the Integrated Report,[24] water bodies are placed in one of five categories. Water bodies included in Category 5 in the Integrated Report indicate at least one beneficial use is not being supported or is threatened, and a TMDL is required. Water bodies included in Category 5 are placed on the 303(d) List.

Category 4 in the Integrated Report is for water bodies where available data and/or information indicate that at least one beneficial use is not being supported or is threatened, but a TMDL is not needed.[25] Impaired surface water bodies may be included in Category 4 if a TMDL has been adopted and approved (Category 4a); if other pollution control requirements required by a local, state or federal authority are stringent enough to implement applicable water quality standards within a reasonable period of time (Category 4b); or, if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution (Category 4c).

Impaired water bodies can be included in Category 4a if a TMDL has been adopted and approved. The TMDLs in Attachment E to the Order implement the requirements of the TMDLs adopted by the San Diego Water Board, and approved by the State Water Board and USEPA. The water bodies in Attachment E will be included in Category 4a in the Integrated Report and removed from the 303(d) List.

Impaired water bodies can be included in Category 4b if there are *acceptable* "pollution control requirements" required by a local, state or federal authority stringent enough to implement applicable water quality standards within a reasonable period of time (e.g., a compliance date is set). When evaluating whether a particular set of pollution controls are "requirements," the USEPA considers a number of factors, including: (1) the authority (local, state, federal) under which the controls are required and will be implemented with respect to sources contributing to the water quality impairment (examples may include: self-executing state or local regulations, permits, and contracts and grant/funding agreements that require implementation of necessary controls), (2) existing commitments made by the sources and completion or soon to be completed implementation of the controls (including an analysis of the amount of actual implementation that has already occurred), (3) the certainty of dedicated funding for the implementation of the controls, and (4) other relevant factors as determined by USEPA depending on case-specific circumstances.[26]

Impaired water bodies can be included in Category 4c if the failure to meet an applicable water quality standard is not caused by a pollutant, but caused by other types of pollution. Pollution, as defined by the CWA is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."[27] In

[24] USEPA, 2005. Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act
[25] Ibid
[26] Ibid
[27] CWA section 502(19)

other cases, pollution does not result from a pollutant and a TMDL is not required. Examples of circumstances where an impaired segment may be placed in Category 4c include segments impaired solely due to lack of adequate flow, stream channelization, or hydromodification. In these situations, there may be water quality management actions that can address the cause(s) of the impairment, but a TMDL may not be required to implement the actions.

The Water Quality Improvement Plans will require the implementation of pollution controls and water quality management actions (i.e. water quality improvement strategies) which can result in the attainment of water quality standards in water bodies impaired by discharges from the Copermittees' MS4s. The Water Quality Improvement Plans also include requirements that are expected to attain water quality standards in a reasonable period of time. The San Diego Water Board considers the Water Quality Improvement Plans to be a commitment by the Copermittees to develop, plan, budget for, and implement pollution controls that will attain water quality standards in receiving waters in a reasonable period of time, or as soon as possible. The results of the Copermittees' efforts in implementing the Water Quality Improvement Plans can be used to re-evaluate the condition of the impaired water bodies during the next update to the 303(d) List.

After the Copermittees submit the Water Quality Improvement Plans and demonstrate that water quality standards are being attained or will be attained in a reasonable period of time, the San Diego Water Board may re-evaluate the water bodies on the 303(d) List. These water bodies on the 303(d) List may be re-evaluated and placed into Category 4b or Category 4c in the Integrated Report. The water bodies placed in Category 4b or Category 4c in the Integrated Report must show a record that the water bodies are attaining water quality standards or supporting the identified beneficial uses, or will attain water quality standards or support identified beneficial uses in a reasonable period of time, in order for the water bodies to be appropriately removed from the 303(d) List.

C. Action Levels

Purpose: Provision C includes requirements for the Copermittees to identify and include numeric action levels in the Water Quality Improvement Plan to direct and focus the Copermittees' jurisdictional runoff management program implementation efforts for controlling MS4 discharges to receiving waters.

Discussion: Under Provision C, the numeric action levels required are for non-storm water discharges and storm water discharges. The non-storm water action levels (NALs) are applicable to non-storm water discharges from the Copermittees' MS4s, which can occur year-round. The storm water action levels (SALs) are applicable to storm water discharges from the Copermittees' MS4s, which occur during the rainy season defined as the period between October 1 and April 30.

The action levels required by Provision C are based on the action level requirements that were developed and incorporated into Order Nos. R9-2009-0002 and R9-2010-0016, the Orange County and Riverside County MS4 Permits, respectively. The Fact Sheets for these Orders provide detailed discussions about the development of the numeric NALs and SALs included in this Order.

Order Nos. R9-2009-0002 and R9-2010-0016 required the Copermittees to perform prescribed actions if the NALs or SALs are exceeded. The actions required under Order Nos. R9-2009-0002 and R9-2010-0016 generally included conducting additional monitoring and source investigations when a discharge from the MS4 is observed to exceed one or more NALs and/or SALs.

For this Order, however, the action levels of Provision C are to be used by the Copermittees to prioritize the actions to be implemented as part of the Water Quality Improvement Plan. Monitoring data collected by the Copermittees from MS4 outfalls will be compared with the NALs and SALs. Exceedances of the NALs and SALs will not require the Copermittees to immediately identify sources causing exceedances, but will provide some numeric indicator levels that can give the Copermittees a way to measure the relative severity of a pollutant contributing to receiving water quality impacts.

NALs and SALs must be included in the Water Quality Improvement Plans to be used by the Copermittees in directing and focusing their water quality improvement strategies. The Copermittees are expected to utilize the NALs and SALs to help focus their implementation efforts on addressing pollutants that have the most significant potential or observed impacts to receiving waters. The NALs and SALs will be used as part of the MS4 discharges assessments required under Provision D.4.b. The NALs and SALs may also be used by the Copermittees as the numeric goals to be achieved in MS4 discharges and/or receiving waters as the Water Quality Improvement Plans are implemented.

More specific and detailed discussions of the requirements of Provision C are provided below.

Provision C.1 (Non-storm Water Action Levels) requires the Copermittees to incorporate NALs into the Water Quality Improvement Plan for pollutants and/or constituents that are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to non-storm water discharges from the MS4s. NALs generally must be consistent with the water quality objectives found within the Basin Plan.

The NALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. The federal CWA requires permits for municipal storm sewer systems to "*effectively prohibit non-storm water discharges into the storm sewers.*" The federal NPDES regulations, which were promulgated to implement the CWA requirements for discharges from municipal storm sewers, require a program to address illicit discharges, which are non-storm water discharges. Provision A.1.b prohibits "*[n]on-storm water discharges into MS4s*" unless the non-storm water discharge authorized by a separate NPDES permit. The NALs will be used as part of the illicit discharge detection and elimination program required pursuant to Provision E.2, as well as part of the MS4 discharges assessments required pursuant to Provision D.4.b.

Provision A.1.a prohibits non-storm water discharges from the MS4 from "*causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.*" In addition, pursuant to Provision A.2.a, non-storm water discharges "*must not cause or contribute to the violation of water quality standards in any receiving waters.*"

Ideally, the Copermittees' jurisdictional runoff management programs will eliminate all non-storm water discharges entering the MS4s within their jurisdictions. The complete elimination of non-storm water discharges to the Copermittees' MS4s would be in compliance with the CWA requirements for non-storm water discharges, as well as the prohibitions and limitations of Provisions A.1.a and A.2.a.

The federal regulations, however, also refer to several non-storm water discharge categories that must be addressed as illicit discharges if they are found to be a source of pollutants. The federal regulations thus identify some non-storm water discharges that are not required to be addressed as illicit discharges if they are not a source of pollutants (e.g. non-storm water discharges specified in Provisions E.2.a.(1)-(5)). Thus, these regulations imply that some non-storm water discharges into and from the MS4 may occur even if non-storm water discharges are "effectively" prohibited by the Copermittees.

If the source of a non-storm water discharge is identified as a category of non-storm water specified in Provisions E.2.a.(1)-(5), the NALs can be used to determine if the category of non-storm water discharges is a source of pollutants. For other non-storm water discharges not specified in Provisions E.2.a.(1)-(5), the CWA requires those discharges to be "*effectively*" prohibited by removing the discharge to the MS4 through enforcement of the Copermittees' legal authority established under "*ordinance, order or similar means*" to prohibit illicit discharges to the MS4s.

If there are non-storm water discharges that are not required to be addressed as illicit discharges, those discharges must comply, at a minimum, with the discharge prohibitions and receiving water limitations of Provision A. Thus, the non-storm water discharges from the MS4 must be at levels that will not cause or contribute to a condition of pollution, contamination, or nuisance (Provision A.1.a), and must not cause or contribute to a violation of water quality standards in receiving waters (Provision A.2.a) to be consistent with the discharge prohibitions and receiving water limitations of Provisions A.1.a and A.2.a.

Furthermore, the San Diego Region has predominantly intermittent and ephemeral rivers and streams which vary in flow volume and duration at spatial and temporal scales. For most of these river and stream systems, non-storm water discharges from the MS4 are likely to be the most significant or the only source contributing to surface flows present within the receiving water, especially during the dry season.

Therefore, because of the prohibitions and limitations of Provision A.1.a and A.2.a, and the likelihood that non-storm water discharges from the MS4 are the most significant or only source contributing to surface flows present within the receiving water, NALs generally must be consistent with the water quality objectives found within the Basin Plan. Non-storm water discharges that are meeting the NALs would not be expected to cause or contribute to an exceedance of water quality objectives in receiving waters, which would be consistent with the discharge prohibitions and receiving water limitations of Provisions A.1.a and A.2.a.

Exceedances of the NALs would then provide an indication of the relative severity of a pollutant in non-storm water discharges from the MS4 contributing to potential or observed receiving water quality impacts. The relative severity or significance of a pollutant in non-storm water discharges from the MS4 will provide the Copermittees a valuable source of information that can be used to identify priority water quality conditions within a Watershed Management Area and within each Copermittee's jurisdiction.

Tables C-1 through C-4 under Provision C.1.a specify numeric NALs for several parameters or pollutant constituents for non-storm water discharges from the MS4 to several water body types. The NALs for MS4 discharges given under Provision C.1.a are based on the water quality objectives for inland surface waters in the Basin Plan, and the water quality objectives for ocean waters in the Ocean Plan. The NALs for

most of the metals were calculated based on the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). The NALs provided in Tables C-1 through C-4 must be included in the Water Quality Improvement Plans required to be developed pursuant to Provision B.

Provision C.1.b requires the Copermittees to identify NALs for pollutants and/or constituents, not specified in Provision C.1.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to non-storm water discharges from the MS4s. The NALs must be based on the water quality objectives in the Basin Plan. The NALs identified under Provision C.1.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the NALs required pursuant to Provisions C.1.a and C.1.b may be exceeded more frequently than not. Thus, Provision C.1.c has been included in the Order to provide the Copermittees the option to develop secondary NALs that are set at levels greater than the levels required pursuant to Provisions C.1.a and C.1.b to further refine the prioritization and assessment of water quality improvement strategies for addressing non-storm water discharges to and from the MS4s, as well as the detection and elimination of non-storm water and illicit discharges to and from the MS4.

Provision C.2 (Storm Water Action Levels) requires the Copermittees to incorporate SALs into the Water Quality Improvement Plan for pollutants and/or constituents causing or contributing, or may be causing or contributing, to the highest priority water quality conditions identified in the Water Quality Improvement Plan related to storm water discharges from the MS4s.

The SALs have been included to ensure that the Copermittees are implementing and complying with several requirements of the MS4 permit. Provision A.1.a prohibits storm water discharges from the MS4 from "*causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in waters of the state.*" In addition, pursuant to Provision A.2.a, storm water discharges "*must not cause or contribute to the violation of water quality standards in any receiving waters.*"

Provision A.3.a, however, implicitly acknowledges that compliance with Provisions A.1.a and A.2.a cannot be achieved immediately for discharges of storm water from the MS4 by applying the MEP standard. Thus, Provision A.4 requires the Copermittees to implement an iterative approach to demonstrate that MEP is being achieved. This approach is supported by USEPA.

The federal CWA requires permits for municipal storm sewer systems to "*require controls to reduce the discharge of pollutants [in storm water] 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." MEP is an ever-evolving, flexible, and advancing concept. As knowledge about controlling storm water runoff and discharges evolves, so does the knowledge which constitutes MEP. Reducing the discharge of storm water pollutants from the MS4 to the MEP requires the Copermittees to assess their jurisdictional runoff management programs and revise activities, control measures, BMPs, and measurable goals, as necessary to meet MEP. The SALs provide the Copermittees measureable goals that may be used to demonstrate the achievement of MEP for reducing pollutants in storm water discharges from the MS4. The SALs will be used as part of the MS4 discharges assessments required under Provision D.4.a.

In June of 2006, the State Water Board's Blue Ribbon Storm Water Panel released its report titled "*The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities.*" In the recommendations, the Blue Ribbon panel proposed storm water effluent limitations which are computed using statistical based population approaches. The SALs specified in Table C-5 under Provision C.2.a were developed from a regional subset of nationwide Phase I MS4 data by using USEPA Rain Zone 6 (arid west) data.[28] Additionally, utilization of regional data is appropriate due to the addition of data into the nationwide Phase I MS4 monitoring dataset in February 2008. This additional data increased the number of USEPA Rain Zone 6 samples to more than 400, and included additional monitoring events within Southern California.

Utilizing data from USEPA Rain Zone 6 resulted in SALs which closely reflect the environmental conditions experienced in the San Diego Region. The localized subset of data includes sampling events from multiple Southern California locations including Orange, San Diego, Riverside, Los Angeles, and San Bernardino Counties. The dataset includes samples taken from highly built-out impervious areas and from storm events representative of Southern California conditions.

The SALs for cadmium, copper, lead and zinc require the measurement of hardness and to provide more specificity in the assessment of samples with SALs for total metal concentrations. While USEPA Rain Zone 6 data include a large sample size for concentrations of total metals, the impact the concentration will have on receiving waters will vary with receiving water hardness. Since it is the goal of the SALs, through the iterative process and MEP standard, to have MS4 storm water discharges meet all applicable water quality objectives, the hardness of the receiving water should be used when assessing the total metal concentration of a sample.

Thus, when there is an exceedance of a SAL for a metal, the Copermittee must determine if that exceedance is above the existing applicable water quality objectives based upon the hardness of the receiving water. The water quality objectives

[28] Data used to develop SAL were obtained from http://rpitt.eng.ua.edu/Research/ms4/mainms4.shtml

Copermittees must use to assess total metal SAL exceedances are the California Toxic Rule (CTR) and USEPA National Recommended Water Quality Criteria for Freshwater Aquatic Life 1 hour maximum concentrations. The 1-hour maximum concentration is to be used for comparison since it is expected to most replicate the impacts to waters of the State from the first flush following a precipitation event.

The statistically calculated SALs given in Table C-5 are at levels greater than the water quality objectives in the Basin Plan or Ocean Plan. Because the objective of the CWA is to "*to restore and maintain the chemical, physical, and biological integrity of the Nation's waters*", meaning eventually pollutants in storm water discharges must be reduced to a level that cannot cause or contribute to an exceedance of water quality objectives in receiving waters, over time the SALs are expected to be reduced to a level that is based on the water quality objectives rather than statistical calculations. The San Diego Water Board will review the SALs as more data for discharges of storm water from the MS4s are collected, and revise them as conditions improve and the MEP standard advances. For the Water Quality Improvement Plans required under this Order, the SALs identified under Provision C.2.a must be included.

Provision C.2.b requires the Copermittees to identify SALs for pollutants and/or constituents, not specified in Provision C.2.a, which are causing or contributing, or may be causing or contributing, to the highest priority water quality conditions of the Watershed Management Area related to storm water discharges from the MS4s. The SALs identified under Provision C.2.b must be included in the Water Quality Improvement Plan.

The San Diego Water Board recognizes that some of the SALs required pursuant to Provisions C.2.a and C.2.b may be exceeded more frequently than not. Thus, Provision C.2.c has been included in the Order to provide the Copermittees the option to develop secondary SALs that are set at levels greater than the levels required pursuant to Provisions C.2.a and C.2.b to further refine the prioritization and assessment of water quality improvement strategies for reducing pollutants in storm water discharges from the MS4s.

D. Monitoring and Assessment Program Requirements

Purpose: Provision D includes minimum monitoring and assessment requirements that must be developed and implemented by the Copermittees as part of the Water Quality Improvement Plans. Implementation of the monitoring and assessment requirements of Provision D will allow the Copermittees to demonstrate that the requirements of the CWA to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP are being achieved. Implementation of the monitoring and assessment requirements of Provision D will also allow the Copermittees and the San Diego Water Board to track improvements to the water quality in the San Diego Region. The monitoring and assessment program requirements are necessary to implement, as well as ensure the Copermittees are in compliance with, the requirements of the Order.

Discussion: The San Diego Water Board recognized that changes to the monitoring and assessment requirements of the Fourth Term Permit were necessary to improve the usefulness and usability of monitoring data collected by the Copermittees to support their jurisdictional storm water programs more efficiently and with increased effectiveness. The data collected are needed to better inform the Copermittees' understanding of the physical, chemical, and biological condition of the receiving waters and the quality of the MS4 discharges. The monitoring program needs to provide opportunities for the Copermittees to integrate regional monitoring efforts into municipal storm water monitoring requirements to provide a cost-effective approach to monitoring and avoid duplication of efforts.

The requirements in Provision D were largely recommended by the Copermittees as an outcome of the San Diego Water Boards Focused Meeting process. The monitoring and assessment program requirements now require collection of more specific information necessary for each Copermittee to adapt its jurisdictional runoff management program in such a way that focuses resources on a watershed's highest priority water quality conditions. The monitoring and assessment program will require the Copermittees to collect data that can be utilized to answer both watershed level management questions (e.g. Are the chemical, physical, and biological conditions of a receiving water protective, or likely protective of beneficial uses?), and specific jurisdictional runoff management program activity questions (e.g. Are the water quality improvement strategies of the jurisdictional program effectively eliminating non-storm water discharges to the MS4?).

The monitoring data collected and assessment information that will be reported to the San Diego Water Board are necessary to determine if the Copermittees are complying with the prohibitions and limitations of Provision A. The required monitoring and assessments that must be reported to the San Diego Water Board will be utilized for three purposes:

(1) Inform the Copermittees, San Diego Water Board, and the public on the progress of the Copermittees' efforts to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP;

(2) Inform the Copermittees, San Diego Water Board, and the public on the condition of water bodies receiving discharges from the Copermittees' MS4, and the progress of the Copermittees' water quality improvement implementation efforts toward improving the receiving water quality; and

(3) Inform the Copermittees, the San Diego Water Board, and the public on the effectiveness of the Water Quality Improvement Plan toward achieving (1) and (2).

The monitoring and assessment information reported pursuant to Provision F is also expected to be key to the iterative approach and adaptive management process required under Provision A.4 and implemented through the Water Quality Improvement Plan required under Provision B. As required by Provision A.4, the iterative approach and adaptive management process is required if the Copermittees cannot meet the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c, and/or A.2.a under the present conditions.

Provision D provides the minimum monitoring and assessment requirements that must be included in each Water Quality Improvement Plan to be developed and implemented by the Copermittees. The Copermittees, however, are not limited to the requirements of Provision D and may include additional methods to track progress toward improving water quality in a Watershed Management Area.

More specific and detailed discussions of the requirements of Provision D are provided below.

Provision D.1 (Receiving Water Monitoring Requirements) specifies the minimum receiving water monitoring that the Copermittees must conduct within the Watershed Management Area and include as part of the Water Quality Improvement Plan.

Provision D.1 establishes minimum monitoring requirements that must be conducted by the Copermittees within each Watershed Management Area. Provision D.1 requires the Copermittees to collect and develop the data and information necessary to determine potential impacts to the beneficial uses in the receiving waters due to discharges from the MS4s. The monitoring required under Provision D.1 will also provide the data that will allow the Copermittees to gauge the effectiveness and progress of its Water Quality Improvement Plan implementation efforts toward improving the quality of receiving waters.

The receiving water monitoring requirements of Provision D.1 are focused primarily on monitoring the conditions and response of the receiving waters to the Copermittees'

collective implementation efforts to reduce receiving water impacts that may be caused by the discharges from the MS4s. The preference of the San Diego Water Board is for the Copermittees to spend their resources achieving tangible and observable improvements in receiving water conditions instead of collecting samples and analyzing data that has consistently indicated that receiving water conditions are degraded and require improvement. In general, the ability to measure potential improvements in receiving water conditions due to any actions implemented by the Copermittees as part of the Water Quality Improvement Plan may require several years before a response can be observed. Thus, the frequency of collecting receiving water monitoring data has been kept to a minimum.

During the transitional period between adoption of this Order and San Diego Water Board acceptance of a Water Quality Improvement Plan, the Copermittees must conduct receiving water monitoring in accordance with Provision D.1.a. This approach to collecting receiving water data is different from what was required in the Fourth Term Permits, but one that truly embraces the concept of an integrated, cost-effective, streamlined receiving water monitoring approach.

Provision D.1.a requires Copermittees to continue performing the receiving water monitoring programs required in Order Nos. R-2007-0001, R9-2009-002, and R9-2010-0016; plus participation in: hydromodification management plan monitoring approved by the San Diego Water Board, monitoring plans as part of load reduction plans (either Bacteria Load Reduction Plans or Comprehensive Load Reduction Plans) for TMDLs in Attachment E of the Order, Storm Water Monitoring Coalition Regional Monitoring, Southern California Bight Regional Monitoring, Sediment Quality Monitoring, and ASBS Monitoring as applicable to a Watershed Management Area.

Provision D.1.a also provides an opportunity for the Copermittees to use third party data to meet receiving water monitoring requirements where feasible. Allowing the Copermittees to use the data currently collected through its participation in existing regional receiving water programs and that of third parties provides an efficiency of resources in obtaining the data necessary to inform the Copermittees and the San Diego Water Board about the physical, chemical, and biological conditions of the receiving waters, which can also help to focus the receiving water monitoring during the implementation of the Water Quality Improvement Plan. Once a Water Quality Improvement Plan is developed for a Watershed Management Area in compliance with Provision B of this Order, the transitional period is over and Copermittees are required to conduct receiving water monitoring according to the requirements of Provisions D.1.b-e.

Provision D.1.b requires each Copermittee to identify at least one long term receiving water monitoring station to be representative of receiving water quality within each Watershed Management Area. Long term receiving water monitoring stations can be located at any existing mass loading stations, temporary watershed assessment stations, bioassessment stations, and stream assessment stations previously established by the Copermittees. The requirements under Provision D.1.b. are

consistent with 40 CFR 122.26(d)(2)(iii)(D), which specifies that a "*monitoring program for representative data collection for the term of the permit*" may include "*instream locations.*" For each Watershed Management Area, at least one long term watershed monitoring station is required to be established and monitored. The Copermittees may choose to establish additional long term monitoring stations where necessary to support the implementation and adaptation of the Water Quality Improvement Plan.

Provision D.1.b. requires the Copermittees to locate the long term receiving water monitoring station at one of these existing receiving water monitoring stations to provide the Copermittees an opportunity to experience monitoring cost savings while continuing to collect the necessary data to assess the status and trends of receiving water quality conditions in 1) coastal water, 2) enclosed bays, harbors, estuaries, and lagoons, and 3) streams under both dry weather and wet weather conditions. Ideally these stations will continue to be monitored as part of the receiving water monitoring for each Watershed Management Area to maintain a consistent set of locations and a period of data that can be built upon with the monitoring required under this Order.

The receiving water monitoring requirements are separated into monitoring required during dry weather conditions pursuant to Provision D.1.c, and wet weather conditions pursuant to Provision D.1.d.

At each long term monitoring station the Copermittees must conduct at least three dry weather monitoring events as required pursuant to Provision D.1.c and at least three wet weather monitoring events as required pursuant to Provision D.1.d per permit term. Provisions D.1.c and D.1.d require the Copermittees to monitor priority water quality conditions identified in the Water Quality Improvement Plan, constituents listed as causing impairment of receiving waters in the Watershed Management Area, applicable NALs, toxicity, constituents listed in Tables D-2 and D-3, and constituents for implementation plans (e.g. Bacteria Load Reduction Plans and Comprehensive Load Reduction Plans). Required toxicity monitoring was changed to reflect an updated understanding of the unique challenges associated with sampling storm water for toxicity. Copermittees are required to sample receiving water for toxicity during each dry weather and each wet weather event pursuant to Provision D.1.c.(4) and D.1.d.(4). Required toxicity monitoring is now consistent with the State Water Resources Control Board Policy for Toxicity Assessment and Control (Draft June 2012) and recently adopted MS4 permits for Caltrans and Los Angeles Water Board. Receiving water monitoring efforts in this Order have been streamlined to redirect resources to monitoring efforts that better support pollutant reduction solutions with an increasing emphasis on MS4 outfall monitoring, source identification, and source abatement activities.

In addition to the receiving water monitoring requirements under Provisions D.1.b-d, Provision D.1.e requires the Copermittees participate in and/or conduct other types of receiving water monitoring. As recommended and requested by the Copermittees, Provision D.1.e.(1) requires the Copermittees to participate in existing regional monitoring, as applicable to each Watershed Management Area. Existing regional

monitoring includes monitoring conducted by the Storm Water Monitoring Coalition and for the Southern California Bight. Participation in and use of monitoring data collected from these existing regional water quality monitoring programs provide the Copermittees a greater opportunity for efficiency in the use of their resources to manage their storm water programs and those controllable discharges under their authority.

Provision D.1.e.(1)(c) requires the south Orange County MS4 Copermittees to participate in "unified regional beach water quality monitoring." This monitoring replaces requirements to conduct "core monitoring" of beach water quality, as provided for in Appendix III of the Ocean Plan.

Several different public agencies currently conduct routine, ongoing beach water quality monitoring in south Orange County in accordance with several different sets of requirements. The monitoring programs implemented to meet those requirements overlap temporally and spatially. These monitoring programs are partially but not fully integrated. In November 2010, the State Water Board adopted Resolution No. 2010-0053, which directed Regional Water Boards to work with dischargers to modify beach water quality monitoring programs required by Regional Water Board-issued permits in order to eliminate redundancies and incorporate beach water quality monitoring required by beach water quality statutes, where appropriate.

In April 2012, the San Diego Water Board requested that its staff review beach water quality monitoring conducted in south Orange County. To assist in responding to that request, staff of the Board convened a workgroup that included representatives of the three public agencies that currently conduct almost all of the routine, ongoing beach water quality monitoring in south Orange County, i.e., South Orange County Wastewater Authority (SOCWA), Orange County Public Works, and Orange County Health Care Agency (OCHCA). The workgroup also included other interested parties, including representatives of the Sierra Club and Surfrider Foundation. In December 2012, the San Diego Water Board adopted Resolution No. R9-2012-0069, which endorsed the San Diego Water Board staff report entitled "A Framework for Monitoring and Assessment in the San Diego Region," dated November 2012.

The unified program is consistent with and will meet or exceed the minimum requirements for beach water quality monitoring and related public notification and reporting established by State law, including the Ocean Plan. The unified program is consistent with State Water Board Resolution No. 2010-0053. The unified program is also consistent with and will help implement, "A Framework for Monitoring and Assessment in the San Diego Region," which emphasizes the need for question-driven, beneficial use-oriented monitoring and assessment. The primary purpose of the unified program will be to answer the question "Does beach water quality meet standards for the beneficial use of water contact recreation?"

The unified program is intended to be protective; it will help protect the health of swimmers, surfers, and others who use south Orange County beach waters for water

contact recreational activities. The unified program is also intended to be reasonable; it will eliminate duplicative monitoring and will include triggers for public notification and additional sampling at all sampling stations year-round. The unified program is intended to be equitable; responsibility for implementation of the unified program will be shared and the responsible agencies will jointly make arrangements to implement the program and will have the flexibility to jointly make short and/or long term changes in those arrangements.

The San Diego Water Board Executive Officer issued a written directive on December 5, 2014, pursuant to California Water Code section 13383, for SOCWA and the south Orange County MS4 Copermittees to implement the unified program in cooperation with OCHCA. The Executive Officer may make revisions to the unified program, provided that the unified program, as revised, continues to be consistent with and meet the requirements of State law, including the Ocean Plan, for beach water quality monitoring and related public notification and reporting. Following a thirty day public comment period, and subject to a request for a hearing before the San Diego Water Board, any such revision shall take effect as specified in a written directive issued by the Executive Officer pursuant to CWC section 13383. The program and any Executive Officer issued revisions to the program are subject to CWC section 13320 right of review from the date of issuance.

The unified program will supersede the existing routine, ongoing, beach water quality monitoring programs in south Orange County that are conducted in accordance with the existing requirements of the NPDES permits for discharges from the SOCWA ocean outfalls and the south Orange County MS4s. The requirement to participate in "regional monitoring" of beach water quality replaces requirements to conduct "core monitoring" of beach water quality, as provided for in Appendix III of the Ocean Plan.

The State Water Resources Control Board adopted the Water Quality Control Plan for Enclosed Bays and Estuaries of California – Part 1 Sediment Quality which became effective August 25, 2009 (Sediment Quality Monitoring Policy). Provision D.1.e.(2) requires any Copermittees with MS4 discharges to an enclosed bay or estuary to monitoring the sediments in the enclosed bay or estuary receiving water in accordance with the sediment quality monitoring procedures as prescribed in the Sediment Quality Monitoring Policy.

The State Water Board adopted Resolution No. 2012-0012 which approved exceptions to the California Ocean Plan for selected discharges into Areas of Special Biological Significance (ASBS), including special protections for beneficial uses. State Board Resolution No. 2012-0012 became effective on March 20, 2012, and Attachment B to the Resolution established limitations on point source storm water discharges to ASBS. Copermittees with MS4s that discharge to an ASBS must monitor its discharge to assure compliance with State Board Resolution No. 2012-0012 as required pursuant to Provision D.1.e.(3).

The San Diego Water Board is developing a regional monitoring strategy to assess the conditions of receiving waters in the San Diego Region. The monitoring requirements of Provision D.1 are expected to be incorporated or serve as a foundation of this regional monitoring strategy, but may require some modifications. When the San Diego Water Board develops an alternative regional monitoring strategy, the Copermittees will be required to participate in the development and implementation of the alternative regional monitoring program pursuant to Provision D.1.f.

Provision D.2 (MS4 Outfall Discharge Monitoring Requirements) specifies the minimum MS4 outfall discharge monitoring requirements that the Copermittees must incorporate and implement as part of the Water Quality Improvement Plan.

The dry weather MS4 outfall discharge monitoring requirements are included under Provisions D.2.a.(2) and D.2.b. The dry weather MS4 outfall discharge monitoring requirements are part of the "*program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer*" required by 40 CFR 122.26(d)(2)(iv)(B), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(ii) statutory requirement for municipal storm water permits to require the Copermittees to "*effectively prohibit non-storm water discharges into the storm sewers*." The dry weather MS4 outfall discharge monitoring data collection requirements are based on requirements under 40 CFR 122.26(d)(1)(iv)(D) and 122.26(d)(2)(iv)(B)(3).

The dry weather MS4 outfall discharge monitoring requirements are designed to provide wide spatial and temporal coverage of each jurisdiction to better understand the extent and magnitude of non-storm water discharges to receiving waters, and make a distinction between persistent and transient non-storm water flows. This information is expected to allow each Copermittee to focus its resources on eliminating and controlling the highest priority threats to receiving water quality, as well as integrating other elements of the storm water programs (e.g. complaint call response) and third party data to efficiently and effectively assist in efforts to eliminate non-storm water discharges.

The dry weather MS4 outfall discharge monitoring requirements of Provision D.2.a.(2) and D.2.b are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees' Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision D.2.a.(2) includes the transitional dry weather MS4 outfall discharge monitoring requirements.

The requirements under Provision D.2.a.(2) are based on the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B), which include the requirements for a monitoring program to identify, detect, and eliminate illicit connections and illegal discharges to the MS4s. The federal regulations (40 CFR 122.26(d)(1)(iv)(D)) require

the monitoring program to include "*a field screening analysis for illicit connections and illegal dumping [that]…[a]t a minimum, include[s] a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods.*" The federal regulations (40 CFR 122.26(d)(1)(v)(B)) require the monitoring program to include "*inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.*" Furthermore, the monitoring program is required by federal regulations (40 CFR 122.26(d)(2)(iv)(B)) to include "*a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer.*"

Dry weather transitional MS4 outfall discharge monitoring requires each Copermittee to field screen (inspect) its major MS4 outfalls to classify the MS4 outfall locations as having persistent dry weather flows, transient dry weather flows, or no dry weather flows. To account for the variance in size of the 39 jurisdictions covered under this Order, the Copermittees recommended a tiered approach to the number of major MS4 outfalls that must be inspected. Provision D.2.a.(2)(a) provides a tiered approach to the number of major MS4 outfalls that must be visually inspected per jurisdiction as well as a minimum frequency each Copermittee must inspect each major MS4 outfall per year. This tiered approach is based on the total number of major MS4 outfalls within a Copermittees jurisdiction within each Watershed Management Area.

Based on the field screening, each Copermittee is required to make a determination whether any observed flowing, pooled, or ponded waters are transient or persistent flows. Based on this field screening information, other jurisdictional program information, and third party information, each Copermittee is required to prioritize the MS4 outfalls within its jurisdiction for follow up investigation and elimination of the non-storm water discharge, as part of its illicit discharge detection and elimination program required pursuant to Provision E.2. In accordance with the requirements of Provision E.2, each Copermittee is required to immediately investigate obvious illicit discharges (e.g. outfall discharges with unusual color, unusual odor, or high flows).

This approach allows a Copermittee to use all of its resources, as well as leverage resources and information provided by third parties, to effectively eliminate non-storm water discharges from its MS4 outfalls. If the source of the non-storm water discharge cannot be immediately eliminated, the Copermittee uses the persistent flow or transient flow classification along with other programmatic implementation data to prioritize the MS4 outfalls for future investigation. In accordance with the adaptive management approach deployed throughout this Order, Provision D.2.a.(2)(c) requires each Copermittee to update its MS4 outfall discharge monitoring station inventory, compiled pursuant to Provision D.2.a.(1), with any new information on the classification of whether the MS4 outfall produces persistent flow, transient flow, or no dry weather flow. The requirement of Provision D.2.a.(2)(c) assures that each Copermittee is collecting data that can be used to demonstrate compliance with the CWA requirement that each Copermittee must implement a program to "*effectively*

prohibit non-storm water discharges into the [MS4]" and with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b describes the dry weather MS4 outfall discharge monitoring required to be incorporated and implemented as part of the Water Quality Improvement Plan. Dry weather MS4 outfall discharge monitoring must be performed by each Copermittee to identify non-storm water and illicit discharges within its jurisdiction pursuant to Provision E.2.c, and to prioritize the dry weather MS4 discharges that will be investigated and eliminated pursuant to Provision E.2.d. The emphasis of the dry weather MS4 outfall discharge monitoring required pursuant to Provision D.2.b is consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

Provision D.2.b.(1) requires each Copermittee to continue field screening its major MS4 outfalls and identifying those with persistent flows and transient flows, as conducted during the transitional period (i.e. before the Water Quality Improvement Plan was developed). However, each Copermittee now has the flexibility to adjust the field screening monitoring frequencies and locations for the MS4 outfalls in its inventory, as needed, to identify and eliminate sources of non-storm water persistent flow discharges in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan. In order to ensure a minimum number of outfalls are inspected, Provision D.2.b.(1) requires the number of visual inspections be equal to the number of visual inspections required in the tiered inspection program pursuant to Provision D.2.a.(2)(a).

Provision D.2.b.(2)(b) requires each Copermittee to monitor a minimum of 5 major MS4 outfalls with persistent flows identified as the highest priorities within a Copermittee's jurisdiction, within each Watershed Management Area. In other words, Copermittees located in more than one Watershed Management Area must identify at least 5 major MS4 outfalls with persistent flows in its jurisdiction in each Watershed Management Area. If a Copermittee is located in more than one Watershed Management Area, and they have less than 5 major MS4 outfalls with persistent flows per jurisdictional area per Watershed Management Area, all of the major MS4 outfalls must be identified as high priority dry weather persistent flow MS4 outfalls. The Copermittees identified as Responsible Copermittees by a TMDL in Attachment E of the Order may need to monitor more than 5 dry weather major MS4 outfall locations to determine compliance with the requirements of the TMDL(s).

Monitoring must occur at the highest priority outfall locations at least semi-annually until the non-storm water discharges have been eliminated for three consecutive dry weather monitoring events; identified to be authorized by a separate NPDES Permit; or reprioritized to a lower priority. Persistent flow MS4 outfall monitoring stations that have been removed must be replaced with the next highest prioritized MS4 major outfall in the Copermittee's jurisdiction within the Watershed Management Area, unless there are no remaining qualifying major MS4 outfalls within the Copermittees jurisdiction. The Copermittees must continually update their dry weather persistent

flow MS4 outfall discharge monitoring locations with the next highest priority non-storm water flow that have yet to be eliminated until all persistent and transient flows are eliminated or its threat reduced.

Non-storm water persistent flow MS4 outfall discharge monitoring data collected during each semi-annual monitoring event, must be collected and analyzed according to the requirements of Provision D.2.b.(2)(b)-(e). These monitoring requirements are consistent with the requirements under 40 CFR 122.26(d)(1)(iv)(D), (d)(1)(v)(B) and (d)(2)(iv)(B).

The wet weather MS4 outfall discharge monitoring requirements are included under Provisions D.2.a.(3) and D.2.c. The wet weather MS4 outfall discharge monitoring requirements are necessary for the Copermittees to implement a "*management program…to reduce the discharge of pollutants to the maximum extent practicable, using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate*" required by 40CFR 122.26(d)(2)(iv), which is expected to achieve compliance with the CWA section 402(p)(3)(B)(iii) statutory requirement for municipal storm water permits to require "*controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable.*" The wet weather MS4 outfall discharge monitoring data collection requirements are based on requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)-(4), and 40 CFR 122.21(g)(7)(i)-(ii).

The wet weather MS4 outfall discharge monitoring requirements of Provision D.2.a.(3) and D.2.c are separated into monitoring required before and after the San Diego Water Board accepts the Copermittees' Water Quality Improvement Plan. Outfall monitoring conducted prior to acceptance of the Water Quality Improvement Plan is referred to in the Order as Transitional MS4 Outfall Discharge Monitoring. Provision D.2.a.(3) includes the transitional wet weather MS4 outfall discharge monitoring requirements.

Until the wet weather MS4 outfall discharge monitoring requirements of Provision D.2.c are incorporated into a Water Quality Improvement Plan that is accepted by the San Diego Water Board, the Copermittees must comply with the requirements of transitional wet weather MS4 outfall monitoring requirements pursuant to Provision D.2.a.(3). Provision D.2.a.(3) requires the Copermittees in each Watershed Management Area to sample, at least five of the major MS4 outfalls inventoried pursuant to Provision D.2.a.(1) once per wet season for the monitoring data required to be collected pursuant to Provision D.2.a.(3)(c)-(e). Provision D.2.a.(3) further requires at least one major MS4 outfall monitoring station be located in each Copermittee's jurisdiction within the Watershed Management Area.

At a minimum, the five sampling locations chosen must be representative of storm water discharges from residential, commercial, industrial, and typical mixed-use land uses present within a Watershed Management Area. The San Diego Water Board expects the Copermittees to extrapolate from these data to similar land uses

throughout the Watershed Management Area to better inform the Water Quality Improvement Plan development process by prioritizing drainages for implementation of storm water control efforts required pursuant to Provision E.

Provision D.2.c describes the wet weather MS4 outfall discharge monitoring required to be included and implemented as part of the Water Quality Improvement Plan. Provision D.2.c provides the Copermittees the flexibility to adjust the wet weather MS4 outfall discharge monitoring locations and frequencies in the Watershed Management Area, as needed, to identify sources of pollutants in storm water discharges from MS4s in accordance with the highest priority water quality conditions identified in the Water Quality Improvement Plan.

Although Provision D.2.c.(1) allows the Copermittees to adaptively manage the wet weather MS4 outfall discharge monitoring locations and frequencies, the provision requires a minimum of at least five wet weather outfall stations to be monitored. Provision D.2.c.(2) further allows the Copermittees to modify the monitoring frequency at each wet weather MS4 outfall station to meet the goals of the Water Quality Improvement Plan as long as the monitoring frequency occurs at least once per year and is at an appropriate frequency to identify sources of pollutants in storm water discharges, guide pollutant source identification efforts, or determine compliance with the requirements of the applicable TMDLs in Attachment E to the Order.

The wet weather MS4 outfall discharge monitoring requirements of Provisions D.2.c.(3) and D.2.c.(4) are the same as the transitional wet weather MS4 outfall discharge monitoring. In contrast, the requirements of Provision D.2.c.(5) are focused on collecting analytical data specific to the highest priority water quality conditions in the Watershed Management Area identified in the Water Quality Improvement Plan. The wet weather MS4 outfall discharge monitoring data collection requirements are consistent with the requirements under 40 CFR 122.26(d)(2)(iii), 122.26(d)(2)(iii)(A) and 122.26(d)(2)(iii)(A)(1)-(4), and 40 CFR 122.21(g)(7)(i)-(ii).

Provision D.3 (Special Studies) requires the Copermittees to develop special studies that will be conducted for each Watershed Management Area and the entire San Diego Region. Data collected pursuant to Provision D.3 is to be used by the Copermittees to improve the effectiveness of the strategies implemented by the jurisdictional runoff management programs toward achieving the numeric goals identified in the Water Quality Improvement Plans and ultimately achieve compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c, and A.2.a, which is consistent with the requirements of Provision A.4.

Special studies are often necessary to fill data gaps or provide more refined information that allow the Copermittees to better manage the generation or elimination of pollutants and discharges to and from the MS4. In the Fourth Term Permits, the Copermittees have been required to implement special studies as directed by the San Diego Water Board. The special studies required by this Order provide the Copermittees more flexibility to identify and implement special studies that will be most

useful to improving the effectiveness of their jurisdictional runoff management programs.

Provision D.3.a.(1) requires the Copermittees to develop and conduct at least two special studies per Watershed Management Area, to be determined by the Copermittees. One of the two special studies may be accomplished through participation in a Regional Special Study required under Provision D.3.a.(2). The requirements provide the Copermittees great latitude in identifying and developing the special studies. Watershed Management Area special studies are required, at a minimum, to: (a) relate in some way to the highest water quality priorities identified by the Copermittees in the Water Quality Improvement Plan, (b) be conducted within the Watershed Management Area, and (c) include some form of participation (e.g. contribution of funds, personnel services, project management) by all the responsible Copermittees within the Watershed Management Area.

Examples of Watershed Management Area special studies might include, but are not limited to: (1) focused pollutant source identification studies, (2) BMP effectiveness and/or comparison studies, (3) pilot tests for new or emerging pollutant control methods, (4) receiving water pollutant or stressor source identification and/or mitigation studies, or (5) pollutant fate and transport studies. The Watershed Management Area special studies are expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of the Copermittees' jurisdictional runoff management programs to address the highest priority water quality conditions.

Provision D.3.a.(2) requires the Copermittees to develop at least one special study that will be conducted for the entire San Diego region. The regional special study is expected to provide data that can be utilized by the Copermittees to improve the Water Quality Improvement Plan or implementation of the Copermittees' jurisdictional runoff management programs to identify or address regional water quality concerns and priorities.

An example of a regional special study would be to develop and establish allowable exceedance frequencies of the bacteria water quality objectives for several types of water bodies, during different wet and dry weather conditions the San Diego region. The special study would be related to bacteria, which is a priority for the San Diego region due to the adoption of "*Bacteria TMDL Project I – Beaches and Creeks in the San Diego Region.*" The study results could be used to inform the Copermittees and the San Diego Water Board about the indictor bacteria water quality objective exceedance frequencies that occur in natural or reference watersheds.

Provision D.4 (Assessment Requirements) specifies the assessments that the Copermittees are required to perform, based on the monitoring data collected, and will be reported as part of the Annual Report for the Water Quality Improvement Plan implementation. Provision D.4 requires the Copermittees assess the progress of the

water quality improvement strategies in the Water Quality Improvement Plan toward achieving compliance with Provisions A.1.a, A.1.c, and A.2.a.

Provision D.4 specifies the assessments that Copermittees must perform for each Watershed Management Area to assess the effectiveness of each Copermittee's jurisdictional runoff management program and the Water Quality Improvement Plan. The effectiveness of each Copermittee's jurisdictional runoff management program and Water Quality Improvement Plan is measured through these types of assessments: (a) Receiving Waters Assessments (b) MS4 Outfall Discharges Assessments, (c) Special Studies Assessments, and (d) Integrated Assessment of Water Quality Improvement Plan.

Provision D.4.a requires the Copermittees to assess the status of receiving water conditions annually during the transitional monitoring period (during development of the Water Quality Improvement Plan) and after acceptance of the Water Quality Improvement Plan. The monitoring data collected pursuant to Provision D.1 will be evaluated, among other information, to assess the condition of a Watershed Management Area's streams, coastal waters, enclosed bays, harbors, estuaries, and lagoons. The focus of the receiving waters assessments is to measure progress toward the objective of the CWA to "*restore and maintain the chemical, physical, and biological integrity of the Nation's waters*" as the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program are implemented within a Watershed Management Area. Provision D.4.a is consistent with 40 CFR 122.42(c)(7) which requires the Copermittees to annually report the *"[i]dentification of water quality improvements or degradation."*

Provision D.4.b includes the MS4 outfall discharges assessment requirements. The focus of MS4 outfall discharges assessments is to determine if the Copermittees' are implementing programs that comply with the requirements of the CWA for MS4 permits to "*effectively prohibit non-stormwater discharges into the storm sewers*" and "*require controls to reduce the discharge of pollutants* [in storm water] *to the maximum extent practicable.*" The monitoring data collected pursuant to Provisions D.2 will be evaluated, among other information, to assess the effectiveness of the transitional MS4 outfall field screening monitoring, the implementation of the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program. The MS4 outfall discharge assessments consist of Non-Storm Water Discharges Reduction Assessments and Storm Water Pollutant Discharges Reduction Assessments.

The Non-Storm Water Discharges Reduction Assessments are how each Copermittee will demonstrate that its jurisdictional runoff management program implementation efforts are achieving the CWA requirement to "*effectively prohibit non-stormwater discharges into the storm sewers.*" Provision D.4.b.(1) requires each Copermittee to assess and report on its illicit discharge detection and elimination program required pursuant to Provision E.2 to reduce and effectively prohibit non-storm water and illicit discharges into the MS4 within its jurisdiction. The Non-Storm Water Discharges

Reduction Assessments include specific assessment requirements applicable to each Copermittee.

As each Copermittee collects and analyzes the data collected pursuant to dry weather MS4 outfall discharges monitoring requirements of Provisions D.2.a.(2) and D.2.b, Provision D.4.b.(1) requires each Copermittee to assess the progress, assess the effectiveness of its current actions, and identify modifications necessary to increase the effectiveness of its actions toward reducing and eliminating non-storm water and illicit discharges to its MS4. The findings from these assessments are expected to be utilized by the Copermittee as part of its procedures to prioritize the non-storm water discharges that will be addressed by its Illicit Discharge Detection and Elimination program required pursuant to Provision E.2.

The assessment requirements of Provision D.4.a.(1) are consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(3) which require "*procedures…to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information [emphasis added], indicate a reasonable potential of contain illicit discharges or other sources of non-storm water*" as part of a "*program…to detect and remove…illicit discharges and improper disposal into the storm sewer.*" The assessment requirements of Provision D.4.a.(1) are also consistent with 40 CFR122.42(c)(1) requires the Copermittees to annually report the "*status of implementing the components of the storm water management program that are established as permit conditions.*"

The Storm Water Pollutant Discharges Reduction Assessment is how the Copermittees in each Watershed Management Area will demonstrate that their jurisdictional runoff management program implementation efforts are achieving the CWA requirement to "*reduce the discharge of pollutants* [in storm water] *to the maximum extent practicable*." Provision D.4.b.(2) requires the Copermittees in each Watershed Management Area to assess and report the progress of the Copermittees' efforts to reduce pollutants in storm water discharges from the MS4s to the MEP. The Storm Water Pollutant Discharges Reduction Assessments include specific assessment requirements during both the transitional monitoring period and after acceptance of the Water Quality Improvement Plan applicable to the Watershed Management Area and each Copermittee.

As the Copermittees collect and analyze the data collected pursuant to wet weather MS4 outfall discharges monitoring requirements of Provisions D.2.a.(3) and D.2.c, Provision D.4.b.(2) requires the Copermittees to assess runoff conditions during the transitional period, and the progress of the Water Quality Improvement Plan strategies toward reducing pollutants in storm water from the MS4 to the MEP. The findings from these assessments are expected to be utilized by the Copermittees to identify any modifications to the wet weather MS4 outfall discharge monitoring locations and frequencies necessary to identify sources of pollutants in storm water discharges from the MS4s, as well as focus, modify, and improve the water quality improvement

strategies implemented by each Copermittee within its jurisdiction to reduce pollutants in storm water discharges to the MEP.

The assessment requirements of Provision D.4.b.(2) are consistent with 40 CFR 122.26(d)(2)(iii)(B) which requires "*[e]stimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls…during a storm event…accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modeling, data analysis, and calculation methods.*" The assessment requirements of Provision D.4.a.(2) are consistent with 40 CFR 122.26(d)(2)(v) which requires that each Copermittee assesses the *"estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program."* The assessment requirements of Provision D.4.b.(2) are also consistent with 40 CFR122.42(c)(1) requires the Copermittees to annually report the "*status of implementing the components of the storm water management program that are established as permit conditions.*"

Provision D.4.c includes the special studies assessment requirements. Performing special studies are how the Copermittees will address data gaps identified during the development of and updates to the Water Quality Improvement Plan. The relevant findings from the special studies assessments are expected to be incorporated as part of the applicable receiving water assessments, MS4 outfall discharge assessments, and integrated water quality improvement assessments required in Provision D.4.a, D.4.b, and D.4.d, respectively.

The assessment requirements in Provision D.4.d are part of the iterative approach and adaptive management process required by Provision A.4. The Copermittees are required to integrate the data collected pursuant to Provisions D.4.a-c, and information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to re-evaluate the Water Quality Improvement Plan.

The monitoring data collected pursuant to Provisions D.1 and D.2, and the results of the assessment required pursuant to Provisions D.4.a-c, will be used to determine whether the Water Quality Improvement Plan and each Copermittee's jurisdictional runoff management program are effective, or require modifications or improvements to become more effective to achieve the requirements of the CWA. The assessments required by Provision D.4.d are consistent with 40 CFR 122.42(c)(1) which requires that the Copermittees to report the *"[t]he status of implementing the components of the storm water management program that are established as permit conditions."*

E. Jurisdictional Runoff Management Programs

Purpose: Provision E includes the requirements for the jurisdictional runoff management programs to be implemented by each of the Copermittees. Compliance with the requirements for the jurisdictional runoff management programs will allow the Copermittees to demonstrate that they are implementing programs to effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP. The jurisdictional runoff management program document prepared by each Copermittee will also provide the details for implementing the water quality improvement strategies identified in the Water Quality Improvement Plan specifically within its jurisdiction.

Discussion: Implementation of the jurisdictional runoff management program requirements under Provision E is how the Copermittees "*effectively prohibit non-stormwater discharges into the storm sewer,*" and outlines the "*controls to reduce the discharge of pollutants to the maximum extent practicable*" consistent with the federal regulations under 40 CFR 122.26. The jurisdictional runoff management program is part of the "*comprehensive planning process*" that is required pursuant to 40 CFR 122.26(d)(2)(iv). Where the Water Quality Improvement Plan is the "*comprehensive planning process*" on a Watershed Management Area scale, requiring "*intergovernmental coordination,*" the jurisdictional runoff management program document is the "*comprehensive planning process*" on a jurisdictional scale that should be coordinated with the other Copermittees in the Watershed Management Area to achieve the goals of the Water Quality Improvement Plan.

The jurisdictional runoff management program requirements are included to provide each Copermittee criteria that can be used to demonstrate that its storm water management program is implementing the "*comprehensive planning process*" within its jurisdiction to "*effectively prohibit non-stormwater discharges into the storm sewers,*" and to identify and implement the most effective "*controls to reduce the discharge of pollutants to the maximum extent practicable*" in accordance with the performance standards given in the CWA.

Provision E includes the requirements for each of the components that must be included in the Copermittee's jurisdictional runoff management program document that will be implemented by the Copermittee within its jurisdiction. Implementation of the components of each Copermittee's jurisdictional runoff management program must incorporate the water quality improvement strategies identified by each Copermittee in the Water Quality Improvement Plans, described pursuant to Provision B.3.b.(1)(a).

More specific and detailed discussions of the requirements of Provision E are provided below.

Provision E.1 (Legal Authority Establishment and Enforcement) requires each Copermittee to establish and enforce sufficient legal authority to control discharges to the MS4 within its jurisdiction.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system*" and be able to demonstrate that it can "*operate pursuant to legal authority established by statute, ordinance or series of contracts.*" Provision E.1.a describes the minimum legal authorities each Copermittee must establish for itself within its jurisdiction to control discharges to its MS4. The requirements of Provision E.1.a are consistent with the requirements set forth in 40 CFR 122.26(d)(2)(i)(A)-(F).

The certification statement required from each Copermittee by Provision E.1.b is included to provide the San Diego Water Board additional documentation that each Copermittee has established the legal authorities consistent with Provision E.1.a and 40 CFR 122.26(d)(2)(i)(A)-(F), and the Copermittee can "*operate pursuant to legal authority established by statute, ordinance or series of contracts.*"

Provision E.2 (Illicit Discharge Detection and Elimination) requires each Copermittee to implement an illicit discharge detection and elimination program to effectively prohibit non-storm water discharges to the MS4 by actively detecting and eliminating illicit discharges and disposal into its MS4. If the San Diego Water Board finds that a Copermittee is fully implementing the requirements of Provision E.2, then the Copermittee is deemed in compliance with the effective prohibition of non-storm water discharges to the MS4 required under Provision A.1.b.

Provision E.2 establishes the minimum requirements that each Copermittee must implement within its jurisdiction to effectively prohibit non-storm water discharges from entering its MS4. The federal CWA requires permits for municipal storm sewer systems to "*effectively prohibit non-storm water discharges into the storm sewers.*" The federal regulations (40CFR122.26(d)(2)(i)(B)) require each Copermittee to establish the legal authority to prohibit illicit discharges to its MS4s. Under 40 CFR 122.26(d)(2)(iv)(B), each Copermittee must implement a "*program…to detect and remove…illicit discharges and improper disposal into the storm sewer.*" The federal NPDES regulations, under 40 CFR 122.26(b)(2), define illicit discharges as "*any discharge to a municipal separate storm sewer that is not composed entirely of storm water.*" Thus, non-storm water discharges are not authorized to enter the MS4 and are considered to be illicit discharges, unless authorized by a separate NPDES permit.

The Phase I Final Rule clarifies that non-storm water discharges through an MS4 are not authorized under the CWA (55 FR 47995):

> "*Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not*

authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer…Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit."

The federal NPDES requirements for the program to address illicit discharges must include "*inspections, to implement and enforce an ordinance, orders, or other similar means to prevent illicit discharges to the MS4.*" The federal NPDES regulations also reference several categories of "*non-storm water discharges or flows* [which] *shall be addressed where such discharges are identified…as sources of pollutants to waters of the United States.*" The Phase I Final Rule (55 FR 48037) further clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) as follows:

"*EPA is clarifying that section 402(p)(3)(B) of the CWA (which requires permits for municipal separate storm sewers to 'effectively' prohibit non-storm water discharges) does not require permits for municipalities to prohibit certain discharges or flows of nonstorm water to waters of the United States through municipal separate storm sewers in all cases.*"

In previous iterations of the municipal storm water permits for the San Diego Region, these categories were simply listed and referred to as categories of non-storm water discharges "not prohibited" unless identified as a source of pollutants. The Copermittees have often referred to these categories as "exempt" discharges. In both cases, however, the language is inconsistent with the federal CWA and NPDES regulations. And, the clarification provided in the Phase I Final Rule does not specifically state that such discharges are "not prohibited" or "exempt" or in any way authorized. The federal NPDES regulations do, however, state that specific categories of non-storm water discharges must be "*addressed*" if identified as "*sources of pollutants to waters of the United States.*"

The language of Provision E.2.a has been revised to be fully consistent with the language of the CWA and the requirements of the federal regulations under 40 CFR 122.26(d)(2)(iv)(B)(1). Provision E.2.a requires each Copermittee to address <u>all</u> types of non-storm water discharges into its MS4 as illicit discharges, <u>unless</u> the discharge is authorized by a separate NPDES permit, or identified as a category of non-storm water discharges or flows that must be addressed pursuant to Provisions E.2.a.(1) through E.2.a.(5). Only non-NPDES-permitted non-storm water discharges identified as a category of non-storm water discharges under Provisions E.2.a.(1) through E.2.a.(5) <u>and</u> *not identified as a source of pollutants* do not have to be addressed as illicit discharges. Categories of non-storm water discharges that meet the requirements of Provisions E.2.a.(1) through E.2.a.(5) do not have to be addressed by the Copermittee as illicit discharges.

Several of the non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) have not been included in Provisions E.2.a.(1) through E.2.a.(5), including: street wash water, landscape irrigation, irrigation water, and lawn watering. Because these are no longer included within the categories listed under Provisions E.2.a.(1) through E.2.a.(5), the Copermittees must prohibit these types of non-storm water discharges from entering the MS4. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states:

> *"[T]he Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate."*

Street wash water is a category of non-storm water discharges that was removed when the Third Term Permits were issued. Street wash water is a source of several pollutants (e.g., metals, oil and grease, petroleum hydrocarbons, chlorinated solvents, sediment) which are generated during the street washing process. The removal of this category requires the Copermittees to prohibit this type of non-storm water discharge from entering the MS4.

The landscape irrigation, irrigation water, and lawn watering categories, collectively referred to hereafter as "over-irrigation" discharges, were removed from the list of non-storm water discharge categories in the Fourth Term Orange County and Riverside County Permits. Non-storm water discharges resulting from over-irrigation have been found to be a source of several types of pollutants (e.g., nutrients, bacteria, pesticides, sediment) in receiving waters. The San Diego Water Board and the Copermittees have identified categories of non-storm water discharges associated with over-irrigation as a source of pollutants and conveyance of pollutants to the MS4 and waters of the United States in the following documents:

- **SmartTimer/Edgescape Evaluation Program (SEEP) Grant Application**

  The State Water Board allocated grant funding to the SEEP project grant application submitted in 2006, which targeted irrigation runoff by retrofitting areas of existing development and documenting the conservation and runoff improvements. The basis of this grant project is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, the grant application indicated that this alteration of natural flows is impacting the beneficial uses of waters of the state and U.S. Results from the study indicate that that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 *is* a source and conveyance of pollutants. The results of this study can be applied broadly to any area where over-irrigation takes place. The grant application included the following statements:

  > *"Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators."*

"Regional program managers agree that the reduction and/or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the San Diego Basin Plan and Bacteria TMDL over the long term."

"Elevated dry-weather storm drain flows, composed primarily ... of landscape irrigation water wasted as runoff, carry pollutants that impair recreational use and aquatic habitats all along Southern California's urbanized coastline. Storm drain systems carry the wasted water, along with landscape derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean. Given the local Mediterranean climate, excessive perennial dry season stream flows are an unnatural hydrologic pattern, causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the near-shore marine environment."

- **2006-2007 Orange County Watershed Action Plan Annual Reports**

The Watershed Action Plan Annual Reports for the 2006-2007 reporting period were submitted by the County of Orange, Orange County Flood Control District and Copermittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds. San Juan Creek, Laguna Coastal Streams, Aliso Creek and Dana Point Coastal Streams are all currently 303(d) listed as impaired for indicator bacteria within their watersheds and/or in the Pacific Ocean at the discharge points of their watersheds. The Orange County Copermittees, within their Watershed Action Strategy Table for fecal indicator bacteria included the following:

"Support programs to reduce or eliminate the discharge of anthropogenic dry weather nuisance flow throughout the...watershed. Dry weather flow is the transport medium for bacteria and other 303(d) constituents of concern."

Additionally, they state that *"conditions in the MS4 contribute to high seasonal bacteria propagation in-pipe during warm weather. Landscape irrigation is a major contributor to dry weather flow, both as surface runoff due to over-irrigation and overspray onto pavements; and as subsurface seepage that finds its way into the MS4."*

- **Fiscal Year 2008 Carlsbad Watershed Urban Runoff Management Program Annual Report**

The Carlsbad Watershed Urban Runoff Management Program Annual Report for Fiscal Year 2008 was submitted by the Carlsbad Watershed Copermittees (Cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista, and the County of San Diego). In the Annual Report, the Carlsbad Watershed Copermittees stated the following:

"The Carlsbad Watershed Management Area (WMA) collective watershed strategy identifies bacteria, sediment, and nutrients as high priority water quality pollutants in the Agua Hedionda (904.3 – bacteria and sediment), Buena Vista (904.2 – bacteria), and San Marcos Creek (904.5 – nutrients) Hydrologic Areas. Bacteria, sediment, and nutrients have been identified as potential discharges from over-irrigation."

- **2007-2008 San Diego Bay Watershed Urban Runoff Management Program Annual Report**

  The San Diego Bay Watershed Urban Runoff Management Program 2007-2008 Annual Report was submitted by the San Diego Bay Watershed Copermittees (Cities of Chula Vista, Coronado, Imperial Beach, La Mesa, Lemon Grove, National City, and San Diego, the County of San Diego, the Port of San Diego, and the San Diego County Airport Authority). In Appendix D of the Annual Report, titled "Likely Sources of Pollutants," the San Diego Bay Watershed Copermittees identified over-irrigation of lawns as a pollutant generating activity from business and/or residential land uses for bacteria, pesticides, and sediment.

- **Copermittee Public Education Materials**

  The Orange County Public Works *Tips for Landscape & Gardening* public education brochure states: *"Fertilizers, pesticides and other chemicals that are left on yards or driveways can be blown or washed into storm drains that flow to the ocean. Overwatering lawns can also send materials into storm drains."*

  The Riverside County Flood Control and Water Conservation District *Landscape and Garden* public education brochure states: *"Soil, yard wastes, over-watering and garden chemicals become part of the urban runoff mix that winds its way through streets, gutters and storm drains before entering lakes, rivers, streams, etc. Urban runoff pollution contaminates water and harms aquatic life!"*

- **Los Peñasquitos Lagoon Sedimentation/Siltation TMDL Technical Report**

  The Los Peñasquitos Lagoon Sedimentation/Siltation TMDL technical report was prepared for the City of San Diego and USEPA in October 2010. The technical report was included as a technical supporting document attached to the Sediment TMDL for Los Peñasquitos Lagoon staff report prepared by the San Diego Water Board, dated June 13, 2012. Under the Source Assessment section, the technical report states the following:

  "Dry weather loading is dominated by nuisance flows from urban land use activities such as car washing, sidewalk washing, and lawn over-irrigation, which pick up and transport sediment into receiving waters."

These documents confirm that non-storm water discharges associated with over-irrigation are a source of pollutants and should be addressed as illicit discharges to the MS4. Prohibiting non-storm water discharges associated with over-irrigation, however, is not a new requirement for the Copermittees because it is also consistent with and required by the Water Conservation in Landscaping Act (AB 1881, Laird).

The Water Conservation in Landscaping Act required the Department of Water Resources (DWR) to prepare a Model Water Efficient Landscape Ordinance for use by local agencies (e.g. the Copermittees). All local agencies were required to adopt a water efficient landscape ordinance by January 1, 2010. Local agencies could adopt the Water Efficient Landscape Ordinance developed by DWR, or an ordinance considered at least as effective as the Model Ordinance. The Water Efficient Landscape Ordinance includes a requirement that local agencies prohibit runoff from irrigation (§ 493.2):

> "*Local agencies shall prevent water waste resulting from inefficient landscape irrigation by prohibiting runoff from leaving the target landscape [emphasis added] due to low head drainage, overspray, or other similar conditions where water flows onto adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures. Penalties for violation of these prohibitions shall be established locally.*"

Furthermore, non-storm water discharges from over-irrigation not only transport and discharge pollutants to receiving waters, but are also a likely source of the dry weather flows causing changes to habitat within and along the receiving water bodies. Examples of habitat changes from the dry weather flows include perennialization of ephemeral streams, and conversion of saltwater and brackish water marsh habitats to freshwater marsh habitats (e.g. Los Peñasquitos Lagoon). Both of these examples have resulted in the promotion of invasive species in several areas of the San Diego Region.

The removal of the over-irrigation discharges categories does not require the Copermittees to strictly prohibit lawn and landscape irrigation, but does require the prohibition of excessive irrigation water that results in non-storm water discharges to the MS4. Non-storm water discharges to the MS4 from over-irrigation must be addressed as illicit discharges by the Copermittees pursuant to the requirements of Provision E.2.

The remaining non-storm water categories listed in 40 CFR 122.26(d)(2)(iv)(B)(1) are listed under Provisions E.2.a.(1) through E.2.a.(5) and generally fall into four categories: (1) non-storm water discharges subject to existing San Diego Water Board waste discharge requirements and NPDES permits; (2) non-storm water discharges generally not expected to be a source of pollutants to receiving waters; (3) non-storm water discharges likely to contain pollutants requiring some form of control to address

the pollutants prior to discharging to the MS4; and (4) non-storm water discharges or flows associated with firefighting.

Provisions E.2.a.(1) and E.2.a.(2) include several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) for which the San Diego Water Board already has developed general waste discharge requirements and NPDES permits to address the discharges. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges not having coverage under the applicable NPDES permit.

Provision E.2.a.(3) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) which are generally not expected to be a source of pollutants to receiving waters, many of which originate from what are typically natural, uncontrollable sources. The Copermittees are only required to address these types of non-storm water discharges as illicit discharges if the Copermittees or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters. Because many of these sources are generally uncontrollable, enforcing a prohibition may not be a possibility for the Copermittees. The Copermittees would be able to address these non-storm water discharges by preventing these non-storm water discharges from entering the MS4. This could potentially be achieved by sealing their MS4 structures so the discharges cannot enter the MS4.

Provision E.2.a.(4) includes several categories of non-storm water discharges listed in 40 CFR 122.26(d)(2)(iv)(B)(1) that are likely to contain pollutants requiring some form of control to address the pollutants prior to discharging to the MS4. At this time, an outright prohibition of these types of non-storm water discharges does not yet appear to be warranted. Thus, Provision E.2.a.(4) includes several requirements for the Copermittees to control the pollutants from these types of non-storm water discharges. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to "*control any of these types of discharges where appropriate*."

Unlike non-storm water discharges from over-irrigation, these types of non-storm water discharges are not expected to occur in close proximity to each other or very frequently. Provided these types of non-storm water discharges are controlled as required in Provision E.2.a.(4), the Copermittees would only be required to address these types of non-storm water discharges as illicit discharges if the Copermittee or the San Diego Water Board identifies these non-storm water discharges as a source of pollutants to receiving waters.

Provision E.2.a.(5) includes specific requirements for fire fighting discharges and flows. The requirements for non-storm water discharges and flows associated with fire

fighting have been separated into requirements for: a) non-emergency fire fighting discharges and flows, and b) emergency fire fighting discharges and flows.

The San Diego Water Board has found that discharges from building fire suppression system maintenance (e.g. fire sprinklers) contain waste and potentially a significant source of pollutants to receiving waters. As such, the San Diego Water Board is requiring these discharges be addressed as illicit discharges by the Copermittees. Thus, the discharges to the MS4 are to be prohibited via ordinance, order or similar means. For other non-emergency firefighting discharges and flows (i.e. flows from controlled or practice blazes, firefighting training, and maintenance activities not associated with building fire suppression systems), the Copermittees are required to develop and implement a program to address pollutants in these non-storm water discharges and flows. This is consistent with the clarification of the federal regulations in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board has the authority to require the Copermittees to "*control any of these types of discharges where appropriate*."

For emergency firefighting discharges and flows, the Phase I Final Rule (55 FR 48037) has clarified the requirements of 40 CFR 122.26(d)(2)(iv)(B)(1) pertaining to emergency firefighting flows and discharges, which states:

> "*In the case of firefighting it is not the intention of these rules to prohibit in any circumstances the protection of life and public or private property through the use of water or other fire retardants that flow into separate storm sewers.*"

Thus, the requirements have been made to be consistent with the guidance provided by the Phase I Final Rule. The Order recommends that the Copermittees develop and encourage implementation of BMPs to reduce or eliminate the discharge of pollutants from emergency firefighting flows to the MS4s and receiving waters. The Order does not include any requirements that should be interpreted as requiring the implementation of BMPs for emergency firefighting flows to the MS4s and receiving waters.

The Copermittees are expected to review the dry weather MS4 outfall discharge monitoring data they collect to determine if and when there are non-storm water discharges to or from their MS4s that are a source of pollutants to receiving waters. If the Copermittees identify one of the types of non-storm water discharges listed in Provisions E.2.a.(1) through E.2.a.(4) as a source of pollutants to receiving waters based on the review and evaluation of monitoring data, Provision E.2.a.(6) requires the Copermittees to prohibit those categories of discharges from entering the MS4 through ordinance, order or similar means. In addition, Provision E.2.a.(6) clarifies that the San Diego Water Board may identify categories of non-storm water discharges or flows listed under Provisions E.2.a.(1) through E.2.a.(4) that must be prohibited.

Provision E.2.a.(6) also provides the Copermittees an option to propose controls to be implemented for the category of non-storm water discharges as part of the Water Quality Improvement Plan instead of prohibiting the category of non-storm water discharges. If the Water Quality Improvement Plan is accepted by the San Diego Water Board with the proposed controls, the Copermittees will not be required to prohibit the category of non-storm water discharges to their MS4s as long as the controls are implemented. This is consistent with the clarification of 40 CFR 122.26(d)(2)(iv)(B)(1) in the Phase I Final Rule (55 FR 48037), which states the San Diego Water Board may "*require municipalities to prohibit or otherwise control any of these types of discharges where appropriate*."

Finally, Provision E.2.a.(7) has been included in the requirements for non-storm water discharges to clarify that any non-storm water discharges to the Copermittee's MS4, even those identified pursuant to Provisions E.2.a.(1) through E.2.a.(4), must be reduced or eliminated, unless a non-storm water discharge is identified as a discharge authorized by a separate NPDES permit. Provision E.2.a.(7) is consistent with the requirements of CWA section 402(p)(3)(B)(ii) and 40 CFR 122.26(d)(1)(v)(B), as clarified in the Phase I Final Rule (55 FR 47995) that "*[u]ltimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit*." However, the reduction or elimination of those non-storm water discharges are expected to be achieved as feasible, in accordance with the priorities in the Water Quality Improvement Plan and when the resources are available to the Copermittee.

Consistent with 40 CFR 122.26(d)(2)(iv)(B) and 122.26(d)(2)(iv)(B)(1), each Copermittee must implement a "*program…to prevent illicit discharges to the municipal storm sewer system*" and "*detect…illicit discharges and improper disposal into the storm sewer.*" Provision E.2.b requires each Copermittee to implement measures to prevent and detect illicit discharges and connections to its MS4 as part of its illicit discharge detection and elimination program.

As part of the program to prevent and detect illicit discharges to the MS4, 40 CFR 122.26(d)(2)(iv)(B)(2) requires "*procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens.*" As part of the procedures, each Copermittee is required to maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. Having knowledge about where inlets, access points, connections with other MS4s, and outfalls are located is necessary for each Copermittee to track, identify, and eliminate illicit discharges and connections. Thus, Provision E.2.b.(1) of the Order specifies that the map must include the segments of the storm sewer system owned, operated, and maintained by the Copermittee, and include locations of all known inlets, connections with other MS4s, and outfalls to the Copermittee's MS4. The remaining requirements of Provision E.2.b are consistent with the requirements of 40 CFR 122.26(d)(2)(iv)(B)(3)-(7) related to implementing measures to prevent and detect illicit discharges and connections to the MS4.

Provision E.2.c requires each Copermittee to conduct field screening and monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect non-storm water and illicit discharges and connections to the MS4. Field screening is a required element of the program to detect and eliminate illicit discharges and connections to the MS4, pursuant to 40 CFR 122.26(d)(2)(iv)(B)(2). The field screening requirement will be implemented through the dry weather MS4 outfall discharge monitoring required under Provisions D.2.a.(2) and D.2.b.(1).

Provision E.2.d specifies the measures each Copermittee must implement to eliminate illicit discharges and connections to its MS4. Elimination of illicit discharges and connections to the MS4 is consistent with the requirement of 40 CFR 122.26(d)(2)(iv)(B) "*to detect and remove [emphasis added]...illicit discharges and improper disposal into the storm sewer*" and will achieve the CWA requirement for MS4 permits to "*effectively prohibit non-storm water discharges into the storm sewers.*"

Generally, each Copermittee is responsible for prioritizing its efforts to eliminate non-storm water and illicit discharges or connections to its MS4 based on field screening and monitoring data, NALs, illicit discharge investigation records, and the known or suspected sources. Sources of non-storm water and illicit discharges or connections must be eliminated by enforcing the legal authority established by each Copermittee pursuant to Provision E.1.

Provision E.3 (Development Planning) requires each Copermittee to use its land use and planning authority to implement a development planning program to control and reduce the discharge of pollutants in storm water from new development and significant redevelopment to the MEP. Proper implementation of the development planning program will also contribute toward effectively prohibiting non-storm water discharges from development projects to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a "*management program...to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.*" As part of the management program, 40 CFR 122.26(d)(2)(iv)(A)(2) requires "*planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.*"

Land development generally alters the natural conditions of the land by removing vegetative cover, compacting soil, and/or placement of concrete, asphalt, or other impervious surfaces. These impervious surfaces concentrate urban pollutants (such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that

accumulate on impervious surfaces are not easily biodegraded nor subject to natural treatment processes.

Impervious surfaces greatly affect the natural hydrology of the land because they do not allow natural infiltration and treatment of storm water runoff to take place. Instead, storm water runoff from impervious surfaces is typically directed through pipes, curbs, gutters, and other hardscape into receiving waters, with little treatment, at significantly increased volumes and accelerated flow rates over what would occur naturally. The increased pollutant loads, storm water volume, discharge rates and velocities, and discharge durations from the MS4 adversely impact stream habitat by causing accelerated, unnatural erosion and scouring within creek bed and banks. Placement of impervious surfaces also encapsulates "good" sediment (such as sand, gravel, rocks and cobbles) that would normally replenish creek beds and banks to help stabilize them. Collectively, these changes to natural hydrologic processes are termed hydrograph modification, or hydromodification.

Hydromodification, which is caused by both altered storm water flow and altered sediment flow regimes, is largely responsible for degradation of creeks, streams, and associated habitats in the San Diego Region. In an ongoing study by the Stormwater Monitoring Coalition to assess the health of streams throughout Southern California, researchers found that three of the four highest risk stressors to creeks (percent sands and fines present, channel alteration, and riparian disturbance) were related to physical habitat.[29] Researchers studying flood frequencies in Riverside County have found that increases in watershed imperviousness of only 9-22 percent can result in increases in peak flow rates for the two-year storm event of up to 100 percent.[30] Such changes in runoff have significant impacts on channel morphology.

In addition, a technical report issued by the Southern California Coastal Water Research Project (SCCWRP) stated that "*[r]ecent studies indicate that California's intermittent and ephemeral streams are more susceptible to the effects of hydromodification than streams from other parts of the United States. Physical degradation of stream channels in the central and eastern United States can initially be detected when watershed impervious cover approaches 10 percent, although biological effects (which may be more difficult to detect) may occur at lower levels. In contrast, initial response of streams in the semi-arid portions of California appears to occur between 3 and 5 percent impervious cover.*"[31] These studies highlight the extent to which impacts originating from impervious surfaces created by land development are responsible for the degradation of creek and stream habitat.

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[29] Assessing the Health of Southern California Streams, Stormwater Monitoring Coalition, Fact Sheet
[30] Schueler and Holland, 2000. Storm Water Strategies for Arid and Semi-Arid Watersheds (Article 66). The Practice of Watershed Protection.
[31] Stein, E. and Zaleski, S., 2005. Technical Report 475, Managing Runoff to Protect Natural Streams: The Latest Development on Investigation and Management of Hydromodification in California. December 30, 2005.

This is consistent with what USEPA has noted, that "*[m]ost stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.*"[32]

Reducing the impact from the increased pollutant loads and flows generated by impervious surfaces within a watershed is essential to protecting and restoring the integrity of the receiving waters. Provision E.3 includes the minimum "*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*" to be included in the "*planning procedures…to reduce the discharge of pollutants…from areas of new development and significant redevelopment.*" The requirements of Provision E.3 will 1) minimize the generation and discharge of pollutants in storm water from the MS4, and 2) minimize the potential of storm water discharges from the MS4 from causing altered flow regimes and excessive downstream erosion in receiving waters.

The requirements of Provision E.3.a include the minimum "*management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*" to be included in the "*planning procedures…to reduce the discharge of pollutants…from areas of new development and significant redevelopment*" applicable to all development projects, regardless of size or purpose of development. In general, all development projects must implement onsite BMPs to remove pollutants from runoff prior to its discharge to any receiving waters, as close to the pollutant generating source as possible, and structural BMPs must not be constructed within waters of the U.S.

Furthermore, the onsite BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors (e.g. mosquitos, rodents, and flies). If not properly designed or maintained, certain BMPs implemented or required by municipalities may create a habitat for vectors. Monitoring studies conducted by the California Department of Public Health (CDPH) have documented that mosquitoes opportunistically breed in structural storm water BMPs, particularly those that hold standing water for over 96 hours. Certain site design features that hold standing water may similarly produce mosquitoes.

[32] USEPA, 2007. Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, December 2007.

Structural BMPs and site design features should incorporate design, construction, and maintenance principles to promote drainage within 96 hours to minimize standing water available to mosquitoes. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities and local vector control agencies and the CDPH during the development and implementation of storm water runoff management programs. The CDPH also has issued guidance for BMP implementation that will minimize potential nuisances and public health impacts resulting from vector breeding.[33]

All development projects are required to implement source control BMPs that will minimize the generation of pollutants. Additionally, each development project must implement, where applicable and feasible, low impact development (LID) BMPs to mimic the natural hydrology of the site and retain and/or treat pollutants in storm water runoff prior to discharging to and from the MS4.

The LID Center defines LID as "*a comprehensive land planning and engineering design approach with a goal of maintaining and enhancing the pre-development hydrologic regime of urban and developing watersheds.*"[34] LID designs seek to control storm water at the source, using small-scale integrated site design and management practices to mimic the natural hydrology of a site, retain storm water runoff by minimizing soil compaction and impervious surfaces, and disconnect storm water runoff from conveyances to the storm drain system.

LID BMPs may utilize interception, storage, evaporation, evapotranspiration, infiltration, and filtration processes to retain and/or treat pollutants in storm water before it is discharged from a site. Because of these numerous options, the San Diego Water Board expects that every development project will be able to implement some form of LID BMPs. Examples of LID BMPs include using permeable pavements, rain gardens, rain barrels, grassy swales, soil amendments, and native plants.

Provision E.3.a also includes requirements for all development projects to, where feasible, landscape with native and/or low water use plants to minimize the discharge of non-storm water discharges associated with excessive irrigation, as well as harvest (i.e., storage) and use precipitation to promote the concept of utilizing storm water as a resource.

While all development projects are subject to the requirements of Provision E.3.a, Provision E.3.b identifies Priority Development Projects that exceed given size thresholds and/or fit under specific use categories. Priority Development Projects are required to incorporate specific performance criteria for structural BMPs into the

[33] California Department of Public Health, 2012. Best Management Practices for Mosquito Control in California. (http://www.cdph.ca.gov/HealthInfo/discond/Documents/BMPforMosquitoControl07-12.pdf)
[34] www.lowimpactdevelopment.org

project plan to reduce the generation of pollutants, and address potential impacts from hydromodification.

The Priority Development Project categories are based on the requirements of the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), and do not differ significantly from the Fourth Term Permit for San Diego County. Furthermore, the Priority Development Project categories are consistent with Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), and Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit).

Because of the impact of relatively small increases in watershed impervious surfaces to receiving waters, Provision E.3.b.(1)(c)(iv) has been updated to include large driveways that are 5,000 square feet or more. The San Diego Water Board finds that large driveways can exacerbate altered flow regimes if not properly controlled.

Provision E.3.b.(3) describes projects that are exempt from Priority Development Project status. These include new or retrofit paved sidewalks, bicycle lanes, or trails that are designed and constructed to direct runoff to vegetated areas or be hydraulically disconnected from paved areas. The exemptions have been provided to encourage these types of projects because they provide multiple environmental benefits, such as promoting walking rather than driving, which will in turn improve air quality. Additionally, retrofitting of existing alleys, streets, or roads are exempt from Priority Development Project status if they are constructed using USEPA Green Streets guidance.[35] By doing so, retrofitting of these types of projects is encouraged. The San Diego Water Board recognizes that there are spatial constraints associated with these projects, and implementation of structural BMPs are not always feasible.

For development projects identified as Priority Development Projects, the requirements of Provision E.3.c are the minimum *"management practices, control techniques and system, design and engineering methods, and other such provisions where applicable"* to be included in the *"planning procedures…to reduce the discharge of pollutants…from areas of new development and significant redevelopment."* Provisions E.3.c.(1)-(3) describe the performance criteria for the structural BMPs that must be implemented for each Priority Development Project defined by Provision E.3.b.

Provision E.3.c.(1) describes the storm water pollutant control BMP requirements that must be implemented by all Priority Development Projects. The purpose of Provision E.3.c.(1) is to reduce pollutants in storm water runoff to the MEP from Priority Development Projects before it is discharged to the MS4. Of all the available treatment processes available, retention of storm water, and therefore capture of the

[35] "Managing Wet Weather with Green Infrastructure – Municipal Handbook: Green Streets" (USEPA, 2008).

pollutants in the storm water, will achieve 100 percent pollutant removal efficiency for the volume of storm water retained. No other method of treatment can achieve 100 percent pollutant removal efficiency. Thus, retention of as much storm water onsite is the most effective way to reduce pollutants in storm water discharges to, and consequently from the MS4, and controls pollutants in storm water discharges from a site to the MEP.

Under Provision E.3.c.(1)(a), retention of the pollutants in the runoff produced from the 85th percentile storm event ("design capture volume") is the design standard to which Priority Development Projects must comply. Since the 85th percentile storm event has previously been used as the numeric design standard for treatment control BMPs, this same size storm event is used as the numeric design standard for storm water retention. This is the MEP standard recognized by the San Diego Water Board and is consistent with the Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), as well as Santa Ana Water Board Order Nos. R8-2009-0030 and R8-2010-0033 (Orange County and Riverside County MS4 Permits, respectively), Los Angeles Water Board Order No. R4-2010-0108 (Ventura County MS4 Permit), and Los Angeles Water Board Order No. R4-2012-0175 (Los Angeles County MS4 Permit).

The 85th percentile storm event is the event that has a precipitation total greater than or equal to 85 percent of all storm events over a given period of record in a specific area or location. For example, to determine what the 85th percentile storm event is in a specific location, all 24 hour storms that have recorded values over a 30 year period would be tabulated and a 85th percentile storm would be determined from this record (i.e. 15 percent of the storms would be greater than the number determined to be the 85th percentile storm). Most jurisdictions in the San Diego Region have already developed isopluvial maps that can provide this type of information. The 85th percentile storm might be determined to be a number such as 1.0 inch, and this would be multiplied by the total area of the project footprint producing runoff to calculate the design capture volume. The Priority Development Project designer would then select a system of BMPs that would retain (i.e. intercept, store, infiltrate, evaporate, or evapotranspire) the pollutants contained in the design capture volume onsite.

Retention BMPs are necessary to capture and retain pollutants generated from a Priority Development Project. In a recent study performed by SCCWRP in the Los Angeles Region, they found "*that the magnitude of constituent load associated with storm water runoff depends, at least in part, on the amount of time available for pollutant build-up on land surfaces. The extended dry period that typically occurs in arid climates such as southern California maximizes the time for constituents to build-up on land surfaces, resulting in proportionally higher concentrations and loads during*

initial storms of the season."[36] This implies that the "first flush" of a rainy season and the first storm events after long antecedent dry periods tend to have the highest pollutant loads. Capturing and retaining the pollutant loads of the "first flush" of a rainy season and the first storm events after long antecedent dry periods will reduce a significant portion of the pollutants in storm water discharged to and from the MS4.

The San Diego Water Board, however, acknowledges that in some situations retention of the full design capture volume onsite may not be technically feasible. In this event, the Copermittee may allow the Priority Development Project to use biofiltration BMPs to treat 1.5 times the design capture volume not reliably retained onsite, or biofiltration BMPs with a flow-thru design that has a total volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained onsite.

The 1.5 multiplier is based on the finding in the Ventura County Technical Guidance Manual that biofiltration of 1.5 times the design capture volume not retained onsite will provide approximately the same pollutant removal as retention of the design capture volume on an annual basis.[37] This standard is consistent with the Los Angeles Water Board's Los Angeles County and Ventura County municipal storm water permits (Order Nos. R4-2012-0175 and R4-2010-0108, respectively). The flow-thru design of 0.75 times the portion of the design capture volume not reliably retained onsite is consistent with the San Diego Water Board's Fourth Term Permits for Orange County and Riverside County (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). In either case, the biofiltration BMPs must be designed with an appropriate hydraulic loading rate to maximize storm water retention and pollutant removal, as well as to prevent erosion, scour, and channeling within the BMP. Each Copermittee is required to update its BMP Design Manual to provide guidance for hydraulic loading rates and other biofiltration design criteria necessary to maximize storm water retention and pollutant removal.

The San Diego Water Board further recognizes that, in addition to not being technically feasible, retention of the full design capture storm onsite may be cost prohibitive, or may not provide as much water quality benefit to the Watershed Management Area as would implementing BMPs elsewhere in the watershed. Thus, Provision E.3.c.(1)(b) allows for the use of a combination of onsite retention BMPs, and the implementation of an Alternative Compliance Program described in Provision E.3.c.(3). Provision E.3.c.(3) is discussed in more detail below.

If the full design capture volume is not retained onsite either because biofiltration is not technically feasible, or a Copermittee grants a Priority Development Project permission

[36] Stein, E.D., Tiefenthaler, L.L., and Schiff, K.C., 2007. Technical Report 510, Sources, Patterns and Mechanisms of Storm Water Pollutant Loading from Watershed and Land Uses of the Greater Los Angeles Area, California, USA. March 20, 2007.
[37] Ventura Countywide Stormwater Management Program. 2011. Ventura Technical Guidance Manual, Manual Update, 2011.

to utilize the Alternative Compliance Program, then the pollutants in the portion of the design capture volume that are not reliably retained onsite must still be reduced to the MEP. Thus, flow-thru treatment control BMPs are required to be implemented on Priority Development Projects in addition to the retention BMPs. The requirements of Provisions E.3.c.(1)(a)(ii)[a]-[c] include the performance standards for flow-thru treatment control BMPs, consistent with the Fourth Term Permits in the San Diego Region.

Whereas the purpose of the requirements under Provision E.3.c.(1) is to reduce pollutants in storm water runoff to the MEP, the purpose of the requirements under Provision E.3.c.(2) is to maintain or restore more natural hydrologic flow regimes to prevent accelerated, unnatural erosion in downstream receiving waters, also to the MEP standard. Provision E.3.c.(2) describes hydromodification management BMP requirements that must be implemented by all Priority Development Projects.

The performance criteria for the implementation of hydromodification management BMPs on Priority Development Projects are consistent with the requirements in the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively). Modifications to the Orange County and Riverside County Hydromodification Management Plans (HMPs) will likely be minor, or may not be necessary. The HMP for San Diego County will likely require some minor modifications to incorporate the requirements of Provision E.3.c.(2) and become consistent with the Orange County and Riverside County HMPs. The San Diego Water Board does not, however, expect that it will be necessary for the San Diego County Copermittees to develop a new approach or significantly re-write the San Diego County HMP. This is because the premise of the hydromodification management BMP requirements, which are to control storm water runoff conditions (flow rates and durations) for Copermittee-defined range of flows, is unchanged from all Fourth Term Permits in the San Diego Region.

Provision E.3.c.(2)(a) requires that post-project runoff conditions mimic the *pre-development* runoff conditions, and not the *pre-project* runoff conditions. Fundamentally, the San Diego Water Board believes that using a hydrology baseline that approximates that of an undeveloped, natural watershed is the only way to facilitate the return of more natural hydrological conditions to already built-out watersheds, and ultimately improved stream health. On the other hand, using the *pre-project* hydrology as a baseline for redevelopment projects results in propagating the unnatural hydrology of urbanized areas. Propagating the urbanized flow regime does not support conditions for restoring degraded or channelized stream segments, and would forever sentence such streams to the degraded state. Furthermore, reducing the volume of storm water runoff associated with the urbanized flow regime will also result in reducing the discharge of pollutants into receiving waters, since storm water runoff from impervious surfaces contains untreated pollutants.

The San Diego Water Board understands that approximating the pre-development runoff condition associated with a redevelopment site is not necessarily straightforward because factors such as natural grade and native vegetation for the site cannot be precisely known. Therefore, the San Diego Water Board does not expect project designers to estimate historical conditions associated with redevelopment sites. Rather, the San Diego Water Board expects project designers and the Copermittees to approximate pre-development runoff conditions using the parameters of a *pervious* area rather than an *impervious* area. This means that for redevelopment sites, approximating pre-development runoff conditions equates to using existing onsite grade and assuming the infiltration characteristics of the underlying soil. A redevelopment Priority Development Project must not use runoff coefficients of concrete or asphalt to estimate pre-development runoff conditions. Rather, redevelopment projects must use available information pertaining to existing underlying soil type (such as soil maps published by the National Resource Conservation Service), onsite existing grade, and any other readily available pertinent information to estimate pre-development runoff conditions.

The San Diego Water Board understands, indeed asserts, that the pre-development hydrology of an area in question can only be roughly estimated and cannot be precisely known. However, using the hydrology of a natural condition, even if not precisely known, will provide significant benefit to receiving waters over using the hydrology associated with impervious (developed) surfaces. Therefore in order to achieve the goals of the Clean Water Act, which are to "*restore and maintain the chemical, physical, and biological integrity of the nation's waters* [emphasis added]," the most appropriate standard to use for hydromodification management is the standard associated with the pre-development condition.

Provision E.3.c.(2)(b) requires Priority Development Projects to avoid known critical sediment yield areas or implement measures that would allow coarse sediment to be discharged to receiving waters, such that the natural sediment supply is unaffected by the project. This is necessary because the availability of coarse sediment supply is as much an issue for causing erosive conditions to receiving streams as are accelerated flows.

The San Diego Water Board recognizes that in some situations implementing the hydromodification management BMP requirements for flow control fully onsite may not be technically feasible, may be cost prohibitive, or may not provide any overall water quality benefits to the Watershed Management Area. Thus, Provision E.3.c.(2)(c) allows for the use of a combination of onsite hydromodification management BMPs for flow control and alternative compliance options described in Provision E.3.c.(3).

Provision E.3.c.(3) allows for alternative compliance in instances where the Copermittee determines that offsite measures will have a greater overall water quality benefit for the Watershed Management Area than if the Priority Development Project were to implement structural BMPs onsite. Consequently, watershed-specific

structural BMP requirements are present in this Order in the form of allowable compliance offsite. The Alternative Compliance Program to Onsite Structural BMP Implementation Provision is intended to integrate with the Copermittees' planning efforts in the Water Quality Improvement Plans.

The Alternative Compliance Program is an option for Priority Development Projects where the governing Copermittee has participated in the development of a Watershed Management Area Analysis as part of the Water Quality Improvement Plan (described in Provision B.3.b.(4)). Such an approach is consistent with the latest findings in hydromodification management by the scientific community. In a Technical Report entitled *Hydromodification Assessment and Management in California,*[38] the report states:

> *"An effective [hydromodification] management program will likely include combinations of on-site measures (e.g., low-impact development techniques, flow-control basins), in-stream measures (e.g., stream habitat restoration), floodplain and riparian zone actions, and off-site measures. Off-site measures may include compensatory mitigation measures at upstream locations that are designed to help restore and manage flow and sediment yield in the watershed."*

Consistent with the ideas brought forth in the report, in the Watershed Management Area Analysis of Provision B.3.b.(4), which is optional, the Copermittees will develop watershed maps that include as much detail about factors that affect the hydrology of the watershed as is available. Such factors included identification of areas suitable for infiltration, coarse sediment supply areas, and locating stream channel structures and constrictions. Once these factors are mapped and studied, the Copermittees can identify areas in the watershed where candidate projects may be implemented that are expected to improve water quality in the watershed by providing more opportunity for infiltration, slowing down storm water flows, or attenuation of pollutants naturally via healthy stream habitat. These candidate projects may be in the form of retrofitting existing development, rehabilitating degraded stream segments, identifying regional BMPs, purchasing land to preserve valuable floodplain functions, and any other project(s) that the Copermittees identify.

Under the Alternative Compliance Program, Priority Development Projects may be allowed to fund, partially fund, or implement a candidate project, in lieu of implementing structural BMPs onsite, if they enter into a voluntary agreement with the governing Copermittee permitting this arrangement. Project proponents may also propose an alternative project not previously identified by the Copermittees. In either case, whether a project proponent implements a candidate project identified by the Copermittees or a separate alternative compliance project, the governing Copermittee must determine that implementation of the project will have a greater overall water

[38] 2012. ED Stein, F Federico, DB Booth, BP Bledsoe, C Bowles, Z Rubin, GM Kondolf, A Sengupta. Technical Report 667. Southern California Coastal Water Research Project. Costa Mesa, CA.

quality benefit for the Watershed Management Area than fully implementing structural BMPs onsite. Determination of greater overall water quality benefits associated with alternative compliance projects would be accomplished by utilizing Water Quality Equivalency calculations developed pursuant to Provision E.3.c.(3)(a). Water Quality Equivalency calculations are necessary to establish a regional and technical basis for determining water quality benefits associated with alternative compliance projects, which can be consistently used by all Copermittees in the San Diego Region. Finally, if ~~If~~ alternative compliance involves funding or implementing a project that is outside the jurisdiction of the governing Copermittee, then that Copermittee may enter into an inter-agency agreement with the appropriate jurisdiction.

Finally, Provision E.3.c.(2)(d) allows Priority Development Projects to be exempt from the hydromodification management BMP requirements if there is no threat of erosion to downstream receiving waters (i.e. the receiving stream is concrete lined from the point of discharge all the way to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean). If the Copermittees believe that more exemptions are warranted, then they must perform the optional Watershed Management Area Analysis of Provision B.3.b.(4). Additional exemptions other than those specified in this Order may be established on a watershed basis, provided the Copermittees perform the analysis, provide supporting rationale for the exemptions, and complete the Water Quality Improvement Plan approval process pursuant to Provision F.1.

To facilitate the transition to this Order from the Fourth Term Permits for Orange and Riverside County Copermittees, Provision E.3.c.(2)(e) allows two additional temporary exemptions from hydromodification management BMP implementation. The first temporary exemption allows relief from hydromodification management BMP implementation for Priority Development Projects discharging directly to an engineered channel conveyance system with a capacity to convey peak flows generated by the 10-year storm event all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Similar to the exemption allowed for concrete-lined channels, this exemption is premised on the concept that there is little threat of erosion to these types of engineered channel systems.

The second temporary exemption allows relief from hydromodification management BMP implementation for Priority Development Projects discharging directly to large river reaches with drainage areas larger than 100 square miles and a 100-year flow capacity in excess of 20,000 cubic feet per second. If this exemption is claimed, then properly sized energy dissipation is required at all discharge points associated with the Priority Development Project. This exemption is premised on the concept that large river reaches can essentially assimilate the accelerated flow rates associated with individual Priority Development Projects because they are inconsequential compared

to the flow rate in the large river reach. Both of these exemptions are included in the Hydromodification Management Plan for San Diego County[39].

These temporary exemptions are allowed as a means to facilitate Orange and Riverside County Copermittees' transition to this Order from the Fourth Term Permits and are not meant to reside as permanent exemptions without additional rigorous technical analyses specific to each County. Therefore, these exemptions will no longer apply once the Copermittees' land development programs are fully updated to reflect the requirements of this Order, i.e., upon implementation of the BMP Design Manual pursuant to Provision F.2.b. If the Copermittees believe that these or other exemptions are warranted in the context of water quality improvement and stream restoration opportunities, then the Copermittees must perform the optional Watershed Management Area Analysis of Provision B.3.b.(4) and provide supporting rationale for the exemptions. The San Diego County Copermittees are also required to perform the optional Watershed Management Area Analysis to provide supporting rationale to justify use of these and other exemptions. Updated BMP Design Manuals including rationale to justify use of exemptions will be reviewed by the San Diego Water Board pursuant to Provision F.2.b.

Provisions E.3.c.(4) and E.3.c.(5) were included under the BMP requirements applicable to all development projects in the Fourth Term Permits for San Diego, Orange, and Riverside Counties (Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016, respectively). In this Order, the long-term BMP maintenance and infiltration and groundwater protection requirements apply to structural BMPs implemented by Priority Development Projects only.

Provision E.3.d requires the Copermittees to update their BMP Design Manual as needed to incorporate the requirements of Provision E.3. The BMP Design Manual is formerly known as the Standard Storm Water Mitigation Plan, or SSMP, and was renamed so that the title has a more accurate description of the document content. The contents of the BMP Design Manual are largely unchanged from the previous Standard Storm Water Mitigation Plans required under the Fourth Term Permits. The BMP Design Manual fulfills the 40 CFR 122.26(d)(2)(iv)(A)(2) requirement that the Copermittee's development planning program includes "*a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal storm sewers which receive discharges from areas of new development and significant redevelopment.*"

As part of the "*planning procedures,*" 40 CFR 122.26(d)(2)(iv)(A)(2) requires the procedures to "*address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.*" The requirements applicable to the implementation and oversight of structural BMPs at Priority Development Projects are provided under Provision E.3.e.

[39] Final Hydromodification Management Plan Prepared for County of San Diego, March 2011

Proper installation of the structural BMPs approved for a Priority Development Project is necessary to ensure that pollutants in storm water discharges will be reduced to the MEP after the project is completed. In addition to the proper installation of structural BMPs, the maintenance of structural BMPs on Priority Development Projects is necessary to ensure that pollutants in storm water discharges will continue to be reduced to the MEP. Provision E.3.e.(1) includes the minimum requirements that each Copermittee must implement to ensure structural BMPs are properly installed and will be properly maintained.

Provisions E.3.e.(1)(a)(i)-(ii) have been included to provide additional clarification regarding when a Copermittee may allow land development requirements from earlier MS4 permits to apply to a Priority Development Project. Since the MS4 permits issued from 2001 to the adoption of Order No. R9-2015-0001 amending Order No. R9-2013-0001 (Regional MS4 Permit), a Copermittee could allow development projects with "prior lawful approval" to be "grandfathered" into implementing BMP requirements from previous MS4 permits. The Copermittees were given the discretion to use their land use authority to determine when it was appropriate to allow a development project with prior lawful approval to implement BMP requirements from the previous MS4 permits, and when the most recent BMP requirements should be required to achieve the reduction of pollutants in storm water runoff from development projects to the MEP. However, the San Diego Water Board has found that the Copermittees and the development community frequently disagree about when a development project has prior lawful approval and what is necessary to reduce pollutants in storm water runoff from development projects to the MEP.

Therefore, Provisions E.3.e.(1)(a)(i)-(ii) were included to provide more clarity and certainty for the Copermittees, the land development community, and the general public about when the structural BMP performance standards of earlier MS4 permits may be allowed to be implemented. A Copermittee may allow a Priority Development Project to implement BMP requirements of the previous MS4 permit only if all requirements of Provisions E.3.e.(1)(a)(i)[a]-[d] have been met. Otherwise, the Copermittees must require all Priority Development Projects to incorporate the BMP requirements of Provision E.3 into the project to reduce pollutants in storm water runoff from development projects to the MEP.

Provisions E.3.e.(1)(a)(i)[a]-[d] are dependent upon the effective date of the BMP Design Manual. Unless otherwise directed by the San Diego Water Board, the effective date of the BMP Design Manual is December 24, 2015 for the San Diego County Copermittees, September 28, 2017 for the Orange County Copermittees, and July 5, 2018 for the Riverside County Copermittees.

Alternatively, if the Copermittee can demonstrate a lack of land use authority or legal authority to require a Priority Development Project to implement the requirements of Provision E.3, the Copermittee may allow land development requirements from the previous MS4 permits to apply. However, under these circumstances the San Diego

Water Board expects the Copermittee to utilize its available land use authority or legal authority to require the implementation of as much of Provision E.3 as possible to reduce the discharge of pollutants in storm water from development and redevelopment projects within its jurisdiction to the MEP.

In cases where BMP requirements from the earlier MS4 permits govern the structural BMP design requirements of a Priority Development Project, the San Diego Water Board expects the Copermittees to be able to demonstrate, in a programmatic audit or other means, that a Priority Development Project met all the requirements listed under Provisions E.3.e.(1)(a)(i)[a]-[d], or have evidence that the Copermittee did not have the land use or legal authority to require the implementation of Provision E.3 for a Priority Development Project.

The requirements under Provision E.3.e.(2)-(3) are necessary to demonstrate each Copermittee is implementing a program that complies with Provisions E.3.b-c and E.3.e.(1), and ensure structural BMPs at Priority Development Project will continue to be able to reduce pollutants in storm water discharges to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system.*" Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision E.3 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision E.3.f requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provision E.4 (Construction Management) requires each Copermittee to implement a construction management program to control and reduce the discharge of pollutants in storm water from construction sites to the MEP. Proper implementation of the construction management program will also contribute toward effectively prohibiting non-storm water discharges from construction sites to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a "*management program…to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable*." As part of the management program, 40 CFR 122.26(d)(2)(iv)(D) requires "*a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system.*"

Construction sites can be significant sources of sediment, trash, and other pollutants to receiving waters. Although sediment is naturally occurring in the natural environment, the discharge of sediment under unnatural conditions is problematic to receiving waters. Fine sediment in creeks causes high turbidity that interferes with the

functionality of native flora and fauna in local creeks. For example, turbidity interferes with both photosynthesis of water-philic plants, as well as successful foraging and reproduction of benthic macroinvertebrates. Sediment can also make it difficult for fish to breathe because it clogs fish gills. Other pollutants such as heavy metals or pesticides can adhere to sediment and are transported to receiving waters during storm events, where they dissolve in the water column and become bioavailable to aquatic organisms. Sediment is recognized as a major stressor to surface waters and is responsible for the impairment of several lagoons and creeks in the San Diego Region.

Provision E.4 includes requirements that each Copermittee must implement to minimize the discharge of sediment and other pollutants from construction sites to the MS4 within its jurisdiction. The requirements under Provision E.4 are consistent with the Fourth Term Permits for San Diego, Orange, and Riverside Counties. Therefore, Copermittees are expected to implement the requirements seamlessly, with minimal changes to their existing construction management programs. The Copermittees, however, are given more flexibility to run their programs as needed to maximize efficiency, and also to be consistent with the Water Quality Improvement Plan for the Watershed Management Area.

As part of the construction management program, 40 CFR 122.26(d)(2)(iv)(D)(1) requires "*procedures for site planning which incorporate consideration of potential water quality impacts.*" Provision E.4.a describes the minimum elements each Copermittee is required to include as part of the construction site planning and project approval process. The construction site planning and approval process is based primarily on ensuring each project had an adequate site-specific pollution control, construction BMP, and/or erosion and sediment control plan that will be implemented to minimize the discharge of pollutants in storm water to the MEP, and minimize impacts to receiving waters.

The requirements under Provision E.4.b provide the data and information necessary to identify "*priorities for inspecting sites and enforcing control measures*" required pursuant to 40 CFR 122.26(d)(2)(iv)(D)(3). Under Provision E.4.b, each Copermittee must identify construction sites that are considered a high threat to downstream surface waters. Designation of "high threat to water quality" construction sites will necessitate the Copermittees to develop criteria to identify such sites. Provision E.4.b.(2) describes a list of factors that must be considered when the Copermittee considers threat to water quality. For example, a Copermittee must identify sites as "high threat to water quality" if it is located within a hydrologic subarea where sediment is known or suspected to contribute to the highest priority water quality conditions, according to the Water Quality Improvement Plan. This ensures that construction management program implementation is compatible with the Copermittee's identified highest priority water quality conditions.

Pursuant to 40 CFR 122.26(d)(2)(iv)(D)(2) each Copermittee is required describe "*requirements for nonstructural and structural best management practices*" at

construction sites. Provision E.4.c includes the types of construction site BMPs that the Copermittees must implement, or require the implementation of, at each construction site to reduce pollutants in storm water discharges to the MEP.

Each Copermittee is expected to require the implementation of appropriate BMPs given specific site conditions, the season and likelihood of rain events, and construction phase (i.e. grading vs. vertical construction). This means that throughout the life of the project construction, the appropriate BMPs will vary, especially if the construction of the project spans multiple wet seasons. As opposed to describing specific minimum BMPs that must be implemented, the Order describes major BMP categories that should be considered for each site.

Each Copermittee is expected to use its 20 years of storm water experience and knowledge to require implementation of appropriate BMPs from the various categories at each construction site within its jurisdiction. For example, the San Diego Water Board expects that each site will be required to implement erosion control and sediment control. The San Diego Water Board also expects each Copermittee to require implementation of active/passive sediment treatment systems at sites where other BMPs have been tried and are known to be inadequate, and discharges of sediment are causing or contributing to water quality impairment downstream. Each Copermittee is granted flexibility in specifying the minimum level of BMP requirements at each site, but the San Diego Water Board expects each site to be capable of controlling pollutants in storm water discharges to the MEP and preventing illicit discharges.

The requirements under Provision E.4.d are necessary to demonstrate that each Copermittee is implementing a program that complies with Provisions E.4.a and E.4.c and ensure BMPs at construction sites will reduce pollutants in storm water discharges to the MEP.

Provision E.4.d does not include minimum required inspection frequencies for construction sites. Each Copermittee must use its experience and knowledge to specify an appropriate inspection frequency for both high priority and lower priority sites in their jurisdictional runoff management program documents, and in accordance with the Water Quality Improvement Plan. Appropriate inspection frequencies may vary by Copermittee, but the San Diego Water Board expects that the stated frequency will be adequate for each Copermittee to properly oversee the construction sites within its jurisdiction, confirm BMPs are implemented to reduce pollutants in storm water discharges from constructions sites to the MEP, and make needed changes to its program on an ongoing basis as necessary.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system.*" Where enforcement is necessary for any development projects to compel compliance with the requirements of Provision E.4 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to

the MEP, Provision E.4.e requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provision E.5 (Existing Development Management) requires each Copermittee to implement an existing development management program to control and reduce the discharge of pollutants in storm water from areas of existing development to the MEP. Proper implementation of the existing development management program will also contribute toward effectively prohibiting non-storm water discharges from areas of existing development to the MS4.

Pursuant to 40 CFR 122.26(d)(2)(iv), each Copermittee is required to implement a "*management program…to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and other such provisions where applicable.*" Within 40 CFR 122.26(d)(2)(iv)(A) and (C), the management program is required to reduce impacts on receiving waters and reduce pollutants in storm water discharges to the MEP from commercial and residential areas, industrial facilities, and municipal facilities.

Commercial and residential areas, industrial facilities, and municipal facilities must be addressed by each Copermittee with the existing development management program required under Provision E.5. All other areas within each Copermittee's jurisdiction should be either undeveloped open space, or areas that are being developed or under construction. Areas being developed or under construction will be addressed by the Copermittee under the requirements of Provision E.3 (Development Planning) or Provision E.4 (Construction Management).

Areas of existing development typically include impervious surfaces such as sidewalks, driveways, roads, and rooftops, which generate and concentrate pollutants (such as pesticides, petroleum hydrocarbons, heavy metals, and pathogens) that are otherwise not found in high concentrations in the natural environment. Pollutants that accumulate on impervious surfaces are not easily biodegraded or not subject to natural treatment processes. When it rains, these pollutants are transported in storm water runoff from these impervious surfaces into receiving waters, resulting in poor water quality and degradation of beneficial uses.

In addition to the generation of pollutants, areas of existing development have generally altered the natural conditions of the land and removed vegetative cover, reduced the perviousness of the surface, and reduced the capacity of storm water that can be intercepted, captured, stored, infiltrated, evaporated, and/or evapotranspired. The alteration of the natural conditions and the impervious surfaces associated with areas of existing development causes water quality problems due to the alteration of natural flow regimes within the watersheds; resulting in hydromodification of channels, streams, and habitats that exist within or adjacent to the areas of existing development.

Thus, storm water discharges from areas of existing development are responsible for poor water quality, degraded habitats, and hydromodified channels throughout the developed portions of the watersheds in the San Diego Region. To improve the health and functionality of the receiving waters in a Watershed Management Area, land use practices and the amount of impervious surfaces in areas of existing development must change to reduce the various impacts caused by hydromodification and pollutants from storm water runoff generated in developed areas. Each Copermittee must be aggressive to address pollutant sources and runoff from areas of existing development to be able to reduce pollutants in storm water discharges from the MS4 to the MEP.

There is some overlap in the requirements under Provision E.5 with the requirements under Provisions E.2 (Illicit Discharge Detection and Elimination), E.3 (Development Planning), and E.4 (Construction Management). Illicit discharges frequently originate from areas of existing development. New development projects, when completed will become some type of residential, commercial, industrial or municipal existing development. Redevelopment projects are, by definition, redeveloping areas of existing development. And, redevelopment projects become construction sites located in areas of existing development. Much of the data and information collected, inspections performed, and enforcement actions taken for the requirements under Provisions E.2 to E.4 may also be utilized by the existing development management program. The requirements under Provision E.5, however, are focused primarily on reducing pollutants generated in areas of existing development that can be transported in storm water runoff and discharged to and from the MS4.

The requirements under Provision E.5 build upon existing program elements being implemented by the Copermittees. Provision E.5 is generally consistent with the existing development requirements of the Fourth Term Permits for Orange and Riverside Counties (Order Nos. R9-2009-0002 and R9-2010-0016, respectively), but modified to provide more flexibility to implement the programs so resources can be better focused toward addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

For a Copermittee to properly manage areas of existing development, having knowledge of what development exists within its jurisdiction is essential. Provision E.5.a requires each Copermittee to maintain a watershed-based inventory of all the existing development within its jurisdiction. This requirement is necessary for each Copermittee to implement the requirements of Provision E.5.b-e.

As opposed to just maintaining separate inventories based on the type of site, each Copermittee must maintain a watershed-based inventory that includes all types of existing development within its jurisdiction. By utilizing a watershed-based inventory, the Copermittees within a Watershed Management Area can combine their inventories and review the inventories by watershed in addition to by jurisdiction. Pollutant

sources and strategies for abatement can then be evaluated on a watershed level, as opposed to evaluating sources and strategies strictly by type of site.

Provision E.5.a includes the information that must be included in the inventory. Provision E.5.a.(1) specifies what facilities or areas must be included in the inventory. A commercial type of existing development may be identified in the inventory as a facility (e.g. individual building, individual business) or an area (e.g. shopping center, commercial zone). An industrial type of existing development must be identified in the inventory by facility (e.g. individual industrial entity). A municipal type of existing development must be identified in the inventory by facility, with a list of specific municipal facilities that must be included in the inventory. A residential type of existing development must be identified by areas to be designated by the Copermittee. For each of the facilities and areas identified in the Copermittee's inventory developed pursuant to Provision E.5.a.(1), Provision E.5.a.(2) specifies the information that must be included in the description for the facility or area.

Provision E.5.a.(3) requires each Copermittee to maintain an updated map showing the location of inventoried existing development, watershed boundaries, and water bodies. This requirement was included because this information is expected to help the Copermittees in a Watershed Management Area identify and prioritize sources of pollutants and/or stressors in areas of existing development that contribute toward the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Knowledge of the existing development that are likely to be sources of pollutants contributing to the highest priority water quality conditions is expected to be a key element in the Copermittees' development of the water quality improvement strategies that will be included in the Water Quality Improvement Plans. The strategies described in the Water Quality Improvement Plans will direct efforts within the existing development management programs implemented by each Copermittee.

Pursuant to 40 CFR 122.26(d)(2)(iv)(A) each Copermittee is required describe "*structural and source control measures to reduce pollutants*" in storm water runoff discharged from areas of existing development. Provision E.5.b includes the BMP implementation and maintenance requirements that the each Copermittee must require at areas of existing development to reduce pollutants in storm water discharges to the MEP. The San Diego Water Board, however, recognizes that BMP implementation and maintenance for residential areas will require much more education and encouragement through less authoritative measures than for commercial, industrial and municipal facilities and areas. Thus, the BMP implementation and maintenance requirements have been separated between requirements under Provision E.5.b.(1) for commercial, industrial and municipal facilities and areas, and Provision E.5.b.(2) for residential areas.

Most of the requirements in Provision E.5.b are consistent with the related requirements in the Fourth Term Permits. The level of specificity, however, has been changed to allow each Copermittee the flexibility to implement its program to achieve maximum efficiency, and to perform functions that will address the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Each Copermittee is expected to require the implementation of appropriate BMPs to address the expected pollutants from each facility or area. The Third and Fourth Term Permits described specific minimum BMPs that must be implemented at various sites. This Order, however, requires each Copermittee to designate minimum BMPs themselves and require implementation. Consistent with the Fourth Term Permits, each Copermittee is required to maintain, or require the maintenance of, all BMPs as needed.

The BMP implementation and maintenance requirements include a schedule of operation and maintenance activities for the MS4 and related structures (such as catch basins, storm drain inlets, and detention basins), as well as public streets and roads. Public streets and roads specifically include public unpaved roads. The San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the San Diego Region. Inspection activities conducted by the San Diego Water Board since the Third Term Permits have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees.

Unpaved roads are a source of sediment that can be discharged in runoff to receiving waters, especially during storm events. Erosion of unpaved roadways occurs when soil particles are loosened and carried away from the roadway base, ditch, or road bank by water, wind, traffic, or other transport means. Exposed soils, high runoff velocities and volumes, sandy or silty soil types, and poor compaction increase the potential for erosion.

Road construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. Poorly designed unpaved roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other public works activities along unpaved roads have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways.

USEPA also recognizes that discharges from unpaved roads pose a significant potential threat to water quality. USEPA guidance[40] emphasizes the threat of unpaved roads to water quality:

[40] USEPA, 2006. Environmentally Sensitive Maintenance for Dirt and Gravel Roads. Gesford and Anderson, USEPA-PA-2005.

"Dirt and gravel roads are a major potential source of these pollutants [sediment] and pollutants that bind to sediment such as oils, nutrients, pesticides, herbicides, and other toxic substances. Many roads have unstable surfaces and bases. Roads act like dams, concentrating flows that accelerate erosion of road materials and roadsides. Both unstable surfaces and accelerated erosion then lead to sediment and dust."

There are several guidance documents, developed by the USEPA,[41] the US Forest Service,[42] the University of California,[43] and others, that include design and construction specifications and BMPs that are readily available for implementation by public entities. Implementing design and other source control BMPs for unpaved roads in the region is necessary to reduce and minimize the impacts of sediment discharged during storm events from unpaved roads to the MS4s and receiving waters.

Provision E.5.c describes existing development site inspection frequency, content, and tracking that each Copermittee must incorporate into their existing development management programs. The requirements under Provision E.5.c are necessary to demonstrate each Copermittee is implementing a program that complies with Provision E.5.b and ensure BMPs implemented in areas of existing development will reduce pollutants in storm water discharges to the MEP. Provision E.5.c has been modified to include a minimum of once every 5 years for all inventoried facilities and areas of existing development, utilizing one or more methods of inspection.

In addition to onsite inspections, the methods of inspection have been expanded to include drive-by inspections. Inspections may be performed by the Copermittee's municipal and contract staff, or by volunteer monitoring or patrol programs. Volunteer monitoring or patrol programs are not expected to enforce the Copermittee's ordinances, or to inspect areas or facilities where members of the public are not allowed access. Volunteer monitoring or patrol programs must be trained by the Copermittee, and are only expected to collect visual observations. By utilizing drive-by inspections and volunteer monitoring or patrol programs, the Copermittees will be able to maximize and efficiently use their resources to identify and address sources of pollutants in areas of existing development.

The municipal and contract staff of each Copermittee must annually perform onsite inspections of an equivalent of at least 20 percent of the commercial, industrial, and municipal facilities and areas in its inventoried existing development pursuant to Provision E.5.c.(1)(a)(iv). An "equivalent" of at least 20 percent means if any commercial, industrial, or municipal facilities or areas require multiple onsite

[41] Ibid
[42] US Forest Service, 1996. Forest Service Specifications for Construction of Roads & Bridges. EM-7720-100. Revised August 1996.
[43] University of California Division of Agriculture and Natural Resources, 2007. Rural Roads: A Construction and Maintenance Guide of California Landowners. Publication 8262.

inspections during any given year, those additional inspections may count toward the total annual inspection requirement. Linear municipal facilities (i.e. MS4 linear channels, sanitary sewer collection systems, streets, roads and highways) in the Copermittee's existing development inventory are not subject to the inspection frequency requirement of Provision E.5.c.(1)(a)(iv).

The inspection content specified in Provision E.5.c.(2)(a) includes the information required to be collected during an inspection by any method. The inspection content specified in Provision E.5.c.(2)(b) includes additional information that must be collected when a Copermittee's municipal or contract staff perform an onsite inspection. Provision E.5.c.(3) specifies the information that each Copermittee must maintain in its existing development inspection records.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient *"legal authority to control discharges to the municipal separate storm sewer system."* Where enforcement is necessary to compel compliance with the requirements of Provision E.5 and ensure the pollutants in storm water discharges from the MS4 are reduced and continue to be reduced to the MEP, Provision E.5.d requires each Copermittee to enforce its legal authority established pursuant to Provision E.1, and in accordance with its Enforcement Response Plan required to be developed pursuant to Provision E.6.

Provisions E.5.e.(1)-(2) specifically require the Copermittee to identify areas of existing development as candidates for retrofitting, and streams, channels, and/or habitats as candidates for rehabilitation. Provisions E.5.e.(1)-(2) are based on the retrofitting requirements of the Fourth Term Permits for Orange and Riverside Counties, but modified to also include identifying projects to rehabilitate channels within areas of existing development. The requirements have also been modified to be more focused on utilizing these types of projects for addressing the highest priority water quality conditions identified in the Water Quality Improvement Plans.

Interest and opportunity to retrofit areas of existing development and rehabilitate channels located in areas of existing development has been observed in several programs the San Diego Water Board oversees (e.g., CWA Section 401 Water Quality Certification program, supplemental environmental projects, and grant programs). Each jurisdiction has miles and miles of streets that could be retrofitted to become green streets. Reshaping landscaped areas from convex to concave configurations can detain storm water instead of directing runoff as quickly as possible to the MS4. Retrofit projects could also include simply replacing impervious surfaces with permeable surfaces.

Retrofitting projects do not necessarily have to be expensive. Retrofitting projects could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of to hardscaped areas discharging directly to the MS4, providing rain barrels to harvest storm water from downspouts for use at a later time, or planting more trees in areas with little vegetation to provide canopy that can intercept storm

water. The San Diego Water Board encourages the Copermittees to identify simple, low-cost retrofitting opportunities that can be easily implemented, in addition to other more expensive retrofitting and channel rehabilitation projects.

Rehabilitation of channels, streams, and/or habitat will require more significant planning and resources to implement. There are, however, also abundant opportunities to rehabilitate channels, streams and/or habitats in or adjacent to areas of existing development. Each Watershed Management Area likely has several creeks and stream reaches that have been undergrounded, artificially hardened, or hydromodified that could be rehabilitated to be more sustainably configured, which would slow down storm water flows and potentially have more assimilative capacity for pollutants while still being supportive of designated beneficial uses.

The San Diego Water Board recognizes that it may be infeasible to implement retrofitting or channel rehabilitation projects within certain areas of a Copermittee's jurisdictions. For such areas, the Copermittee must instead identify, develop, and implement regional retrofitting and channel rehabilitation projects (i.e. projects that can retain and/or treat storm water from one or more areas of existing development) adjacent to and/or downstream of the areas of existing development.

Provisions E.5.e.(1)-(2) do not require the implementation of retrofitting and rehabilitation projects, but do require the Copermittee to develop a program with strategies to facilitate the implementation of these types of projects in areas of existing development. The strategies are expected to include allowing and encouraging Priority Development Projects to implement retrofitting types of projects as a means of compliance with the structural BMP performance criteria requirements of Provisions E.3.c.(1) and E.3.c.(2).

Provision E.6 (Enforcement Response Plans) requires each Copermittee to develop an Enforcement Response Plan as part of its jurisdictional runoff management program document. Proper implementation of the Enforcement Response Plans is necessary to effectively prohibit non-storm water discharges to the MS4, and reduce the discharge of pollutants in storm water from the MS4 to the MEP.

Pursuant to 40 CFR 122.26(d)(1)(ii) and 40 CFR 122.26(d)(2)(i), each Copermittee must have sufficient "*legal authority to control discharges to the municipal separate storm sewer system*" and be able to demonstrate that it can "*operate pursuant to legal authority established by statute, ordinance or series of contracts*" to control the discharge of non-storm water and pollutants in storm water to and from its MS4. Pursuant to 40 CFR 122.26(d)(2)(i)(E) each Copermittee is specifically required to have the legal authority to "*[r]equire compliance with conditions in ordinances, permits, contracts or orders.*"

The requirements under Provision E.6 are necessary to demonstrate that each Copermittee can enforce its legal authority to *"effectively prohibit non-stormwater discharges"* and "*reduce the discharge of pollutants to the maximum extent*

practicable" as well as "*[r]equire compliance with conditions in ordinances, permits, contracts or order.*"

The Enforcement Response Plan required under Provision E.6 will serve as a reference for the Copermittee and the San Diego Water Board to determine if consistent enforcement actions are being implemented to achieve timely and effective compliance from all public and private entities that are not in compliance with the Copermittee's ordinances, permits, or other requirements. The Enforcement Response Plan must contain clear direction for the Copermittee to take immediate enforcement action, when appropriate and necessary, in their illicit discharge detection and elimination, development planning, construction management, and existing development management programs.

If the entities subject to the Copermittee's legal authority do not implement appropriate corrective actions in a timely manner, or if violations repeat, the Copermittee must take progressively stricter responses to enforce its legal authority and achieve compliance with its ordinances, permits, or other requirements to *"effectively prohibit non-stormwater discharges"* and "*reduce the discharge of pollutants to the maximum extent practicable.*"

Provision E.7 (Public Education and Participation) requires each Copermittee to implement a public education and participation program. Proper implementation of the public education and participation program as part of its jurisdictional runoff management program will contribute toward effectively prohibiting non-storm water discharges to the MS4, and toward the reduction of pollutants in storm water from the MS4 to the MEP.

Provision E.7 establishes the minimum requirements that each Copermittee must implement to engage members of the public as part of its jurisdictional runoff management program. In the Fourth Term Permits, the public education program requirements and the public participation requirements were included as separate jurisdictional runoff management program components. In this Order, the public education requirements have been consolidated with the public participation requirements, as both sets of requirements are related to the engagement of the public by each Copermittee. Engagement of the public is critical for the success of each Copermittee's jurisdictional runoff management program.

The Copermittees have been implementing public education programs for the last 20 years, which are now well established. The specificity of expected public education program elements of the Fourth Term Permits has been removed. For the most part, the public education program requirements in Provision E.7.a have been reduced to a set of requirements that are specifically included in the federal regulations under 40 CFR 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(B)(6) and 122.26(d)(2)(D)(4), which should already be incorporated into each Copermittee's existing public education program. Each Copermittee is expected to utilize the information and data collected from the monitoring and assessments conducted within the Watershed Management Area, and

from its inventories and inspections to best direct its public education program resources toward addressing the highest priority water quality conditions identified within the Water Quality Improvement Plan.

According to 40 CFR 122.26(d)(2)(iv), public participation is required to be included as part of the "*comprehensive planning process*", which includes the development and implementation of the Water Quality Improvement Plan and jurisdictional runoff management programs. The requirements under Provision E.7.b specify the opportunities that the public must be provided to be involved in the "*comprehensive planning process*", as required by to 40 CFR 122.26(d)(2)(iv).

Provision E.8 (Fiscal Analysis) requires each Copermittee to secure the resources and provide an analysis of the resources that will be necessary to implement the requirements of the Order. Adequate fiscal resources are necessary for a jurisdictional runoff management program to effectively prohibit non-storm water discharges to the MS4, and reduce pollutants in storm water from the MS4 to the MEP.

According to 40 CFR 122.26(d)(2)(vi), each Copermittee is responsible for providing "*a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities*" required by this Order, including "*a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.*" The fiscal analysis requirements of Provision E.8 are consistent with 40 CFR 122.26(d)(2)(vi).

The San Diego Water Board has chosen not to require a description of fiscal benefits realized from implementation of the jurisdictional runoff management programs. This is a recommendation from the National Association of Flood and Stormwater Management Agencies.[44] For instance, the fiscal analysis requirements do not address city-wide fiscal benefits of protection (e.g., public health, tourism, property values, economic activity, beneficial uses, etc.), even though many costs currently reported to the San Diego Water Board are for related activities. This type of assessment may help Copermittees improve the allocation of resources and it may help the Copermittees secure adequate funding for the program. Qualitative assessments, however, could be overly subjective and most Copermittees likely lack the ability to provide accurate quantitative assessments. The San Diego Water Board encourages the Copermittees to consider means for conducting assessments of fiscal benefits derived from the programs. Such assessments could be conducted on a regional scale similar to studies of program costs conducted by the State Water Board.[45]

[44] National Association of Flood and Stormwater Management Agencies. 2006. *Guidance for Municipal Stormwater Funding.* Prepared under a grant provided by the USEPA.
[45] State Water Board, 2005. NPDES Stormwater Cost Survey.

F. Reporting

Purpose: Provision F includes the requirements for the documents and reports that the Copermittees must prepare and provide to the San Diego Water Board. The documents prepared by the Copermittees and provided to the San Diego Water Board and made available to the public will provide the documentation that the Copermittees are complying with the requirements of the Order.

Discussion: Provision F requires the Copermittees to prepare several documents and reports that must be provided to the San Diego Water Board and made available to the public. The reporting requirements have been significantly reduced compared to the Fourth Term Permit reporting requirements. The reduction in reporting requirements was recommended by the San Diego County Copermittees in the Report of Water Discharge submitted in June 2011.

More specific and detailed discussions of the requirements of Provision F are provided below.

Provision F.1 (Water Quality Improvement Plans) requires the Copermittees in each Watershed Management Area to develop and submit a Water Quality Improvement Plan in accordance with the requirements of Provision B.

Of all the requirements of Provision F, the Water Quality Improvement Plans will likely be the documents requiring the most significant effort to develop. The content of the Water Quality Improvement Plans, however, is expected to include content that should already have been developed for the Watershed Plans and several elements that are included in the Monitoring and Reporting Programs required under the Fourth Term Permits.

Because the Water Quality Improvement Plan is part of the "*comprehensive planning process which involves public participation*," Provision F.1 includes requirements to give multiple opportunities to the public to provide input on the content of the plans.

Provision F.1.a.(1) specifies the elements that the Copermittees must include in the public participation process for the development of the Water Quality Improvement Plans. In order for the public to be aware of the opportunities to provide input, Provision F.1.a.(1)(a) requires the Copermittees to develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan. These opportunities are when the public can provide the data, information, and recommendations that the Copermittees can consider during the development of the Water Quality Improvement Plans.

The San Diego Water Board recognizes, however, that the Copermittees cannot be expected to incorporate all the data, information, and recommendations that the public may provide into the Water Quality Improvement Plans. The Copermittees will have to

review the data, information, and recommendations received and make some decisions on what to incorporate into the Water Quality Improvement Plans. Before the Copermittees finalize their decisions, members of the public should be allowed to review the Copermittees' decisions. Thus, Provision F.1.a.(1)(b) requires the Copermittees to form a Water Quality Improvement Consultation Panel (Panel).

The Panel will consist of a member from the environmental community and a member from the development community familiar with the Watershed Management Area. A representative from the San Diego Water Board staff will also be part of the Panel. The Copermittees may choose to include additional members, but the Panel is only required to include three panel members.

The Panel will serve as an additional public participation and input mechanism during the development of the Water Quality Improvement Plans. The knowledge and expertise from these Panel members are expected to provide the Copermittees valuable direction during their decision-making process. The Copermittees will review the content of their planned submittals with the Panel members to receive recommendations. If the Panel provides recommendations, the Copermittees must consider revisions to the Water Quality Improvement Plan submittals.

The San Diego Water Board recognizes that the development of multiple Water Quality Improvement Plans concurrently may limit the ability of the public to review and provide comments to the Copermittees. Thus, Provision F.1.a.(1)(c) requires the Copermittees to coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public time and opportunity to participate during the development of the Water Quality Improvement Plans.

Provision F.1.a.(2) requires the Copermittees to develop and submit the first Water Quality Improvement Plan component, in accordance with the requirements of Provision B.2, which includes the identification of the priority water quality conditions and potential water quality improvement strategies. The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the priority water quality conditions and potential water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision B.2 as early as 6 months and no later than 12 months after the commencement of coverage under this Order. After the requirements of Provision B.2 are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Provision F.1.a.(3) requires the Copermittees to develop and submit the second Water Quality Improvement Plan component, in accordance with the requirements of Provision B.3, which includes the identification of the numeric goals for the highest priority water quality conditions identified for the Watershed Management Area, and the strategies that will be implemented to achieve the potential numeric goals. The Copermittees may also develop the Optional Watershed Management Area Analysis, in accordance with the requirements of Provision B.3.b.(4), as part of this submittal.

The public must be provided an opportunity to provide data, information and recommendations to be utilized in the development and identification of the numeric goals and water quality improvement strategies for the Watershed Management Area. The Copermittees must consult with the Panel and consider making revisions. The Copermittees may submit the requirements of Provision B.3 as early as 9 months and no later than 18 months after the commencement of coverage under this Order. After the requirements of Provision B.3 are submitted to the San Diego Water Board, the public will be provided another opportunity to provide comments.

Finally, Provision F.1.b describes the process for the submittal and implementation of the Water Quality Improvement Plans. The complete Water Quality Improvement Plans are required to be submitted by the Copermittees within 24 months after the commencement of coverage under this Order. The San Diego Water Board will provide the public an opportunity to provide comments on each complete Water Quality Improvement Plan.

The San Diego Water Board will review each Water Quality Improvement Plan and the public comments received to determine if the Copermittees have submitted a Water Quality Improvement Plan that meets the requirements of Provision B. If a Water Quality Improvement Plan does not meet the requirements of Provision B, the Copermittees will be considered out of compliance and directed in writing by the San Diego Water Board Executive Officer to correct the deficiencies.

When a Water Quality Improvement Plan meets the requirements of Provision B, the San Diego Water Board will determine whether to hold a public hearing or to limit public input to submittal of written comments before accepting the Water Quality Improvement Plan. Implementation of the Water Quality Improvement Plan must begin within 30 days of acceptance.

The San Diego Water Board expects that any deficiencies in the Water Quality Improvement Plan will be identified either in the public comments or during the review by the San Diego Water Board before implementation begins. In the event any deficiencies are identified after the implementation of the Water Quality Improvement Plan, Provision F.1.b.(7) clarifies that the San Diego Water Board maintains the right to require the Copermittees to correct any deficiencies that may be identified.

Provision F.2 (Updates) requires the Copermittees to update specific documents that the Copermittees will utilize to implement the requirements of this Order.

Each Copermittee is required to continue implementing a jurisdictional runoff management program, as required under Provision E. Implementation of each Copermittee's jurisdictional runoff management program is directed by its jurisdictional runoff management program document. Provision F.2.a requires each Copermittee to update its jurisdictional runoff management program document to be consistent with the requirements of Provision E concurrent with the submittal of the Water Quality Improvement Plan.

Likewise, each Copermittee must continue to require new development and redevelopment projects to implement BMPs to control pollutants in storm water runoff. The control of pollutants in storm water runoff from development and redevelopment projects within each Copermittee's jurisdiction is guided and directed by its BMP Design Manual, formerly known as a Standard Storm Water Mitigation Plan (SSMP). Provision F.2.b requires each Copermittee to update its BMP Design Manual to be consistent with the requirements of Provision E.3 concurrent with the submittal of the Water Quality Improvement Plan.

For situations where the San Diego Water Board may amend the requirements of Provisions E.3.a-d after a Copermittee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), Provision F.2.b.(4) gives the Copermittee up to 90 days to incorporate the amended requirements of Provision E.3.a-d into its BMP Design Manual. The San Diego Water Board Executive Officer has discretion to modify the 90-day time period depending on the complexity of the amendments or other information that warrants a change in the 90-day time period.

In general, the requirements of the Order should not necessitate a complete rewrite of each Copermittee's jurisdictional runoff management program document or BMP Design Manual, as was required by the Third Term Permits. The jurisdictional runoff management program and BMP Design Manual requirements of this Order are not significantly different than the requirements of the Fourth Term Permits. Thus, only sections of the Order which are new or have been significantly changed should warrant revisions to specific sections of the Copermittee's jurisdictional runoff management program document and BMP Design Manual.

Finally, the Water Quality Improvement Plans are expected to require updates as the iterative approach and adaptive management process included in the Water Quality Improvement Plan, as required under Provision B.5, is implemented by the Copermittees. Provision F.2.c.(1) requires the Copermittees to implement a public participation process for the proposed updates, review the proposed updates with the Panel, and submit the updates to the Water Quality Improvement Plan as part of the Annual Reports required under Provision F.3.b.

Also, because TMDLs are likely to be developed, adopted and approved during the term of the Order, Provision F.2.c.(2) has been included to expedite the incorporation of TMDLs into the Copermittees' Water Quality Improvement Plans as part of the update process, potentially before the Order is re-opened to incorporated the requirements of the new TMDLs.

Provision F.3 (Progress Reporting) requires the Copermittees to report on the progress of implementing the Water Quality Improvement Plans.

The requirements of Provision F.3 are to report the progress toward improving water quality that the Copermittees are achieving with the implementation of the Water Quality Improvement Plans and each Copermittee's jurisdictional runoff management program. The Progress Report Presentations required under Provision F.3.a are

included to provide the Copermittees an opportunity to communicate directly with the San Diego Water Board and the public. The Progress Report Presentations will also provide the members of the San Diego Water Board and members of the public an opportunity to become more acquainted with the Copermittees and their projects and programs to address non-storm water and storm water discharges into and from their MS4s.

The Annual Report requirements of Provision F.3.b are a consolidation of several reporting requirements from the Fourth Term Permits, including the Jurisdictional Runoff Management Program Annual Reports, the Watershed Annual Reports, and the Monitoring and Reporting Program Annual Reports. Furthermore, the Annual Report requirements are consistent with the requirements under 40 CFR 122.42(c).

Pursuant to 40 CFR 122.42(c), "*[t]he operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director…must submit an annual report*", which must include the following:

(1) *The status of implementing the components of the storm water management program that are established as permit conditions* [40 CFR 122.42(c)(1)];

(2) *Proposed changes to the storm water management programs that are established as permit conditions* [40 CFR 122.42(c)(2)];

(3) *Revisions, if necessary, to the assessment of controls and fiscal analysis* [40 CFR 122.42(c)(3)];

(4) *A summary of data, including monitoring data, that is accumulated throughout the reporting year* [40 CFR 122.42(c)(4)];

(5) *Annual expenditures and budget for year following each annual report* [40 CFR 122.42(c)(5)];

(6) *A summary describing the number and nature of enforcement actions, inspections, and public education programs* [40 CFR 122.42(c)(6)];

(7) *Identification of water quality improvements or degradation* [40 CFR 122.42(c)(7)].

Under the Fourth Term Permits, each Copermittee is responsible for submitting a Jurisdictional Runoff Management Program Annual Report; the Copermittees in each designated watershed are responsible for submitting a Watershed Annual Report; and the Copermittees from each county are responsible for submitting a Monitoring and Reporting Program Annual Report.

There are 39 Copermittees in the San Diego Region, each required to prepare and submit a Jurisdictional Runoff Management Program Annual Report. There are 9 designated watersheds in San Diego County, 6 designated watersheds in Orange County, and 1 designated watershed in Riverside County for a total of 16 designated watersheds, each requiring a Watershed Annual Report. There are 3 sets of

Copermittees in 3 counties in the San Diego Region, requiring Copermittees from each county to prepare and submit a Monitoring and Reporting Program Annual Report. Thus each Copermittee is currently required to prepare, or participate in the preparation of at least 3 annual reports. In addition, the San Diego County Copermittees are required to prepare and submit a Regional Urban Runoff Management Plan Annual Report.

In total, there are 59 annual reports that are prepared by the Copermittees and submitted to the San Diego Water Board for the Fourth Term Permits. The preparation of these annual reports requires significant time and resources from each Copermittee, which could otherwise be expended on actions that could improve water quality within its jurisdiction. In turn, significant time and resources are required from the San Diego Water Board staff to review these reports, which could otherwise be expended on working directly with the Copermittees to improve their implementation efforts toward restoring and protecting water quality.

Until the Water Quality Improvement Plans are developed, there will be a transitional period during which the Copermittees will continue to implement their existing jurisdictional runoff management programs. There will also be a transitional period during which the Copermittees will implement the transitional monitoring and assessment requirements of Provision D. During the transitional period, the Copermittees will submit annual reports pursuant to the requirements of Provisions F.3.b.(1) and F.3.b.(2).

Provision F.3.b.(1) includes the transitional annual reporting requirements for each Copermittee's jurisdictional runoff management program. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form. Each Copermittee is required to complete and submit a Jurisdictional Runoff Management Program Annual Report Form (contained in Attachment D or a revised form accepted by the San Diego Water Board) no later than October 31 of each year for each jurisdictional runoff management program reporting period (i.e. July 1 to June 30) during the transitional period, until the first Water Quality Improvement Plan Annual Reports are required to be submitted. The Jurisdictional Runoff Management Program Annual Report Form will certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision E. Each Copermittee may choose to continue to utilize and submit the jurisdictional runoff management program annual reporting format of its current Order until the first Water Quality Improvement Plan Annual Report is required to be submitted.

Provision F.3.b.(2) includes the transitional annual reporting requirements for the transitional monitoring and assessment program for each Watershed Management Area. The Copermittees in the Watershed Management Area are required to submit a Transitional Monitoring and Assessment Program Annual Report no later than January 31 for each complete transitional monitoring and assessment program reporting period (i.e. October 1 to September 30) during the transitional period, until the first Water

Quality Improvement Plan Annual Reports are required to be submitted. The Transitional Monitoring and Assessment Program Annual Report is required to include the transitional period monitoring data collected pursuant to Provisions D.1.a and D.2.a, and the findings from the transitional period findings from the assessments required pursuant to Provisions D.4.a.(1)(a), D.4.b.(1)(a)(i), D.4.b.(2)(a)(i).

Provision F.3.b.(3) includes the Water Quality Improvement Plan Annual Report requirements. Only one Water Quality Improvement Plan Annual Report is required for each of the ten (10) Watershed Management Areas designated under Provision B.1, which is a significant reduction in the number of annual reports required to be prepared and submitted by the Copermittees. The Water Quality Improvement Plan Annual Report will document the Copermittees' efforts to implement the Water Quality Improvement Plan. Each Water Quality Improvement Plan Annual Report will be focused primarily on reporting the analysis of the monitoring data collected pursuant to Provisions D.1-D.3 during the reporting period, and the assessments that are required pursuant to Provision D.4 based on the data. The monitoring data analyses and the assessments that are provided in the Water Quality Improvement Plan Annual Report will be the core of the report. The reporting of the jurisdictional runoff management program implementation efforts have been reduced to a single 2-page form, and will no longer be the primary focus of the reporting requirements as in the Third and Fourth Term Permits.

Each Copermittee will continue to prepare and submit a Jurisdictional Runoff Management Program Annual Report Form as part of the Water Quality Improvement Plan Annual Report to certify that each Copermittee has implemented its jurisdictional runoff management program in accordance with the requirements of Provision E. Instead of reviewing a voluminous report from each Copermittee, as was required under the Third and Fourth Term Permits, the San Diego Water Board will conduct audits of each Copermittee's jurisdictional runoff management program to investigate and confirm the information provided by each Copermittee on its Jurisdictional Runoff Management Program Annual Report Form. The audits will allow the San Diego Water Board to become more familiar with the each Copermittee's jurisdictional runoff management program, and each Copermittee will become more informed about the expectations of the San Diego Water Board.

The reduction in the number and content of the Water Quality Improvement Plan Annual Reports should result in significant time, cost and resource savings for the Copermittees, as well as the San Diego Water Board. Those savings should offset a significant portion of any additional costs that may be incurred to develop the Water Quality Improvement Plans and to implement the monitoring and assessment program requirements of Provision D.

The reporting period for the Water Quality Improvement Plan Annual Reports consists of two periods. Because the jurisdictional runoff management programs are typically budgeted and implemented during a fiscal year, the information provided on the

Jurisdictional Runoff Management Program Annual Report Forms will cover the period from July 1 to June 30 of the following year.

The Water Quality Improvement Plan Annual Reports, however, are focused primarily on the monitoring data and the assessments based on the monitoring data. The monitoring data is collected during the monitoring year, which begins October 1 and ends September 30 of the following year. The monitoring year begins after the beginning of the fiscal year and ends after the end of the fiscal year. Therefore, to accommodate and capture the information collected during the fiscal year and the monitoring year, the Annual Report reporting period incorporates both periods.

Finally, Provision F.3.c requires the Copermittees to develop and submit a Regional Monitoring and Assessment Report. The Regional Monitoring and Assessment Report is similar to the Long Term Effectiveness Assessment required under the Fourth Term San Diego County Permit. The Regional Monitoring and Assessment Report is expected to utilize the entire body of data and information collected by the Copermittees during the term of this Order to assess improvements to water quality on a regional scale.

Provision F.4 (Regional Clearinghouse) requires the Copermittees to develop, update, and maintain an internet-based Regional Clearinghouse that can be used to store, disseminate, and share the Copermittees' documents, monitoring data, special studies, and any other data or information.

Most of the documents and data that are generated by the Copermittees can be provided in electronic format, and made available to the San Diego Water Board and the public on the internet. The San Diego Water Board has been gradually transitioning its document submittal requirements to electronic submittals. Provision F.4 has been included to further these efforts.

Provision F.4 has also been included to improve the exchange and availability of information among the Copermittees, as well as between the Copermittees and the San Diego Water Board. Provision F.4 will also make the information generated during the implementation of the Order more accessible to the public.

Provision F.5 (Report of Waste Discharge) requires the Copermittees to submit a Report of Waste Discharge to reapply for renewal of the Order prior to its expiration, in accordance with 40 CFR 122.21(d)(2) and CWC section 13376.

Provision F.5 requires the Copermittees to submit a Report of Waste Discharge 180 days in advance of the expiration of this Order. Provision F.5 also describes the minimum information to be included in the Report of Waste Discharge, based on USEPA guidance "Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems," dated May 17, 1996.

G. Principal Watershed Copermittee Responsibilities

Purpose: Provision G includes the requirements for the Principal Watershed Copermittee designated by the Copermittees in each Watershed Management Area.

Discussion: Unlike previous NPDES requirements, there will no longer be a single Principal Copermittee. Provision G.1 requires the Copermittees to designate a Principal Watershed Copermittee for each Watershed Management Area. There are ten (10) Watershed Management Areas in the San Diego Region, as defined in Table B-1 under Provision B.1 of the Order. An individual Copermittee should not be the Principal Watershed Copermittee for more than two (2) Watershed Management Areas. There could be up to ten (10) Principal Water Copermittees designated for the Watershed Management Areas in the San Diego Region.

Provision G.2 describes the minimum responsibilities of each Principal Watershed Copermittee. The primary responsibility of the Principal Watershed Copermittees is to serve as the liaison between the Copermittees in the Watershed Management Area and the San Diego Water Board on general permit issues. Ideally, the Principal Watershed Copermittee can represent the interests of all the Copermittees within a Watershed Management Area during discussions or meetings to facilitate communication with the San Diego Water Board. The Principal Watershed Copermittees are also responsible for facilitating and coordinating the implementation efforts of the Copermittees and submittals of required documents and reports.

The Principal Watershed Copermittee is responsible for facilitating the efforts of the Copermittees within the Watershed Management Area to develop the Water Quality Improvement Plan required under Provision B, and submit it for approval in accordance with Provision F.1. The Principal Watershed Copermittee is also responsible for coordinating the submittal of the document updates, Progress Report Presentations, and Annual Reports required from the Copermittees within each Watershed Management Area under Provisions F.2, F.3.a, and F.3.b. The Principal Watershed Copermittees are responsible for coordinating with each other to develop and submit the Regional Clearinghouse, Regional Monitoring and Assessment Report, and the Report of Waste Discharge required under Provisions F.3.c, F.4, and F.5.

The designated Principal Watershed Copermittee for each Watershed Management Area does not necessarily have to serve as the Principal Watershed Copermittee for the entire term of the Order. If the Copermittees in a Watershed Management Area choose to designate a new Principal Watershed Copermittee, the change may be submitted as part of the Annual Report required under Provision F.3.b, with an update to the Water Quality Improvement Plan in accordance with Provision F.2.c.

Provision G.3 specifies that the Principal Watershed Copermittee is not responsible for ensuring that the other Copermittees within the Watershed Management Area are in compliance with the requirements of this Order

H. Modification of Order

Purpose: Provision H provides the conditions under which modifications to Order No. R9-2013-0001, as amended, may occur.

Discussion: Provision H allows for modifications to Order No. R9-2013-0001, as amended, for bases in addition to modifications (minor and major) allowed under the federal regulations at 40 CFR 122.62 and 122.63.

Modifications to the Order require re-opening the Order (see Water Code section 13223), subject to the requirements of 40 CFR 122.44, 122.62 to 122.64, and 124.5, but only for the specific provisions subject to the modification. Proposed modifications of the Order will be made available for public review, a public notice and comment period, and a public hearing if requested. Comments on the provisions not subject to the proposed modifications are not required to be considered in the San Diego Water Board's responses to comments or during the public hearing.

Provision H.4 was included to specify that the Order will be re-opened for modifications if the Basin Plan is amended to modify an existing TMDL or incorporate a new TMDL, or the monitoring and assessment program requirements need to be updated or revised.

I. Standard Permit Provisions and General Provisions

Purpose: Provision I incorporates the standard permit provisions required to be included in all NPDES permits, as well as several other general provisions.

Discussion: Provision I refers to Attachment B to the Order. Attachment B expressly incorporates the conditions applicable to all NPDES permits as provided under 40 CFR 122.41(a)-(n), as well as the applicable conditions for MS4s and storm water discharges provided under 40 CFR 122.42(c) and 40 CFR 122.42(d), respectively. Attachment B also includes several general provisions that are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board.

IX. ATTACHMENTS

The attachments to the Order are discussed below. The discussions describe the content of the attachments.

Attachment A – Discharge Prohibitions and Special Protections

Section 1 of Attachment A includes the Waste Discharge Prohibitions from the Basin Plan. They have been provided verbatim in their entirety.

Section 2 of Attachment A includes the "*Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges*" applicable to permitted point source discharges of storm water, adopted under State Water Board Resolution No. 2012-0012, as amended by Resolution No. 2012-0031. The terms, prohibitions, and special conditions (collectively referred to as special conditions) are established as limitations on point source storm water discharges. These special conditions provide Special Protections for marine aquatic life and natural water quality in ASBS, as required for State Water Quality Protection Areas pursuant to California Public Resources Code sections 36700(f) and 36710(f). These Special Protections were adopted by the State Water Board as part of the Ocean Plan General Exception.

Attachment B – Standard Permit Provisions and General Provisions

Conditions applicable to all NPDES permits, as required under 40 CFR 122.41, and conditions applicable to MS4s and storm water discharges, as required under 40 CFR 122.42(c) and 122.42(d), respectively are provided in Attachment B to the Order. They have been provided expressly in their entirety.

In addition to the standard provisions required to be incorporated into the Order and NPDES permit pursuant to 40 CFR 122.41 and 40 CFR 122.42, several other general provisions apply to this Order. These general provisions are typically included in or applicable to waste discharge requirements issued by the San Diego Water Board. Many of the general provisions were developed by the State Water Board. Where a general provision is derived from statute or regulation, a citation of the statute or regulation section is provided. General provisions that do not provide a citation are included under the authority provided CWC 13377.

Attachment C – Acronyms, Abbreviations and Definitions

The acronyms and abbreviations that are used in the Order are provided in Attachment C. Attachment C also includes definitions that may provide an explanation or description of the meaning or intent of specific terms or phrases included in the Order.

Attachment D – Jurisdictional Runoff Management Program Annual Report Form

An example of the Jurisdictional Runoff Management Program Annual Report Form required to be submitted by each Copermittee as part of the Annual Reports required under Provision F.3.b.(1)(e) is provided as Attachment D to the Order. An electronic version of the form will be available from the San Diego Water Board after the adoption of the Order.

The Jurisdictional Runoff Management Program Annual Report Form includes the minimum information necessary to demonstrate that the Copermittee is implementing and in compliance with the requirements of Provision E, and includes much of the information required to be reported pursuant to 40 CFR 122.42(c).

The information that must be provided on the Jurisdictional Runoff Management Program Annual Report Form is limited to the fiscal year, which begins July 1 and ends June 30 of the following year. The information expected to be provided by the Copermittees in each section of the Jurisdictional Runoff Management Program Annual Report Form is discussed below.

I. COPERMITTEE INFORMATION

The name of the Copermittee (e.g. name of city, county, or special district) and the contact information for the storm water program manager are provided under this section.

II. LEGAL AUTHORITY

The Copermittee must confirm whether or not the legal authorities under Provision E.1.a have been established for itself within its jurisdiction.

The Copermittee must also confirm whether or not a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative has certified that the Copermittee obtained and maintains adequate legal authority, as required under Provision E.1.b. The certification statement required by Provision E.1.b is only required to be submitted with the first Annual Report required under Provision F.3.b.

III. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM DOCUMENT UPDATE

The Copermittee must inform the San Diego Water Board whether or not an update to its jurisdictional runoff management program document was required or recommended by the San Diego Water Board during the reporting period. An update to the jurisdictional runoff management program is required under Provision F.2.a. The San Diego Water Board may recommend modifications to the jurisdictional runoff management program as part of the iterative approach and adaptive management process required under Provision B.5, which may result in an update that is necessary for the Copermittee's jurisdictional runoff management document.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a

schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

IV. ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM

The Copermittee must confirm whether or not a program was implemented during the fiscal year to actively detect and eliminate illicit discharges and connections in accordance with the requirements under Provision E.2.

In addition to confirming that a program to detect and eliminate illicit discharges was implemented during the reporting period, the Copermittee is also required to report on several items related to the program. The information that must be reported is limited to the fiscal year for the Annual Report.

All non-storm water discharges are considered illicit discharges unless the source is identified as one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5). If a non-storm water discharge is identified as one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5), the discharge is a non-storm water discharge, but not an illicit discharge. If a non-storm water discharge is identified but not in one of the categories on non-storm water discharges under Provisions E.2.a.(1)-(5), the discharge is both a non-storm water discharge and an illicit discharge.

V. DEVELOPMENT PLANNING PROGRAM

The Copermittee must confirm whether or not a development planning program was implemented during the fiscal year in accordance with the requirements under Provision E.3.

The Copermittee must also inform the San Diego Water Board whether or not an update to its BMP Design Manual was required or recommended by the San Diego Water Board during the fiscal year. An update to the BMP Design Manual is required under Provision F.2.b. The San Diego Water Board may recommend modifications to the BMP Design Manual, which may result in an update that is necessary for Copermittee's the BMP Design Manual.

If an update was required or recommended, the Copermittee must confirm whether or not the update was completed and made available on the Regional Clearinghouse within the reporting period. If no update was required or recommended, an answer is not required. If the answer is NO, meaning the required or recommended update was not completed and/or made available on the Regional Clearinghouse, the Copermittee must attach a schedule for the completion of the update and/or posting of the updated document on the Regional Clearinghouse.

The Copermittee is also required to report on several items related to the program. For the development and redevelopment projects that are reviewed under the program, the Copermittee must report the total number projects submitted for review during the fiscal year. Of those projects, the Copermittee must report the number that are Priority Development Projects, as defined under Provision E.3.b.(1). The Copermittee must also report the number of Priority Development Projects that were approved and/or granted occupancy during the fiscal year, regardless of when the project was originally submitted for review. Any projects that were approved during the fiscal year and granted any

exemptions from the BMP Design Manual requirements and/or allowed to implement alternative compliance options in accordance with Provision E.3.c.(3) must be reported.

Finally, the Copermittee must also report on several items related to its oversight of permanent BMPs on Priority Development Projects within its jurisdiction, as required under Provision E.3.e. The information that must be reported is limited to the fiscal year for the Annual Report.

VI. CONSTRUCTION MANAGEMENT PROGRAM

The Copermittee must confirm whether or not a construction management program was implemented during the fiscal year in accordance with the requirements under Provision E.4.

The Copermittee is also required to report on several items related to its oversight construction projects within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report.

VII. EXISTING DEVELOPMENT MANAGEMENT PROGRAM

The Copermittee must confirm whether or not an existing development management program was implemented during the fiscal year in accordance with the requirements under Provision E.5.

The Copermittee is also required to report on several items related to its oversight in areas of existing development within its jurisdiction. The information that must be reported is limited to the fiscal year for the Annual Report. The information must also be separated into four categories of existing development: municipal, commercial, industrial, and residential.

VIII. PUBLIC EDUCATION AND PARTICIPATION

The Copermittee must confirm whether or not a public education program component was implemented during the fiscal year in accordance with the requirements under Provision E.7.a.

The Copermittee must also confirm whether or not a public participation program component was implemented during the fiscal year in accordance with the requirements under Provision E.7.b.

IX. FISCAL ANALYSIS

The Copermittee must confirm a summary of its fiscal analysis, conducted in accordance with the requirements under Provision E.8, has been attached to the form.

X. CERTIFICATION

A Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative must sign and certify the Jurisdictional Runoff Management Program Annual Report Form. The appropriate box must be checked to indicate the whether a Principal Executive Officer, Ranking Elected Official, or Duly Authorized Representative is signing the form.

Attachment E – Specific Provisions for Total Maximum Daily Loads

Attachment E provides specific provisions for implementing the load allocations (LAs) and wasteload allocations (WLAs) of Total Maximum Daily Loads (TMDLs) adopted by the San Diego Water Board and approved by USEPA in which the Copermittees are identified as responsible for discharges subject to the requirements of the TMDLs. Federal regulations require that NPDES requirements incorporate water quality based effluent limitations (WQBELs) that must be consistent with the requirements and assumptions of any available WLAs,[46] which may be expressed as numeric effluent limitations, when feasible, and/or as a best management practice (BMP) program of expanded or better-tailored BMPs.[47] Where the TMDL includes WLAs that provide numeric pollutant load or pollutant parameter objectives, the WLA has been, where feasible, translated into numeric WQBELs.[48]

For each TMDL in Attachment E, four sections are included:

a. Applicability: This section provides the resolution under which the TMDL Basin Plan amendment was adopted and approved, with the applicable adoption and approval dates. This section also gives the effective date of the TMDL and where the TMDL is applicable (i.e. Watershed Management Area and water body). The Copermittees that are responsible for implementing the specific provisions are also given in this section.

b. Final TMDL Compliance Requirements: For each TMDL, the final TMDL compliance requirements consist of the final TMDL compliance date(s), the final WQBELs, and the final TMDL compliance determination requirements. The final WQBELs are expressed in terms of receiving water limitations, effluent limitations, and/or best management practices (BMPs). The final WQBELs for the TMDLs are incorporated by reference into Provision A of the Order. The final WQBELs become enforceable when the final TMDL compliance dates have passed. Applicable BMPs within the final WQBELs must be incorporated into the Water Quality Improvement Plans. Compliance with the final WQBELs will be determined in accordance with the options provided under the final TMDL compliance determination requirements.

c. Interim TMDL Compliance Requirements: If the final TMDL compliance date has not passed and there are interim TMDL compliance requirements, they are included in this section. If there are interim WQBELs with interim compliance dates, the interim WQBELs become enforceable when the corresponding interim compliance dates have passed. Compliance with the interim WQBELs will be determined in accordance with the options provided under the interim TMDL compliance determination requirements.

d. Specific Monitoring and Assessment Requirements: If there are specific monitoring and assessment requirements that cannot be met with the monitoring and assessment program

[46] 40 CFR 122.44(d)(1)(vii)(B)
[47] 40 CFR 122.44(k)(2) and 40 CFR 122.44(k)(3)
[48] November 26, 2014 Memorandum from the USEPA, Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLA""

requirements under Provision D of the Order, the additional requirements are included in this section.

The requirements of the TMDLs are based on and consistent with the assumptions and requirements of any available adopted and approved TMDLs that have been incorporated into the Basin Plan. Modifications to the requirements for the TMDLs in Attachment E cannot be made unless the TMDLs are modified in the Basin Plan.

A modification to any aspect of a TMDL in the Basin Plan requires a Basin Plan amendment. A Basin Plan amendment to modify a TMDL will require the San Diego Water Board to adopt a resolution to amend the Basin Plan, which includes a separate public process. When the San Diego Water Board adopts a Basin Plan amendment, it subsequently requires approval from the State Water Board, the Office of Administrative Law, and the USEPA before it becomes effective.

If and when the TMDLs are a modified in the Basin Plan, the San Diego Water Board will revise the requirements of the Order in accordance with the Basin Plan amendment. When a Basin Plan amendment to modify a TMDL becomes effective, the San Diego Water Board will modify the requirements of the Order pursuant to the requirements of Provision H.4 of the Order as soon as possible.

TAB 2

California Regional Water Quality Control Board
San Diego Region

Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region

Order No. R9-2010-0016
NPDES No. CAS0108766

November 10, 2010

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
9174 Sky Park Court, Suite 100, San Diego, California 92123-4340
Phone • (858) 467-2952 • Fax (858) 571-6972
http://www.waterboards.ca.gov/sandiego

To request copies of the Riverside County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: http://www.waterboards.ca.gov/sandiego

Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on
November 10, 2010

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
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STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor
LINDA S. ADAMS, Agency Secretary, California Environmental Protection Agency

California Regional Water Quality Control Board
San Diego Region

Grant Destache, *Vice Chair*	Industrial Water Use
Eric Anderson	Irrigated Agriculture
Wayne Rayfield	Water Quality
George Loveland	Water Supply
Marc Luker	Undesignated (Public)
Gary Strawn	Recreation / Wildlife
Bill Green	Water Quality

David W. Gibson, *Executive Officer*
James Smith, *Assistant Executive Officer*

This permit was prepared under the direction of

David T. Barker, P.E., *Supervising Water Resource Control Engineer, Surface Water Basins Branch*
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by

Benjamin Isaac Neill, *Water Resource Control Engineer*
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Wayne Chiu, P.E., *Water Resource Control Engineer*

Table of Contents

The California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board), finds that:

A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000), applicable State and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State Water Board), the Water Quality Control Plan for the San Diego Basin adopted by the San Diego Water Board (Basin Plan), the California Toxics Rule, and the California Toxics Rule Implementation Plan.

2. This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108766, which was first adopted by the San Diego Water Board on July 16, 1990 (Order No. 90-38), and then reissued on May 13, 1998 (Order No. 98-02). On May 26, 1998, the United States Environmental Protection Agency (USEPA), Region IX, objected to Order No. 98-02 due to concerns regarding Receiving Water Limitations (RWL) language. The USEPA concluded that the RWL language in the permit did not comply with the CWA and its implementing regulations. On April 27, 1999, the USEPA reissued the MS4 permit, which the San Diego Water Board adopted as Addendum No. 1 to Order No. 98-02 on November 8, 2000. On July 14, 2004, the San Diego Water Board adopted the third term MS4 permit, Order No. R9-2004-001. On January 15, 2009, the Riverside County Flood Control and Water Conservation District (RCFCD), as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.

3. This Order is consistent with the following precedential Orders adopted by the State Water Board addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, and Order WQO 2002-0014.[1]

[1] In July 2010, the court in Los Angeles County v. State Water Resources Control Board remanded the Los Angeles Water Board's MS4 permit underlying Order WQ 2009-0008 for procedural reasons occurring during the permit adoption process. The court did not evaluate or rule upon the substantive findings and reasoning set forth in Order WQ 2009-0008. The State Water Board rescinded and voided Order WQ 2009-0008 to comply with the court's order. While the San Diego Water Board may no longer cite Order WQ 2009-0008, the San Diego Water Board has independently considered whether the requirement to eliminate non-storm water discharges is subject to the MEP standard. The San Diego Water Board concludes that the MEP standard does not apply to non-storm water discharges for the same reasons expressed by the State Water Board.

4. The Fact Sheet / Technical Report for the Order No. R9-2010-0016, NPDES No. CAS0108766, Waste Discharge Requirements for Discharges from the MS4s Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region, includes cited regulatory and legal references and additional explanatory information and data in support of the requirements of this Order. This information, including any supplements thereto, is hereby incorporated by reference into these findings.

B. REGULATED PARTIES

Each of the persons in Table 1 below, hereinafter called Copermittees or dischargers, owns or operates an MS4, through which it discharges into waters of the United States (U.S.) within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 that contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the U.S.

Table 1. Municipal Copermittees

1. City of Murrieta	4. County of Riverside
2. City of Temecula	5. Riverside County Flood Control and Water Conservation District
3. City of Wildomar	

The Cities of Murrieta, Menifee and Wildomar also discharge into the waters of the U.S. in the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board), so are located partially within both the San Diego and Santa Ana Water Board boundaries. Water Code (WC) section 13228 provides a way to streamline the regulation of entities whose jurisdictions straddle the border of two or more Regions. WC section 13228 is implemented in this Order to ease the regulatory burden on Storm Water Agencies and Municipalities that lie in both the San Diego Water Board and the adjacent Santa Ana Water Board's jurisdiction. As allowed by California Water Code (CWC) §13228, the Cities of Murietta, Menifee, and Wildomar submitted written requests to be regulated for MS4 purposes under a permit adopted by only one Water Board. As authorized by CWC §13228 and pursuant to written agreements dated September 28, 2010 between the San Diego Water Board and the Santa Ana Water Board, the Cities of Murrieta and Wildomar are wholly regulated by the San Diego Water Board under this Order, including those portions of the Cities jurisdiction not within the San Diego Water Board's region. Similarly, the City of Menifee is wholly regulated by the Santa Ana Water Board under Order No. R8-2010-0033, including those portions of the City of Menifee within the San Diego Water Board's region.

C. DISCHARGE CHARACTERISTICS

1. Discharges from the MS4 contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the State. The discharge from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.

2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Basin Plan. Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the Basin Plan for point source discharges.

3. The most common categories of pollutants in runoff include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., copper, lead, zinc and cadmium), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), detergents, and trash.

4. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.

5. Pollutants in runoff can threaten and adversely affect human health. Human illnesses have been clearly linked to recreating near storm drains flowing to receiving waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.

6. Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.

7. The Copermittees discharge runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (Santa Margarita Hydrologic Unit) comprising the San Diego Region as shown in Table 2. Some of the receiving water bodies have been designated as impaired by the San Diego Water Board in 2009 pursuant to CWA section 303(d).

Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters in the San Diego Region.

Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the Santa Margarita Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/Stressor or Water Quality Effect[2]
DeLuz Creek HSA (902.21)	De Luz Creek	Iron, Manganese, Nitrogen, Sulfates
Murrieta HSA (902.32)	Long Canyon Creek (tributary to Murrieta Creek)	Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese
Wolf HSA (902.52)	Murrieta Creek	Chlorpyrifos, Copper, Iron, Manganese, Nitrogen, Toxicity
Pauba HSA (902.51)	Redhawk Channel	Chlorpyrifos, Copper, Diazinon, E. Coli, Fecal Coliform, Iron, Manganese, Nitrogen, Phosphorus, Total Dissolved Solids
Gavilan HSA (902.22)	Sandia Creek	Iron, Sulfates
Gertrudis HSA (902.42)	Santa Gertrudis Creek	Chlorpyrifos, Copper, E. Coli, Fecal Coliform, Iron, Phosphorous
Lower Ysidora HSA (902.11)	Santa Margarita Lagoon	Eutrophic
Lower Ysidora HSA (902.11)	Santa Margarita River (Lower)	Enterococcus, Fecal Coliform, Phosphorus, Total Nitrogen as N
Gavilan HSA (902.22)	Santa Margarita River (Upper)	Toxicity
Pauba HSA (902.51)	Temecula Creek	Chlorpyrifos, Copper, Phosphorus, Total Dissolved Solids, Toxicity
French HSA (902.33)	Warm Springs Creek (Riverside County)	Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese, Phosphorus, Total Nitrogen as N

[2] The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2008 Section 303(d) List of Water Quality Limited Segments.

8. Trash is a persistent pollutant that can enter receiving waters from the MS4, accumulate, and be transported downstream into receiving waters over time. Trash poses a serious threat to the beneficial uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.

9. The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Riverside County.

10. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

11. Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.

12. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant loads than other, more sensitive areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional controls to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.

13. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.

14. Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal ... *Stormwater Discharges* (emphasis added)" from the MS4. Rather, non-storm water discharges into the storm sewers, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the CWA.

15. Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See Vol. 55 Fed. Reg. 48037). The San Diego Water Board and the Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S.

D. RUNOFF MANAGEMENT PROGRAMS

1. General

a. This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in storm water to the MEP. However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermittees' runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region.

b. The Copermittees have generally been implementing the jurisdictional runoff management programs (JRMPs) required pursuant to Order No. R9-2004-001 since July 14, 2005. Prior to that, the Copermittees were regulated by Order No. 98-02, since May 13, 1998. MS4 discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees' monitoring results.

c. This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Water Quality Workplan (Watershed Workplan) section, are designed to specifically address high priority water quality problems. Other requirements, such as for unpaved roads, are a result of San Diego Water Board's identification of water quality problems through investigations and complaints during the previous permit period. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other San Diego Water Board compliance assessment activities. Additional changes in the monitoring program provide consistency with the Code of Federal Regulations, USEPA guidance, State Water Board guidance, and the Southern California Monitoring Coalition recommendations.

d. Updated individual Storm Water Management Plans (Individual SWMP or JRMP), and Watershed Stormwater Management Plans (watershed SWMPs or Watershed Workplans), which, together with references in the DAMP, describe the Copermittees' runoff management programs in their entirety, are needed to guide the Copermittees' runoff management efforts and aid the Copermittees in tracking runoff management program implementation. Hereinafter, the individual SWMP is referred to as the JRMPs and the Watershed SWMP is referred to as the Watershed Workplan. It is practicable for the Copermittees to update the

JRMPs and Watershed Workplans within the timeframe specified in this Order, since significant efforts to develop these programs have already occurred.

e. Pollutants can be effectively reduced in storm water runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Pollution prevention is the reduction or elimination of pollutant generation at its source and is the best "first line of defense." Source control BMPs (both structural and non-structural) minimize the contact between pollutants and flows (e.g., rerouting run-on around pollutant sources or keeping pollutants on-site and out of receiving waters). Treatment control BMPs remove pollutants that have been mobilized by wet-weather or dry-weather flows.

f. Runoff needs to be addressed during the three major phases of urban development (planning, construction, and use) in order to reduce the discharge of pollutants from storm water to the MEP, effectively prohibit non-storm water discharges and protect receiving waters. Development which is not guided by water quality planning policies and principles can unnecessarily result in increased pollutant load discharges, flow rates, and flow durations which can negatively impact receiving water beneficial uses. Construction sites without adequate BMP implementation result in sediment runoff rates which greatly exceed natural erosion rates of undisturbed lands, causing siltation and impairment of receiving waters. Existing development generates substantial pollutant loads which are discharged in runoff to receiving waters.

g. Annual reporting requirements included in this Order are necessary to meet federal requirements and to evaluate the effectiveness and compliance of the Copermittees' programs.

h. This Order establishes Storm Water Action Levels (SALs) for selected pollutants based on USEPA Rain Zone 6 (arid southwest) Phase I MS4 monitoring data for pollutants in storm water. The SALs were computed as the 90th percentile of the data set, utilizing the statistical based population approach, one of three approaches recommended by the State Water Board's Storm Water Panel in its report, 'The Feasibility of Numerical Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 2006). SALs are identified in Section D of this Order. Copermittees must implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the SALs. Exceedance of SALs may indicate inadequacy of programmatic measures and BMPs required in this Order.

2. Development Planning

a. The Standard Storm Water Mitigation Plan (SSMP) requirements contained in this Order are consistent with Order WQ-2000-11 adopted by the State Water Board on October 5, 2000. In the precedential order, the State Water Board

found that the design standards, which essentially require that runoff generated by 85 percent of storm events from specific development categories be infiltrated or treated, reflect the MEP standard. The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories that are also contained in Section F.1 of this Order. The State Water Board also gave California Regional Water Quality Control Boards (Regional Water Boards) the needed discretion to include additional categories and locations, such as retail gasoline outlets (RGOs), in SSMPs.

b. Controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. (2) Whereas, onsite source control BMPs can be applied during all runoff conditions end-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.

c. Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit projects can be an effective means for minimizing the impact of storm water runoff discharges from the development projects on receiving waters. LID is a site design strategy with a goal of maintaining or replicating the pre-development hydrologic regime through the use of design techniques. LID site design BMPs help preserve and restore the natural hydrologic cycle of the site, allowing for filtration and infiltration which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff. Current runoff management, knowledge, practices and technology have resulted in the use of LID BMPs as an acceptable means of meeting the storm water MEP standard.

d. RGOs are significant sources of pollutants in storm water runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas.

e. Industrial sites are significant sources of pollutants in runoff. Pollutant concentrations and loads in runoff from industrial sites are similar or exceed pollutant concentrations and loads in runoff from other land uses, such as commercial or residential land uses. As with other land uses, LID site design,

source control, and treatment control BMPs are needed at industrial sites in order to meet the MEP standard. These BMPs are necessary where the industrial site is larger than 10,000 square feet. The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California.

f. If not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors (e.g. mosquitoes and rodents). Proper BMP design and maintenance to avoid standing water, however, can prevent the creation of vector habitat. Nuisances and public health impacts resulting from vector breeding can be prevented with close collaboration and cooperative effort between municipalities, local vector control agencies, and the California Department of Public Health during the development and implementation of runoff management programs.

g. The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and beneficial uses of local receiving waters.

3. Construction and Existing Development

a. In accordance with federal NPDES regulations and to ensure the most effective oversight of industrial and construction site discharges, discharges of runoff from industrial and construction sites are subject to dual (State and local) storm water regulation. Under this dual system, each Copermittee is responsible for enforcing its local permits, plans, and ordinances, and the San Diego Water Board is responsible for enforcing the General Construction Activities Storm Water Permit, State Water Board Order 2009-0009-DWQ, NPDES No. CAS000002 (General Construction Permit) and the General Industrial Activities Storm Water Permit, State Water Board Order 97-03 DWQ, NPDES No. CAS000001 (General Industrial Permit) and any reissuance of these permits. NPDES municipal regulations require that municipalities develop and implement measures to address runoff from industrial and construction activities. Those measures may include the implementation of other BMPs in addition to those BMPs that are required under the statewide general permits for activities subject to both State and local regulation.

b. Identification of sources of pollutants in runoff (such as municipal areas and activities, industrial and commercial sites/sources, construction sites, and residential areas), development and implementation of BMPs to address those sources, and updating ordinances and approval processes are necessary for the Copermittees to ensure that discharges of pollutants from its MS4 in storm water are reduced to the MEP and that non-storm water discharges are not occurring. Inspections and other compliance verification methods are needed to ensure minimum BMPs are implemented. Inspections are especially important at areas that are at high risk for pollutant discharges.

c. Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Urban streams used in this manner are part of the municipalities' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the urban stream is both an MS4 and receiving water.

d. As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards.

e. Waste and pollutants which are deposited and accumulate in MS4 drainage structures will be discharged from these structures to waters of the U.S. unless they are removed. These discharges may cause or contribute to, or threaten to cause or contribute to, a condition of pollution in receiving waters. For this reason, pollutant discharges from storm water into MS4s must be reduced using a combination of management measures, including source control and an effective MS4 maintenance program implemented by each Copermittee.

f. Enforcement of local runoff related ordinances, permits, and plans is an essential component of every runoff management program and is specifically required in the federal storm water regulations and this Order. Each Copermittee is individually responsible for adoption and enforcement of ordinances and/or policies, implementation of identified control measures/BMPs needed to prevent or reduce pollutants in storm water runoff, and for the allocation of funds for the capital, operation and maintenance, administrative, and enforcement expenditures necessary to implement and enforce such control measures/BMPs under its jurisdiction. Education is an important aspect of every effective runoff management program and the basis for changes in behavior at a societal level. Education of municipal planning, inspection, and maintenance department staffs is especially critical to ensure that in-house staffs understand how their activities impact water quality, how to accomplish their jobs while protecting water quality, and understand their specific roles and responsibilities for compliance with this

Order. Public education, designed to target various urban land users and other audiences, is also essential to inform the public of how individual actions affect receiving water quality and how adverse effects can be minimized.

g. Public participation during the development of runoff management programs is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered.

h. Retrofitting existing development with storm water treatment controls, including LID, is necessary to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Although SSMP BMPs are required for redevelopment, the current rate of redevelopment will not address water quality problems in a timely manner. Cooperation with private landowners is necessary to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.

4. Watershed Runoff Management

a. Since runoff within a watershed can flow from and through multiple land uses and political jurisdictions, watershed-based runoff management can greatly enhance the protection of receiving waters. Such management provides a means to focus on the most important water quality problems in each watershed. By focusing on the most important water quality problems, watershed efforts can maximize protection of beneficial use in an efficient manner. Effective watershed-based runoff management actively reduces pollutant discharges and abates pollutant sources causing or contributing to watershed water quality problems. Watershed-based runoff management that does not actively reduce pollutant discharges and abate pollutant sources causing or contributing to watershed water quality problems can necessitate implementation of the iterative process outlined in section A.3 of this Order. Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions. In some cases, however, this added flexibility provides more, and possibly more effective, alternatives for minimizing waste discharges. Watershed management requires the Copermittees within a watershed to develop a watershed-based management strategy, which can then be implemented on a jurisdictional basis.

b. Some runoff issues, such as general education and training, can be effectively addressed on a regional basis. Regional approaches to runoff management can improve program consistency and promote sharing of resources, which can result in implementation of more efficient programs.

c. It is important for the Copermittees to coordinate their water quality protection and land use planning activities to achieve the greatest protection of receiving water bodies. Copermittee coordination with other watershed stakeholders, especially the State of California Department of Transportation, the U.S. federal government, sovereign American Indian tribes, and water and sewer districts, is also important.

E. STATUTE AND REGULATORY CONSIDERATIONS

1. The RWL language specified in this Order is consistent with language recommended by the USEPA and established in State Water Board Order WQ-99-05, *Own Motion Review of the Petition of Environmental Health Coalition to Review Waste Discharge Requirements Order No. 96-03, NPDES Permit No. CAS0108740*, adopted by the State Water Board on June 17, 1999. The RWL language in this Order requires compliance with water quality standards, which for storm water discharges is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time. Compliance with receiving water limits based on applicable water quality standards is necessary to ensure that MS4 discharges will not cause or contribute to violations of water quality standards and the creation of conditions of pollution, contamination, or nuisance.

2. The Basin Plan, identifies the following existing and potential beneficial uses for surface waters in Riverside County: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Hydropower Generation (POW), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Spawning, Reproduction and/or Early Development (SPWN) and Preservation of Biological Habitats of Special Significance (BIOL).

3. This Order is in conformance with State Water Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*, and the federal Antidegradation Policy described in 40 CFR 131.12.

4. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The adoption and implementation of this NPDES permit relieves the Copermittee from developing a non-point source plan, for the urban category, under CZARA. The San Diego Water Board addresses septic systems through the administration of other programs.

5. Section 303(d)(1)(A) of the CWA requires that "Each state shall identify those waters within its boundaries for which the effluent limitations...are not stringent enough to implement any water quality standard (WQS) applicable to such waters." The CWA also requires states to establish a priority ranking of impaired water bodies known as Water Quality Limited Segments and to establish Total Maximum Daily Loads (TMDLs) for such waters. This priority list of impaired water bodies is called the Section 303(d) List. The 2006 Section 303(d) List was approved by the State Water Board on October 25, 2006. On June 28, 2007, the 2006 303(d) List for California was given final approval by the USEPA. The 303(d) List was recently updated, and on December 16, 2009, the 2008 303(d) List was approved by the San Diego Water Board. The 2008 303(d) List for the San Diego Region was approved by the State Water Board on August 4, 2010. The 2008 303(d) List is awaiting USEPA approval.

6. This Order does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution for several reasons, including, but not limited to, the following. First, this Order implements federally mandated requirements under CWA §402. (33 U.S.C. § 1342(p)(3)(B).) Second, the local agency Copermittees' obligations under this Order are similar to, and in many respects less stringent than, the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges. Third, the local agency Copermittees have the authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. Fourth, the Copermittees have requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA §301, subdivision (a) (33 U.S.C. § 1311(a)) and in lieu of numeric restrictions on their MS4 discharges (i.e. effluent limitations). Fifth, the local agencies' responsibility for preventing discharges of waste that can create conditions of pollution or nuisance from conveyances that are within their ownership or control under State law predates the enactment of Article XIIIB, Section (6) of the California Constitution. Likewise, the provisions of this Order to implement TMDLs are federal mandates. The CWA requires TMDLs to be developed for water bodies that do not meet federal water quality standards. (33 U.S.C. sec. 1313(d).) Once the USEPA or a state develops a TMDL, federal law requires that permits must contain effluent limitations consistent with the assumptions of any applicable wasteload allocation. (40 C.F.R. sec. 122.44(d)(1)(vii)(B).)

7. Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters. Treatment BMPs must not be constructed in waters of the U.S. or State unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. Authorizing the construction of an runoff treatment facility within a water of the U.S., or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the

construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. Without federal authorization (e.g., pursuant to CWA § 404), waters of the U.S. may not be converted into, or used as, waste treatment or conveyance facilities. Similarly, waste discharge requirements pursuant to CWC §13260 are required for the conversion or use of waters of the State as waste treatment or conveyance facilities. Diversion from waters of the U.S./State to treatment facilities and subsequent return to waters of the U.S. is allowable, provided that the effluent complies with applicable NPDES requirements.

8. The issuance of waste discharge requirements and an NPDES permit for the discharge of runoff from MS4s to waters of the U.S. is exempt from the requirement for preparation of environmental documents under the California Environmental Quality Act (CEQA) (Public Resources Code, Division 13, Chapter 3, section 21000 et seq.) in accordance with the CWC section 13389.

9. Storm water discharges from developed and developing areas in Riverside County are significant sources of certain pollutants that cause, may be causing, threatening to cause or contributing to water quality impairment in the waters of Riverside County. Furthermore, as delineated in the CWA section 303(d) list in Table 2, the San Diego Water Board has found that there is a reasonable potential that municipal storm water and non-storm water discharges from MS4s cause or may cause or contribute to an excursion above water quality standards for the following pollutants: Indicator Bacteria (including Fecal Coliform and E. Coli), Copper, Manganese, Iron, Chlorpyrifos, Diazinon, Sulfates, Phosphorous, Nitrogen, Total Dissolved Solids (TDS), and Toxicity. In accordance with CWA section 303(d), the San Diego Water Board is required to establish TMDLs for these pollutants to these waters to eliminate impairment and attain water quality standards. Therefore, certain early pollutant control actions and further pollutant impact assessments by the Copermittees are warranted and required pursuant to this Order.

10. This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2004-0001, and there are others expected to be present in dry weather non-storm water discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather discharges from the MS4. The non-storm water action levels are designed to ensure that the Order's requirement to effectively prohibit all types of unauthorized discharges of non-storm water into the MS4 is being complied with. Non-storm water action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the State Water Board's Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level

requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of a non-storm water action level (NAL or action level) is a violation of this Order. The San Diego Water Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.

11. In addition to federal regulations cited in the Fact Sheet / Technical Report for the Order No. R9-2010-0016, monitoring and reporting required under Order No. R9-2010-0016 is required pursuant to authority under CWC section 13383.

12. With this Order, the San Diego Water Board has completed the re-issuance of the fourth iteration of the Phase I MS4 NPDES Permits for the Copermittees in the portions of San Diego County, Orange County, and Riverside County within the San Diego Region. The NPDES Permit requirements issued to the Copermittees in each county have substantially the same core requirements such as discharge prohibitions, receiving water limitations, jurisdictional components, and monitoring. In addition, the Copermittees cooperate regionally to develop monitoring with the Southern California Stormwater Monitoring Coalition and to develop program effectiveness with the California Stormwater Quality Association. Regional programs could improve the Copermittees' compliance with other permit components such as development of the Hydromodification Management Plans and Retrofitting Existing Development with more consistent implementation and cost sharing. Re-issuing the NPDES Permit requirements within five years for three counties under three different permits requires the San Diego Water Board to expend significant time and resources for issuance of the permits through three separate public proceedings, thereby greatly reducing the time and resources available to oversee compliance. Multiple permits also create confusion for determining compliance among regulated entities, especially the land development community. The San Diego Water Board recognizes that issuing a single MS4 permit for all Phase I entities in the San Diego Region will provide consistent implementation, improve communication among agencies within watersheds crossing multiple jurisdictions, and minimize staff resources spent with each permit renewal. The San Diego Water Board plans to develop a single regional MS4 permit prior to the expiration of this Order that will transfer the Copermittees' enrollment to the regional permit upon expiration of this Order.

F. PUBLIC PROCESS

1. The San Diego Water Board has notified the Copermittees, all known interested parties, and the public of its intent to consider adoption of an Order prescribing waste discharge requirements that would serve to renew an NPDES permit for the existing MS4 discharges of pollutants in waters of the U.S.

2. The San Diego Water Board has held a public hearing on November 10, 2010 and heard and considered all comments pertaining to the terms and conditions of this Order.

IT IS HEREBY ORDERED that the Copermittees, in order to meet the provisions contained in Division 7 of the CWC and regulations adopted thereunder, and the provisions of the CWA and regulations adopted thereunder, must each comply with the following:

A. PROHIBITIONS AND RECEIVING WATER LIMITATIONS

1. Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC section 13050), in receiving waters of the state are prohibited.[3]

2. Storm water discharges from MS4s containing pollutants which have not been reduced to the MEP are prohibited.[3]

3. Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses, water quality objectives developed to protect beneficial uses, and the State policy with respect to maintaining high quality waters) are prohibited.

   a. Each Copermittee must comply with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order through timely implementation of control measures and other actions to reduce pollutants in storm water discharges in accordance with this Order, including any modifications. If exceedance(s) of water quality standards persist notwithstanding implementation of this Order, the Copermittee must assure compliance with section A.3 and section A.4 as it applies to Prohibition 5 in Attachment A of this Order by complying with the following procedure:

      (1) Upon a determination by either the Copermittee or the San Diego Water Board that storm water MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the Copermittee must notify the San Diego Water Board within 30 days and thereafter submit a report to the San Diego Water Board that describes best management practices (BMPs) that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report may be incorporated in the Annual Report unless the San Diego Water Board[4] directs an earlier submittal. The report must include an implementation

[3] This prohibition does not apply to MS4 discharges which receive subsequent treatment to reduce pollutants in storm water discharges to the MEP prior to entering receiving waters (e.g., low flow diversions to the sanitary sewer). Runoff treatment and/or mitigation must occur prior to the discharge of runoff into receiving waters per finding E.7.

[4] The San Diego Water Board by prior resolution has delegated all matters that may legally be delegated to its Executive Officer to act on its behalf pursuant to CWC §13223. Therefore, the Executive Officer is authorized to act on the San Diego Water Board's behalf on any matter within this Order unless such delegation is unlawful under CWC §13223 or this Order explicitly states otherwise.

schedule. The San Diego Water Board may require modifications to the report

(2) Submit any modifications to the report required by the San Diego Water Board within 30 days of notification;

(3) Within 30 days following acceptance of the report described above by the San Diego Water Board, the Copermittee must revise its JRMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required; and

(4) Implement the revised JRMP and monitoring program in accordance with the approved schedule.

b. The Copermittee must repeat the procedure set forth above to comply with the receiving water limitations for continuing or recurring exceedances of the same water quality standard(s) following implementation of scheduled actions unless directed to do otherwise by the San Diego Water Board's Executive Officer.

c. Nothing in section A.3 prevents the San Diego Water Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report.

4. In addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order.

B. NON-STORM WATER DISCHARGES

1. Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4 unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with sections B.2 and B.3 below.

2. The following categories of non-storm water discharges are not prohibited unless a Copermittee or the San Diego Water Board identifies the discharge category as a source of pollutants to waters of the U.S. Where the Copermittee(s) have identified a category as a source of pollutants, the category must be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The San Diego Water Board may identify categories of discharge that either require prohibition, or other controls for non-anthropogenic sources. For a discharge category determined to be a source of pollutants, the Copermittee, under direction of the San Diego Water Board, must either prohibit the discharge category or develop and implement appropriate control measures for non-anthropogenic sources to prevent the discharge of pollutants to the MS4 and report to the San Diego Water Board pursuant to Section K.1 and K.3 of this Order. The discharge categories are:

a. Diverted stream flows;
b. Rising ground waters;
c. Uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
d. Uncontaminated pumped ground water[5];
e. Foundation drains[5];
f. Springs;
g. Water from crawl space pumps[5];
h. Footing drains[5];
i. Air conditioning condensation;
j. Flows from riparian habitats and wetlands;
k. Water line flushing[6,7];
l. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
m. Individual residential car washing; and
n. Dechlorinated swimming pool discharges[8].

3. Emergency fire fighting flows (i.e., flows necessary for the protection of life or property) do not require BMPs and need not be prohibited.

a. As part of the JRMP, each Copermittee must develop and implement a program to address pollutants from non-emergency fire fighting flows (i.e., flows from controlled or practice blazes and maintenance activities) identified as significant sources of pollutants to waters of the U.S.

b. Building fire suppression system maintenance discharges (e.g. sprinkler line flushing) contain waste. Therefore, such discharges are to be prohibited by the Copermittees as illicit discharges through ordinance, order, or similar means.

4. Each Copermittee must examine all dry weather effluent analytical monitoring results collected in accordance with section F.4 of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in section B.2. Follow-up investigations must be conducted to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.

[5] Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.
[6] This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.
[7] Requires enrollment under Order R9-2002-0020.
[8] Excluding saline swimming pool discharges.

C. NON-STORM WATER DRY WEATHER ACTION LEVELS

1. Each Copermittee, beginning no later than July 1, 2012, must implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order.

2. In response to an exceedance of an NAL, the Copermittee(s) having jurisdiction must investigate and seek to identify the source of the exceedance in a timely manner. However, if any Copermittee identifies a number of NAL exceedances that prevents it from adequately conducting source investigations at all sites in a timely manner, then that Copermittee may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report its findings on all of the exceedances. Depending on the source of the pollutant exceedance, the Copermittee(s) having jurisdiction must take action as follows:

   a. If the Copermittee identifies the source of the exceedance as natural (non-anthropogenically influenced) in origin and in conveyance into the MS4; then the Copermittee must report its findings and documentation of its source investigation to the San Diego Water Board in its Annual Report.

   b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittee must eliminate the discharge to its MS4 pursuant to Section F.4.f and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the San Diego Water Board in the Annual Report. If the Copermittee is unable to eliminate the source of discharge prior to the Annual Report submittal, then the Copermittee must submit, as part of its Annual Report, its plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.

   c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit its findings including a description of the steps taken to address the discharge and the category of discharge, to the San Diego Water Board for review in its Annual Report. Such description must include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge, and the anticipated schedule for doing so. The Copermittees must also submit a summary of its findings with the Report of Waste Discharge.

   d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit

(e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the San Diego Water Board including all pertinent information regarding the discharger and discharge characteristics.

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must perform additional focused sampling. If the results of the additional sampling indicate a recurring exceedance of NALs with an unidentified source, then the Copermittee must update its programs within a year to address the common contributing sources that may be causing such an exceedance. The Copermittee's annual report must include these updates to its programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).

f. The Copermittees, or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.

3. NALs can help provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. An exceedance of an NAL does not alone constitute a violation of the provisions of this Order. An exceedance of an NAL may indicate a lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. Neither the absence of exceedances of NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must report in response to Section C.2 above, a description of whether and how the observed exceedances did or did not result in a discharge from the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.

4. Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL, or only has exceedances that are identified as natural in origin and conveyance into the MS4 pursuant to Section C.2.a, for 3 successive years may be replaced with a different station.

5. Each Copermittee must monitor for the non-storm water dry weather action levels, which are incorporated into this Order as follows:

Action levels for discharges to inland surface waters:

Table 3.a: General Constituents

Parameter	Units	AMAL	MDAL	Instantaneous Maximum	Basis
Fecal Coliform	MPN/ 100 ml	200[A] 400[B]	-		BPO
Enterococci	MPN/ 100 ml	33	-	61[C]	BPO
Turbidity	NTU	-	20		BPO
pH	Units	Within limit of 6.5 to 8.5 at all times			BPO
Dissolved Oxygen	mg/L	Not less than 5.0 in WARM waters and not less than 6.0 in COLD waters			BPO
Total Nitrogen	mg/L	-	1.0	See MDAL	BPO
Total Phosphorus	mg/L	-	0.1	See MDAL	BPO
Methylene Blue Active Substances	mg/L	-	0.5	See MDAL	BPO
Iron	mg/L	-	0.3	See MDAL	BPO
Manganese	mg/L	-	0.05	See MDAL	BPO

A – Based on a minimum of not less than five samples for any 30-day period
B – No more than 10 percent of total samples may exceed 400 per 100 ml during any 30 day period
C – This Value has been set to Basin Plan Criteria for Designated Beach Areas
BPO – Basin Plan Objective
MDAL – Maximum Daily Action Level
AMAL – Average Monthly Action Level

Table 3.b: Priority Pollutants

		Freshwater (CTR)	
Parameter	Units	MDAL	AMAL
Cadmium	ug/L	**	**
Copper	ug/L	*	*
Chromium III	ug/L	**	**
Chromium VI (hexavalent)	ug/L	16	8.1
Lead	ug/L	*	*
Nickel	ug/L	**	**
Silver	ug/L	*	*
Zinc	ug/L	*	*

CTR – California Toxic Rule
*- Action Levels developed on a case-by-case basis (see below)
**- Action Levels developed on a case-by-case basis (see below), but calculated criteria are not to exceed Maximum Contaminant Levels under the California Code of Regulations[9]

[9] California Code of Regulations, Title 22, Division 4, Chapter 15, Article 4, Section 64431.

The NALs for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

Cadmium (Total Recoverable)	= exp(0.7852[ln(hardness)] -2.715)
Chromium III (Total Recoverable)	= exp(0.8190[ln(hardness)] + .6848)
Copper (Total Recoverable)	= exp(0.8545[ln(hardness)] - 1.702)
Lead (Total Recoverable)	= exp(1.273[ln(hardness)] - 4.705)
Nickel (Total Recoverable)	= exp(.8460[ln(hardness)] + 0.0584)
Silver (Total Recoverable)	= exp(1.72[ln(hardness)] - 6.52)
Zinc (Total Recoverable)	= exp(0.8473[ln(hardness)] + 0.884)

D. STORM WATER ACTION LEVELS

1. The Copermittees must implement the Wet Weather MS4 Discharge Monitoring as described in Attachment E of this Order, and beginning three years after the Order adoption date, the Copermittees must annually evaluate their data compared to the Stormwater Action Levels (SALs). At each monitoring station, a running average of twenty percent or greater of exceedances of any discharge of storm water from the MS4 to waters of the U.S. that exceed the SALs for each of the pollutants listed in Table 4 (below) requires the Copermittee(s) having jurisdiction to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutants(s) to the MEP. The Copermittees must utilize the exceedance information when adjusting and executing annual work plans, as required by this Order. Copermittees must take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when prioritizing and reacting to SAL exceedances in an iterative manner. Failure to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not reduced pollutants in storm water discharges to the MEP.

Table 4. Storm Water Action Levels

Pollutant	Action Level
Turbidity (NTU)	126
Nitrate & Nitrite total (mg/L)	2.6
P total (mg/L)	1.46
Cd total (µg/L)	3.0
Cu total (µg/L)	127
Pb total (µg/L)	250
Zn total (µg/L)	976

2. The end-of-pipe assessment points for the determination of SAL compliance are major outfalls, as defined in 40 CFR 122.26(b)(5) and (b)(6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of the major outfalls within each hydrologic subarea. At a minimum, outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed an SAL for 3 successive years may be replaced with a different station. SAL samples must be 24 hour time-weighted composites.

3. The absence of SAL exceedances does not relieve the Copermittees from implementing all other required elements of this Order.

4. This Order does not regulate natural sources and conveyances into the MS4 of constituents listed in Table 5. To be relieved of the requirements to take action as described in D.1 above, the Copermittee must demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature. This demonstration does not need to be repeated for subsequent exceedances of the same SAL at the same monitoring station.

5. The SALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above and Attachment E can be used to create SALs based upon local data. The purpose of establishing the SALs is that through the iterative and MEP process, outfall storm water discharges will meet all applicable water quality standards.

E. LEGAL AUTHORITY

1. Each Copermittee must establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Copermittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water rights holders in the exercise of their water rights. This legal authority must, at a minimum, authorize the Copermittee to:

   a. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies both to industrial and construction sites which have coverage under the statewide general industrial or construction storm water permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this Order;
   b. Prohibit all identified illicit discharges not otherwise allowed pursuant to section B.2;
   c. Prohibit and eliminate illicit connections to the MS4;

d. Control the discharge of spills, dumping, or disposal of materials other than storm water to its MS4;
e. Require compliance with conditions in Copermittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
f. Utilize enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders;
g. Control the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements among Copermittees;
h. Control of the contribution of pollutants from one portion of the shared MS4 to another portion of the MS4 through interagency agreements with other owners of the MS4 such as the State of California Department of Transportation, the U.S. federal government, or sovereign Native American Tribes is encouraged;
i. Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4. This means the Copermittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from industrial facilities discharging into its MS4, including construction sites;
j. Require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from storm water to the MEP; and
k. Require documentation on the effectiveness of BMPs implemented to reduce the discharge of storm water pollutants to the MS4 to the MEP.

2. Each Copermittee must submit on or before June 30, 2012, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order. These statements must include:

a. Citation of runoff related ordinances and the reasons they are enforceable;
b. Identification of the local administrative and legal procedures available to mandate compliance with runoff related ordinances and therefore with the conditions of this Order, and a statement as to whether enforcement actions can be completed administratively or whether they must be commenced and completed in the judicial system; and
c. A brief description of how runoff related ordinances are adopted and the process by which they may be challenged.

F. JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP)

Each Copermittee must implement all requirements of section F of this Order no later than July 1, 2012, unless otherwise specified. Upon adoption of this Order and until an updated JRMP is developed and implemented or July 1, 2012, whichever occurs first, each Copermittee must at a minimum implement its JRMP document, as the document was developed and amended to comply with the requirements of Order No. R9-2004-001.

Each Copermittee must develop and implement an updated JRMP for its jurisdiction no later than July 1, 2012. Each updated JRMP must meet the requirements of section F of this Order, reduce the discharge of storm water pollutants from the MS4 to the MEP, effectively prohibit non-storm water discharges, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. In addition, each Copermittee's JRMP must identify all departments and positions within its jurisdiction that conduct runoff related activities, and their roles and responsibilities under this Order. This identification must include an up to date organizational chart specifying these departments and key personnel.

1. DEVELOPMENT PLANNING COMPONENT

Each Copermittee must implement a program which meets the requirements of this section and (1) reduces Development Project discharges of storm water pollutants from the MS4 to the MEP; (2) prevents Development Project discharges from the MS4 from causing or contributing to a violation of water quality standards; (3) prevents illicit discharges into the MS4; and (4) manages increases in runoff discharge rates and durations from Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

a. GENERAL PLAN

Each Copermittee must revise as needed its General Plan or equivalent plan (e.g., Comprehensive, Master, or Community Plan) to include water quality and watershed protection principles and policies that direct land-use decisions and require implementation of consistent water quality protection measures for all development, redevelopment, and retrofit projects. Examples of water quality and watershed protection principles and policies to be considered include the following:

(1) Minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment and where feasible slow runoff and maximize on-site infiltration of runoff.

(2) Implement pollution prevention methods supplemented by pollutant source controls and treatment BMPs. Use small collection strategies located at, or as close as possible to, the source (i.e., the point where water initially meets the ground) to minimize the transport of urban runoff and pollutants offsite and into an MS4.

(3) Preserve, and where possible, create, or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones. Encourage land acquisition of such areas.

(4) Limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges.

(5) Prior to making land use decisions, utilize methods available to estimate increases in pollutant loads and flows resulting from projected future development. Require incorporation of BMPs to mitigate the projected increases in pollutant loads and flows.

(6) Avoid development of areas that are particularly susceptible to erosion and sediment loss; or establish development guidance that identifies these areas and protects them from erosion and sediment loss.

(7) Reduce pollutants associated with vehicles and increasing traffic resulting from development.

(8) Post-development runoff from a site must not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.

b. **ENVIRONMENTAL REVIEW PROCESS**

Each Copermittee must revise as needed its current environmental review processes to accurately evaluate water quality impacts and cumulative impacts and identify appropriate measures to avoid, minimize, and mitigate those impacts for all Development Projects.

c. **APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR ALL DEVELOPMENT PROJECTS**

For all proposed Development Projects, each Copermittee, during the planning process, and prior to project approval and issuance of local permits, must prescribe the necessary requirements so that Development Project discharges of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or

contribute to a violation of water quality standards, and will comply with the Copermittee's ordinances, permits, plans, and requirements, and with this Order.

Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce storm water pollutants of concern in runoff; prevent illicit discharges into the MS4; prevent irrigation runoff; storm drain system stenciling or signage; properly design outdoor material storage areas; properly design outdoor work areas; and properly design trash storage areas.

(2) The following LID BMPs listed below must be implemented at all Development Projects where applicable and feasible.

(a) Conserve natural areas, including existing trees, other vegetation, and soils;
(b) Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety is not compromised;
(c) Minimize the impervious footprint of the project;
(d) Minimize soil compaction to landscaped areas;
(e) Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.); and
(f) Disconnect impervious surfaces through distributed pervious areas.

(3) Buffer zones for natural water bodies, where technically feasible. Where buffer zones are technically infeasible, require project proponent to implement other buffers such as trees, access restrictions, etc.

(4) Other measures necessary so that grading or other construction activities meet the provisions specified in section F.2 of this Order.

(5) Submittal of documentation of a mechanism under which ongoing long-term maintenance of all structural post-construction BMPs will be conducted.

(6) Infiltration and Groundwater Protection

To protect groundwater quality, each Copermittee must apply restrictions to the use of treatment control BMPs that are designed to primarily function as large, centralized infiltration devices (such as large infiltration trenches and infiltration basins). Such restrictions must be designed so that the use of such infiltration treatment control BMPs does not cause or contribute to an exceedance of groundwater quality objectives. At a minimum, each treatment control BMP designed to primarily function as a centralized infiltration device must meet the restrictions below, unless the Development Project demonstrates to the Copermittee that a restriction is not necessary to protect groundwater quality. The Copermittees may collectively or individually

develop alternative restrictions on the use of treatment control BMPs which are designed to primarily function as centralized infiltration devices. Alternative restrictions developed by the Copermittees can partially or wholly replace the restrictions listed below. The restrictions do not apply to small infiltration systems dispersed throughout a development project.

(a) Runoff must undergo pretreatment such as sedimentation or filtration prior to infiltration;

(b) All dry weather flows containing significant pollutant loads must be diverted from infiltration devices and treated through other BMPs;

(c) Pollution prevention and source control BMPs must be implemented at a level appropriate to protect groundwater quality at sites where infiltration treatment control BMPs are to be used;

(d) Infiltration treatment control BMPs must be adequately maintained so that they remove storm water pollutants to the MEP;

(e) The vertical distance from the base of any infiltration treatment control BMP to the seasonal high groundwater mark must be at least 10 feet. Where groundwater basins do not support beneficial uses, this vertical distance criteria may be reduced, provided groundwater quality is maintained;

(f) The soil through which infiltration is to occur must have physical and chemical characteristics (such as appropriate cation exchange capacity, organic content, clay content, and infiltration rate) which are adequate for proper infiltration durations and treatment of runoff for the protection of groundwater beneficial uses;

(g) Infiltration treatment control BMPs must not be used for areas of industrial or light industrial activity; and other high threat to water quality land uses and activities as designated by each Copermittee unless first treated or filtered to remove pollutants prior to infiltration; and

(h) Infiltration treatment control BMPs must be located a minimum of 100 feet horizontally from any water supply wells.

(7) Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the U.S.

(8) Rain water harvesting and water reuse, where feasible, must be encouraged as part of the site design and construction to reduce pollutants in storm water discharges to the MEP.

d. **STANDARD STORM WATER MITIGATION PLANS (SSMPS) – APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR PRIORITY DEVELOPMENT PROJECTS**

On or before June 30, 2012, the Copermittees must submit an updated SSMP, to the San Diego Water Board's Executive Officer for a 30 day public review and comment period. The San Diego Water Board's Executive Officer has the discretion to determine whether to hold a public hearing or to limit public input to written comments. Within 180 days of determination that the SSMP is in compliance with this Order's provisions, each Copermittee must amend its local ordinances consistent with the updated SSMP, and begin implementing the updated SSMP. Any updated local ordinances must be submitted to the San Diego Water Board with the Annual Report. The SSMP must meet the requirements of section F.1.d of this Order to (1) reduce Priority Development Project discharges of storm water pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[10]

(1) Definition of Priority Development Project:

Priority Development Projects are:

(a) All new Development Projects that fall under the project categories or locations listed in section F.1.d.(2), and

(b) Those redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site and the existing development and/or the redevelopment project falls under the project categories or locations listed in section F.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development, and the existing development was not subject to SSMP requirements, the numeric sizing criteria discussed in section F.1.d.(6) applies only to the addition or replacement, and not to the entire development. Where redevelopment

[10] Updated SSMP and hydromodification requirements must apply to all priority projects or phases of priority projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is illegal, the updated SSMP or hydromodification requirement need not apply to the project. Updated Development Planning requirements set forth in Sections F.1. (a) through (h) of this Order must apply to all projects or phases of projects, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has begun grading or construction activities; or (ii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is legally infeasible. Where feasible, the Permittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in its plans.

results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, the numeric sizing criteria applies to the entire development.

(c) One acre threshold: In addition to the Priority Development Project Categories identified in section F.1.d.(2), Priority Development Projects must also include all other post-construction pollutant-generating new Development Projects that result in the disturbance of one acre or more of land by July 1, 2012.[11]

(2) Priority Development Project Categories

Where a new Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements.

(a) New development projects that create 10,000 square feet or more of impervious surfaces (collectively over the entire project site) including commercial, industrial, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.

(b) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(c) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet must meet all SSMP requirements except for structural treatment BMP and numeric sizing criteria requirement F.1.d.(6) and hydromodification requirement F.1.h.

(d) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(e) Environmentally Sensitive Areas (ESAs). All development located within, or directly adjacent to, or discharging directly to an ESA (where

[11] Pollutant generating Development Projects are those projects that generate pollutants at levels greater than natural background levels.

discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10 percent or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(f) Impervious parking lots 5,000 square feet or more and potentially exposed to runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(g) Street, roads, highways, and freeways. This category includes any paved impervious surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. To the extent that the Copermittees develop revised standard roadway design and post-construction BMP guidance that comply with the provisions of Section F.1 of the Order, then public works projects that implement the revised standard roadway sections do not have to develop a project specific SSMP. The standard roadway design and post-construction BMP guidance must be submitted with the Copermittee's updated SSMP.

(h) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

(3) Pollutants of Concern

As part of its local SSMP, each Copermittee must implement an updated procedure for identifying pollutants of concern for each Priority Development Project. The procedure must address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land-use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

(a) The Copermittees must take the following measures to ensure that LID BMPs are implemented at Priority Development Projects:

(i) Each Copermittee must require LID BMPs or make a finding of technical infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(7);

(ii) Each Copermittee must incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects; and

(iii) On or before July 1, 2012, each Copermittee must review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers. The Copermittees must include this review with the updated JRMP.

(b) The following LID BMPs must be implemented at each Priority Development Project:

(i) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) to the extent feasible[12].

(ii) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate, retain and/or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas must be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(iii) Projects with low traffic areas and appropriate soil conditions must be constructed with permeable surfaces.

[12] Priority Development Projects proposing to dredge or fill materials in waters of the U.S. must obtain a CWA Section 401 Water Quality Certification. Priority Development Projects proposing to dredge or fill waters of the State must obtain Waste Discharge Requirements.

(c) LID BMPs sizing criteria:

(i) LID BMPs must be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event[13] ("design capture volume");

(ii) If onsite retention[14] LID BMPs are technically infeasible per section F.1.d.(7)(b), other LID BMPs may treat any volume that is not retained onsite provided that the total volume of the other LID BMPs, including pore spaces and pre-filter detention volume, are sized to hold at least 0.75 times the portion of the design capture volume that is not retained onsite. The LID BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP.

(d) If it is shown to be technically infeasible per Section F.1.d.(7)(b) to retain and/or treat the remaining volume up to and including the design capture volume using LID BMPs, then the project must implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below and must participate in the LID waiver program in Section F.1.d.(7).

(e) All LID BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(5) Source Control BMP Requirements

Each Copermittee must require each Priority Development Project to implement applicable source control BMPs. The source control BMPs to be required must:

(a) Prevent illicit discharges into the MS4;
(b) Minimize storm water pollutants of concern in runoff;
(c) Eliminate irrigation runoff;

[13] This volume is not a single volume to be applied to all of Riverside County. The size of the 85th percentile storm event is different for various parts of the County. The Copermittees are encouraged to calculate the 85th percentile storm event for each of its jurisdictions using local rain data pertinent to its particular jurisdiction (0.6 inch standard is a rough average for the County and should only be used where appropriate rain data is not available). In addition, isopluvial maps may be used to extrapolate rainfall data to areas where insufficient data exists in order to determine the volume of the local 85th percentile storm event in such areas. Where the Copermittees will use isopluvial maps to determine the 85th percentile storm event in areas lacking rain data, the Copermittees must describe their method for using isopluvial maps in its SSMPs.

[14] Infiltration LID BMPs are the preferred method for onsite retention, but does not preclude the use and implementation of all other retention LID BMPs (e.g. evapotranspiration, evaporation, and/or harvest), where technically feasible, prior to considering biofiltration LID BMPs for treatment of the design capture volume that is not otherwise retained onsite.

(d) Include storm drain system stenciling or signage;
(e) Include properly designed outdoor material storage areas;
(f) Include properly designed outdoor work areas;
(g) Include properly designed trash storage areas; and
(h) Include water quality protection requirements applicable to individual priority project categories.

(6) Treatment Control BMP Requirements

Each Copermittee must require each Priority Development Project that meets the Copermittee's technical infeasibility criteria in Section F.1.d(7) below, to implement conventional treatment control BMPs to treat the portion of the "design capture volume" that was not treated by LID BMPs per Section F.1.d(4) above. Conventional treatment control BMPs must meet the following requirements:

(a) All treatment control BMPs for a single Priority Development Project must collectively be sized to comply with the following numeric sizing criteria:

(i) Volume-based treatment control BMPs must be designed to mitigate (infiltrate, filter, or treat) the remaining portion of the design capture volume that was not retained and/or treated with LID BMPs; or

(ii) Flow-based treatment control BMPs must be designed to mitigate (filter, or treat) either: a) the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour of a storm event; or b) the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity (for each hour of a storm event), as determined from the local historical rainfall record, multiplied by a factor of two.

(b) All treatment control BMPs for Priority Development Projects must, at a minimum:

(i) Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as the pollutant removal efficiencies are identified in the Copermittees' SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.
(ii) Be correctly sized and designed so as to remove storm water pollutants to the MEP.

(c) Target removal of pollutants of concern from runoff.

(d) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S.

(e) Include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the life of the project. The mechanisms may be provided by the project proponent or Copermittee.

(f) Be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

(7) Low Impact Development (LID) BMP Waiver Program

The Copermittees must develop, collectively or individually, a LID waiver program for incorporation into the SSMP, which would allow a Priority Development Project to substitute implementation of all or a portion of required LID BMPs in Section F.1.d(4) with implementation of treatment control BMPs and either 1) on-site mitigation, 2) an off-site mitigation project, and/or 3) other mitigation developed by the Copermittees. The Copermittees must submit the LID waiver program as part of their updated SSMP. At a minimum, the program must meet the requirements below:

(a) Prior to implementation, the LID waiver program must clearly exhibit that it will not allow Priority Development Projects to result in a net impact (after consideration of any mitigation) from pollutant loadings over and above the impact caused by projects meeting the onsite LID retention requirements;

(b) For each Priority Development Project participating, the Copermittee must find that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermittee(s) must develop criteria to determine the technical feasibility of implementing LID BMPs . Each Priority Development Project participating must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Technical infeasibility may result from conditions including, but not limited to:

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6) for large, centralized infiltration BMPs. Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite LID BMPs;
(ii) Insufficient demand for storm water reuse;

(iii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the LID BMP requirements; and

(iv) Other site, geologic, soil, or implementation constraints identified in the Copermittees updated SSMP document.

(c) Each Priority Development Project that participates in the LID waiver program must mitigate for the pollutant loads expected to be discharged due to not implementing the LID retention BMPs in section F.1.d.(4). The pollutant loading must be estimated for each project participating in the LID waiver program. The estimated impacts from not implementing the required LID retention BMPs in section F.1.d.(4) must be fully mitigated. Mitigation projects must be implemented within the same hydrologic unit as the Priority Development Project. Mitigation projects outside of the hydrologic subarea but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation projects within the same hydrologic subarea are infeasible and that the mitigation project will address similar beneficial use impacts as expected from the Priority Development Projects pollutant load. Onsite mitigation may include increasing the conventional treatment sizing factors to achieve pollutant load removal equal to or greater than the pollutant load removal expected from implementing onsite retention of the design capture volume. Offsite mitigation projects may include green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and/or riparian restoration projects. Project applicants seeking to utilize these alternative compliance provisions may propose other offsite mitigation projects, which the Copermittees may approve if they meet the requirements of this subpart.

(d) A Copermittee may choose to implement additional mitigation programs (e.g., pollutant credit system, mitigation fund) as part of the LID waiver program provided that the mitigation program clearly exhibits that it will not allow Priority Development Projects to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. Any additional mitigation programs that a Copermittee chooses to implement must be submitted to the San Diego Water Board Executive Officer for review and acceptance prior to implementation.

(8) LID and Treatment Control BMP Standards

(a) As part of the SSMP, each Copermittee must develop and require Priority Development Projects to implement siting, design, and maintenance criteria for each LID and treatment control BMP listed in the SSMP to determine feasibility and applicability and so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization. Development of

BMP design worksheets which can be used by project proponents is encouraged.

(b) LID and treatment control BMPs implemented at any Priority Development Projects must mitigate (treat through infiltration, settling, filtration or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.

(c) All LID and treatment control BMPs must be located so as to remove pollutants from runoff prior to its discharge to any receiving waters. Multiple Priority Development Projects may use shared post-construction BMPs as long as construction of any shared BMP is completed prior to the use or occupation of any Priority Development Project from which the BMP will receive runoff. Post construction BMPs must not be constructed within a waters of the U.S. or waters of the State.

(9) Implementation Process

(a) As part of its local SSMP, each Copermittee must implement a process to verify compliance with SSMP requirements. The process must identify at what point in the planning process Priority Development Projects will be required to meet SSMP requirements and at a minimum, the Priority Development Project must implement the required post-construction BMPs prior to occupancy and/or the intended use of any portion of that project. The process must also include identification of the roles and responsibilities of various municipal departments in implementing the SSMP requirements, as well as any other measures necessary for the implementation of SSMP requirements.

(b) Each Copermittee must establish a mechanism not only to track post-construction BMPs, but also to ensure that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.

(10) Post-construction BMP Review

(a) The Copermittees must review and update the BMPs that are listed in their SSMP as options for treatment control. At a minimum, the update must include removal of obsolete or ineffective BMPs and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update must also add appropriate LID BMPs to any tables or discussions in the local SSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update must include review and revision where necessary of treatment control BMP pollutant removal efficiencies.

(b) The update must incorporate findings from BMP effectiveness studies conducted by the Copermittees for projects funded wholly or in part by the State Water Board or Regional Water Boards.

(c) Each Copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Riverside County) into SSMP project reviews and permitting.

e. **BMP CONSTRUCTION VERIFICATION**

Prior to occupancy and/or intended use of any portion of the Priority Development Project subject to SSMP requirements, each Copermittee must inspect the constructed site design, source control, and treatment control BMPs applicable to the constructed portion of the project to verify that they have been constructed and are operating in compliance with all specifications, plans, permits, ordinances, and this Order.

f. **BMP MAINTENANCE TRACKING**

(1) Inventory of SSMP projects: Each Copermittee must develop and maintain a watershed-based database to track and inventory all projects constructed within their jurisdiction, that have a final approved SSMP (SSMP projects), and its structural post-construction BMPs implemented therein since July, 2005. LID BMPs implemented on a lot by lot basis at single family residential houses, such as rain barrels, are not required to be tracked or inventoried. At a minimum, the database must include information on BMP type(s), location, watershed, date of construction, party responsible for maintenance, dates and findings of maintenance verifications, and corrective actions, including whether the site was referred to the local vector control agency or department.

(2) Each Copermittee must verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

(a) The designation of high priority SSMP Projects must consider the following:

(i) BMP size,
(ii) Recommended maintenance frequency,
(iii) Likelihood of operational and maintenance issues,
(iv) Location,

(v) Receiving water quality,
(vi) Compliance record,
(vii) Land use, and
(viii) Other pertinent factors;

At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of and within the same hydrologic subarea as a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for and within the same hydrologic subarea as an observed action level exceedance of that pollutant.

(b) Beginning on July 1, 2012, each Copermittee must verify that the required structural post-construction BMPs on the inventoried SSMP projects have been implemented, are maintained, and are operating effectively through inspections, self-certifications, surveys, or other equally effective approaches with the following conditions:

(i) The implementation, operation, and maintenance of all (100 percent) approved and inventoried final project public and private SSMPs (a.k.a. WQMPs) must be verified every five years;
(ii) All (100 percent) projects with BMPs that are high priority must be inspected by the Copermittee annually prior to each rainy season;
(iii) All (100 percent) Copermittee projects with BMPs must be inspected by the Copermittee annually;
(iv) At the discretion of the Copermittee, its inspections may be coordinated with the facility inspections implemented pursuant to section F.3. of this Order;
(v) For verifications performed through a means other than direct Copermittee inspection, adequate documentation must be submitted to the Copermittee to provide assurance that the required maintenance has been completed;
(vi) Appropriate follow-up measures (including re-inspections, enforcement, maintenance, etc.) must be conducted to ensure the treatment BMPs continue to reduce storm water pollutants as originally designed; and
(vii) Inspections must note observations of vector conditions, such as mosquitoes. Where conditions are identified as contributing to mosquito production, the Copermittee must notify its local vector control agency.

g. **ENFORCEMENT OF DEVELOPMENT SITES**

Each Copermittee must enforce its storm water ordinance for all development projects as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following tools or their equivalent: Non-monetary penalties, fines, bonding requirements, liens, and/or permit or occupancy denials for non-compliance.

h. **HYDROMODIFICATION – LIMITATIONS ON INCREASES OF RUNOFF DISCHARGE RATES AND DURATIONS**[15]

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects. The HMP must be incorporated into the SSMP and implemented by each Copermittee so that estimated post-project runoff discharge rates and durations must not exceed pre-development discharge rates and durations. Where the proposed project is located on an already developed site, the pre-project discharge rate and duration must be that of the pre-developed, naturally occurring condition. The draft HMP must be submitted to the San Diego Water Board on or before June 30, 2013. The HMP will be made available for public review and comment and the San Diego Water Board Executive Officer will determine whether to hold a public hearing before the full San Diego Water Board or whether public input will be through written comments to the Executive Officer only.

(1) The HMP must:

(a) Identify a method for assessing susceptibility and geomorphic stability of channel segments which receive runoff discharges from Priority Development Projects. A performance standard must be established that ensures that the geomorphic stability within the channel will not be compromised as a result of receiving runoff discharges from Priority Development Projects.

[15] Updated SSMP and hydromodification requirements must apply to all Priority Development Projects or phases of Priority Development Projects which have not yet begun grading or construction activities at the time any updated SSMP or hydromodification requirement commences. If a Copermittee determines that lawful prior approval of a project exists, whereby application of an updated SSMP or hydromodification requirement to the project is legally infeasible, the updated SSMP or hydromodification requirement need not apply to the project. The Copermittees must utilize the SSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SSMP and hydromodification requirements in its plans.

(b) Identify a range of runoff flows[16] based on continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable by the San Diego Water Board) for which Priority Development Project post-project runoff flow rates and durations must not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. The lower boundary of the range of runoff flows identified must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks. The identified range of runoff flows may be different for specific watersheds, channels, or channel reaches. In the case of an artificially hardened (concrete lined, rip rap, etc.) channel, the lower boundary of the range of runoff flows identified must correspond with the critical channel flow that produces the critical shear stress that initiates channel bed movement or that erodes the toe of channel banks of a comparable natural channel (i.e. non-hardened, pre-development).

(c) Identify a method to assess and compensate for the loss of sediment supply to streams due to development. A performance and/or design standard must be created and required to be met by Priority Development Projects to ensure that the loss of sediment supply due to development does not cause or contribute to increased erosion within channel segments downstream of Priority Development Project discharge points.

(d) Designate and require Priority Development Projects to implement control measures so that (1) post-project runoff flow rates and durations do not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent for the range of runoff flows identified under section F.1.h.(1)(b), where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses; (2) post-project runoff flow rates and durations do not result in channel conditions which do not meet the channel standard developed under section F.1.h.(1)(a) for channel segments downstream of Priority Development Project discharge points; and (3) the design of the project and/or control measures compensate for the loss of sediment supply due to development.

[16] The identified range of run off flows to be controlled should be expressed in terms of peak flow rates of rainfall events, such as "10% of the pre-development 2-year runoff event up to the pre-development 10-year runoff event."

(e) Include a protocol to evaluate potential hydrograph change impacts to downstream watercourses from Priority Development Projects to meet the range of runoff flows identified under Section F.1.h.(1)(b).

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

(g) Include a review of pertinent literature.

(h) Identify areas within the Santa Margarita Hydrologic Unit for potential opportunities to restore or rehabilitate stream channels with historic hydromodification of receiving waters that are tributary to documented low or very low Index of Biotic Integrity (IBI) scores.

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

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

(k) Include technical information, including references, supporting any standards and criteria proposed.

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

(m)Include a description of monitoring and other program evaluations to be conducted to assess the effectiveness of implementation of the HMP. Monitoring and other program evaluations must include an evaluation of changes to physical (e.g., cross-section, slope, discharge rate, vegetation, pervious/impervious area) and biological (e.g., habitat quality, benthic flora and fauna, IBI scores) conditions of receiving water channels as areas with Priority Development Projects are constructed (i.e. pre- and post-project), as appropriate.

(n) Include mechanisms for assessing and addressing cumulative impacts of Priority Development Projects within a watershed on channel morphology.

(2) In addition to the control measures that must be implemented by Priority Development Projects per section F.1.h.(1)(d), the HMP must include a suite of management measures that can be used on Priority Development Projects to mitigate hydromodification impacts, protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:

(a) Site design control measures;
(b) On-site management measures;
(c) Regional control measures located upstream of receiving waters; and
(d) In-stream management and control measures.

Where stream channels are adjacent to, or are to be modified as part of a Priority Development Project, management measures must include buffer zones and setbacks. The suite of management measures must also include stream restoration as a viable option to achieve the channel standard in section F.1.h.(1)(a). In-stream controls used as management measures to protect and restore downstream beneficial uses and for preventing or minimizing further adverse physical changes must not include the use of non-naturally occurring hardscape materials such as concrete, riprap, gabions, etc. to reinforce stream channels.

(3) As part of the HMP, the Copermittees may develop a waiver program that allows a redevelopment Priority Development Project, as defined in Section F.1.d.(1)(b), to implement offsite mitigation measures. A waiver may be granted if onsite management and control measures are technically infeasible to fully achieve post-project runoff flow rates and durations that do not exceed the pre-development (naturally occurring) runoff flow rates and durations. Redevelopment projects that are granted a waiver under the program must not have post-project runoff flow rates and durations that exceed the pre-project runoff flow rates and durations. The estimated incremental hydromodification impacts from not achieving the pre-development (naturally occurring) runoff flow rates and durations for the project site must be fully mitigated. The offsite mitigation must be within the same stream channel system to which the project discharges. Mitigation projects not within the same stream channel system but within the same hydrologic unit may be approved provided that the project proponent demonstrates that mitigation within the same stream channel is infeasible and that the mitigation project will address similar impacts as expected from the project.

(4) Each individual Copermittee has the discretion to not require Section F.1.h. at Priority Development Projects where the project:

(a) Discharges storm water runoff into underground storm drains discharging directly to water storage reservoirs and lakes;

(b) Discharges storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs and lakes; or

(c) Discharges storm water runoff into other areas identified in the HMP as acceptable to not need to meet the requirements of Section F.1.h by the San Diego Water Board Executive Officer.

(5) HMP Reporting and Implementation

(a) On or before June 30, 2013, the Copermittees must submit to the San Diego Water Board a draft HMP that has been reviewed by the public, including the identification of the appropriate limiting range of flow rates per section F.1.h.(1)(b).

(b) Within 180 days of receiving San Diego Water Board comments on the draft HMP, the Copermittees must submit a final HMP that addressed the San Diego Water Board's comments.

(c) Within 90 days of receiving a determination of adequacy from the San Diego Water Board, each Copermittee must incorporate and implement the HMP for all Priority Development Projects.

(d) Prior to acceptance of the HMP by the San Diego Water Board, the early implementation measures likely to be included in the HMP must be encouraged by the Copermittees.

(6) Interim Hydromodification Criteria

Immediately following adoption of this Order and until the final HMP required by this Order has been determined by the San Diego Water Board to be adequate, each Copermittee must ensure that all Priority Development Projects are implementing the hydromodification (aka Hydrologic Condition of Concern) requirements found in Section 4.4 of the 2006 Riverside County WQMP (updated in 2009) unless one of the following conditions in lieu of those specified in the WQMP are met:

(a) Runoff from the Priority Development Project discharges (1) directly to a conveyance channel or storm drain that is concrete lined all the way from the point of discharge to the ocean, bay, lagoon, water storage reservoir or lake; and (2) the discharge is in full compliance with Copermittee requirements for connections and discharges to the MS4 (including both quality and quantity requirements); and (3) the discharge will not cause increased upstream or downstream erosion or adversely impact downstream habitat; and (4) the discharge is authorized by the Copermittee.

(b) The Priority Development Project disturbs less than one acre. The Copermittee has the discretion to require a project specific WQMP to address hydrologic condition concerns on projects less than one acre on a case by case basis. The disturbed area calculation should include all disturbances associated with larger common plans of development.

(c) The runoff flow rate, volume, velocity, and duration for the post-development condition of the Priority Development Project do not exceed the pre-development (i.e. naturally occurring) condition for the 2-year, 24-hour and 10-year, 24-hour rainfall events. This condition must be substantiated by hydrologic modeling acceptable to the Copermittee.

Once a final HMP is determined to be adequate and is required to be implemented, compliance with the final HMP is required by this Order and compliance with the 2004 WQMP (updated in 2009) or the in-lieu interim hydromodification criteria set forth above no longer satisfies the requirements of this Order.

(7) No part of section F.1.h eliminates the Copermittees' responsibilities for implementing the Low Impact Development requirements under section F.1.d.(4).

i. UNPAVED ROADS DEVELOPMENT

The Copermittees must develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include the following, or alternative BMPs that are equally effective:

(1) Practices to minimize road related erosion and sediment transport;
(2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards;
(3) Installation of water bars as appropriate; and
(4) Unpaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage.

2. CONSTRUCTION COMPONENT

Each Copermittee must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to the MS4, reduces construction site discharges of storm water pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing or contributing to a violation of water quality standards.

a. ORDINANCE UPDATE

By July 1, 2012, each Copermittee must review and update its grading ordinances and other ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs and other measures.

b. SOURCE IDENTIFICATION

Each Copermittee must maintain an updated watershed-based inventory of all construction sites within its jurisdiction. The use of an automated database system, such as Geographical Information Systems (GIS) is strongly encouraged.

c. SITE PLANNING AND PROJECT APPROVAL PROCESS

Each Copermittee must incorporate consideration of potential water quality impacts prior to approval and issuance of construction and grading permits.

(1) Each construction and grading permit must require proposed construction sites to implement designated BMPs and other measures so that illicit discharges into the MS4 are prevented, storm water pollutants discharged from the site will be reduced to the MEP, and construction discharges from the MS4 are prevented from causing or contributing to a violation of water quality standards.

(2) Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order.

(3) Prior to permit issuance, each Copermittee must verify that project proponents subject to California's statewide General NPDES Permit for Storm Water Discharges Associated With Construction Activities, (hereinafter General Construction Permit), have existing coverage under the General Construction Permit.

d. **BMP IMPLEMENTATION**

(1) Designate BMPs: Each Copermittee must designate a minimum set of BMPs and other measures to be implemented at all construction sites. The designated minimum set of BMPs must include:

(a) Management Measures:

(i) Pollution prevention, where appropriate;
(ii) Development and implementation of a runoff management plan;
(iii) Minimization of areas that are cleared and graded to only the portion of the site that is necessary for construction;
(iv) Minimization of exposure time of disturbed soil areas;
(v) Minimization of grading during the rainy season and correlation of grading with seasonal dry weather periods to the extent feasible;
(vi) Limitation of grading to a maximum disturbed area as determined by each Copermittee before either temporary or permanent erosion controls are implemented to prevent storm water pollution. The Copermittee has the option of temporarily increasing the size of disturbed soil areas by a set amount beyond the maximum, if the individual site is in compliance with applicable storm water regulations and the site has adequate control practices implemented to prevent storm water pollution;
(vii) Temporary stabilization and reseeding of disturbed soil areas as rapidly as feasible;
(viii) Wind erosion controls;
(ix) Tracking controls;
(x) Non-stormwater management measures to prevent illicit discharges and control storm water pollution sources;
(xi) Waste management measures;
(xii) Preservation of natural hydrologic features where feasible;
(xiii) Preservation of riparian buffers and corridors where feasible;
(xiv) Evaluation and maintenance of all BMPs, until removed; and
(xv) Retention, reduction, and proper management of all storm water pollutant discharges on site to the MEP standard.

(b) Erosion and Sediment Controls:

(i) Erosion prevention. Erosion prevention is to be used as the most important measure for keeping sediment on site during construction;
(ii) Sediment controls. Sediment controls are to be used as a supplement to erosion prevention for keeping sediment on-site during construction;

(iii) Slope stabilization must be used on all active slopes during rain events regardless of the season and on all inactive slopes during the rainy season and during rain events in the dry season;
(iv) Permanent revegetation or landscaping as early as feasible; and
(v) Erosion and sediment controls must be required during the construction of unpaved roads.

(2) Each Copermittee must implement, or require implementation of, enhanced[17] measures to address the threat to water quality posed by all construction sites tributary to CWA section 303(d) water body segments impaired for sediment or turbidity. Each Copermittee must also implement, or require implementation of, enhanced, measures for construction sites within, or adjacent to, or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(3) Active/Passive Sediment Treatment (AST): Each Copermittee must require implementation of AST for sediment at construction sites (or portions thereof) that are determined by the Copermittee to be an exceptional threat to water quality. In evaluating the threat to water quality, the following factors must be considered by the Copermittee:

(a) Soil erosion potential or soil type;
(b) The site's slopes;
(c) Project size and type;
(d) Sensitivity of receiving water bodies;
(e) Proximity to receiving water bodies;
(f) Non-storm water discharges;
(g) Ineffectiveness of other BMPs;
(h) Proximity and sensitivity of aquatic threatened and endangered species of concern;
(i) Known effects of AST chemicals; and
(j) Any other relevant factors.

(4) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum BMPs and any additional measures necessary to comply with this Order at each construction site within its jurisdiction year round. BMP implementation requirements, however, can vary based on wet and dry seasons. Dry season BMP implementation must plan for and address unseasonal rain events that may occur during the dry season (May 1 through September 30).

[17] Enhanced BMPs are control actions specifically targeted to the pollutant or condition of concern and of higher quality and effectiveness than the minimum control measures otherwise required. Enhanced in this Order means better, not simply more, BMPs.

e. **INSPECTION OF CONSTRUCTION SITES**

Each Copermittee must conduct construction site inspections for compliance with its ordinances (grading, storm water, etc.), permits (construction, grading, etc.), and this Order. Priorities for inspecting sites must consider the nature and size of the construction activity, topography, and the characteristics of soils and receiving water quality.

(1) During the rainy season, each Copermittee must inspect at least every two weeks, all construction sites within its jurisdiction meeting any of the following criteria:

(a) All sites 30 acres or more in size with rough grading or with active, unstabilized slopes occurring during the rainy season;

(b) All sites one acre or more, and within the same hydrologic subarea and tributary to a CWA section 303(d) water body segment impaired for sediment; or within, directly adjacent to, or discharging directly to a receiving water within an ESA; and

(c) Other sites determined by the Copermittees or the San Diego Water Board as a significant threat to water quality. In evaluating threat to water quality, the following factors must be considered: (1) soil erosion potential; (2) site slope; (3) project size and type; (4) sensitivity of receiving water bodies; (5) proximity to receiving water bodies; (6) non-storm water discharges; (7) known past record of non-compliance by the operators of the construction site; and (8) any other relevant factors.

(2) During the rainy season, each Copermittee must inspect at least monthly, all construction sites with one acre or more of soil disturbance not meeting the criteria specified above in section F.2.e.(1).

(3) During the rainy season, each Copermittee must inspect construction sites less than one acre in size as needed to ensure compliance with its ordinances and this Order.

(4) Each Copermittee must inspect all construction sites as needed during the dry season. Sites meeting the criteria in section F.2.e.(1) must be inspected at least once in August or September each year.

(5) Re-inspections: Based upon site inspection findings, each Copermittee must implement all follow-up actions (i.e., re-inspection, enforcement) necessary to comply with this Order. Reinspection frequencies must be determined by each Copermittee based upon the severity of deficiencies, the nature of the construction activity, and the characteristics of soils and receiving water quality.

(6) Inspections of construction sites must include, but not be limited to:

(a) Check for coverage under the General Construction Permit (Notice of Intent (NOI) and/or Waste Discharge Identification No.) during initial inspections;
(b) Assessment of compliance with Copermittee ordinances and permits related to runoff, including the implementation and maintenance of designated minimum BMPs;
(c) Assessment of BMP effectiveness;
(d) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff;
(e) Review of site monitoring data results, if the site monitors its runoff
(f) Education and outreach on storm water pollution prevention, as needed; and
(g) Creation of a written or electronic inspection report.

(7) The Copermittees must track the number of inspections for each inventoried construction site throughout the reporting period to verify that each site is inspected at the minimum frequencies required.

f. **ENFORCEMENT OF CONSTRUCTION SITES**

(1) Each Copermittee must develop and implement an escalating enforcement process that achieves prompt corrective actions at construction sites for violations of the Copermittee's water quality protection permits, requirements, and ordinances. This enforcement process must include authorizing the Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

(2) Each Copermittee must be able to respond to construction complaints received from third-parties and to ensure the San Diego Water Board that corrective actions have been implemented, if warranted.

g. **REPORTING OF NON-COMPLIANT SITES**

(1) In addition to the notification requirements in Attachment B, each Copermittee must notify the San Diego Water Board when the Copermittee issues high level enforcement (as defined in the Copermittee's JRMP) to a construction site that poses a significant threat to water quality in its jurisdiction as a result of violations of its storm water ordinances.

(2) Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the rainy season, of all construction sites with alleged violations that pose a significant threat to water quality. Information may be

provided as part of the JRMP annual report if submitted prior to the rainy season. Information provided must include, but not be limited to, the following:

(a) WDID number if enrolled under the General Construction Permit
(b) Site Location, including address
(c) Current violations or suspected violations

3. EXISTING DEVELOPMENT COMPONENT

a. MUNICIPAL

Each Copermittee must implement a municipal program for the Copermittee's areas and activities that meets the requirements of this section, prevents illicit discharges into the MS4, reduces municipal discharges of storm water pollutants from the MS4 to the MEP, and prevents municipal discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification / Inventory

Each Copermittee must maintain an updated watershed-based inventory of all its municipal areas and those activities that have the potential to generate pollutants. The inventory must include the name, address (if applicable), and a description of the area/activity; which pollutants are potentially generated by the area/activity; whether the area/activity is adjacent to an ESA; and identification of whether the area/activity is tributary to and within the same hydrologic subarea as a CWA section 303(d) water body segment and generates pollutants for which the water body segment is impaired. Linear facilities, such as roads, streets, and highways, do not need to be individually inventoried. The use of an automated database system, such as Geographical Information Systems (GIS) is highly recommended.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must implement pollution prevention methods in its municipal program and must require their use by appropriate departments, personnel, and contractors.

(b) Designate Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all municipal areas and those activities that have the potential to generate pollutants. The designated minimum BMPs for municipal areas and activities must be area or activity specific as appropriate.

(c) Each Copermittee must designate BMPs for special events that are expected to generate significant trash and litter. Controls to consider must include:

(i) Temporary screens on catch basins and storm drain inlets;
(ii) Temporary fencing to prevent windblown trash from entering adjacent water bodies and MS4 channels;
(iii) Proper management of trash and litter;
(iv) Catch basin cleaning following the special event and prior to an anticipated rain event;
(v) Street sweeping of roads, streets, highways and parking facilities following the special event; and
(vi) Other equivalent controls.

(d) Designate BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for its municipal areas and activities tributary to and within the same hydrologic subarea as CWA section 303(d) impaired water body segments when an area or those activities have the potential to generate pollutants for which the water body segment is impaired. Each Copermittee must also designate additional controls for its municipal areas and activities within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order).

(e) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on its inventory to comply with this Order for each of its municipal area and those activities that have the potential to discharge pollution.

(3) <u>BMP Implementation for Management of Pesticides, Herbicides, and Fertilizers</u>

Each Copermittee must implement BMPs to reduce the contribution of storm water pollutants to the MEP associated with the application, storage, and disposal of pesticides, herbicides and fertilizers from its municipal areas and activities to MS4s and receiving waters. Such BMPs must include, at a minimum:

(a) Educational activities, permits, certifications and other measures for municipal applicators and distributors;
(b) Integrated Pest Management (IPM) measures that rely on non-chemical solutions;
(c) The use of native vegetation;
(d) Schedules for irrigation and chemical application; and

(e) The collection and proper disposal of unused pesticides, herbicides, and fertilizers.

(4) BMP implementation for Flood Control Structures

(a) Each Copermittee must implement procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies.

(b) Each Copermittee must include water quality protection measures, where feasible, when retrofitting existing flood control structural devices.

(c) Each Copermittee must evaluate its existing flood control structures as part of ongoing routine maintenance, identify structures causing or contributing to a condition of pollution, implement measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the San Diego Water Board in each JRMP Annual Report.

(5) BMP Implementation for Sweeping of Municipal Areas

Where municipal area sweeping is implemented as an MS4 BMP for municipal roads, streets, highways, and parking facilities, each Copermittee must design and implement the program based on the following criteria:

(a) Roads, streets, highways, and parking facilities identified as consistently generating the highest volumes of trash and/or debris must be swept at least two times per month.

(b) Roads, streets, highways, and parking facilities identified as consistently generating moderate volumes of trash and/or debris must be swept at least monthly.

(c) Roads, streets, highways, and parking facilities identified as generating low volumes of trash and/or debris must be swept as necessary, but no less than once per year.

(6) Operation and Maintenance of Municipal Separate Storm Sewer System (MS4) and Treatment Controls

(a) Treatment Controls: Each Copermittee must implement a schedule of inspection and maintenance activities to verify proper operation of all its municipal structural treatment controls designed to reduce storm water pollutant discharges to or from its MS4s and related drainage structures.

(b) MS4 and Facilities: Each Copermittee must implement a schedule of maintenance activities for its MS4 and facilities (including but not limited to catch basins, storm drain inlets, detention basins, etc). The maintenance activities must, at a minimum, include:

(i) Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities;
(ii) Additional facilities cleaning as necessary between October 1 and April 30 of each year;
(iii) Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year;
(iv) Open channels and basins must be cleaned of observed anthropogenic litter in a timely manner;
(v) Maintenance activities within open channels must not adversely impact beneficial uses;
(vi) Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed;
(vii) Proper disposal of waste removed pursuant to applicable laws; and
(viii) Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

(7) Infiltration From Sanitary Sewer to MS4/Provide Preventive Maintenance

(a) Each Copermittee must implement controls and measures to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s through thorough, routine preventive maintenance of the MS4. Each Copermittee that operates both a municipal sanitary sewer system and a MS4 must implement controls and measures to prevent and eliminate infiltration of seepage from the sanitary sewers to the MS4s that must include overall sanitary sewer and MS4 surveys and thorough, routine preventive maintenance of both.

(b) Each Copermittee must implement controls to limit infiltration of seepage from sanitary sewers to municipal separate storm sewer systems where necessary. Such controls must include:

(i) Adequate plan checking for construction and new development;
(ii) Incident response training for its municipal employees that identify sanitary sewer spills;
(iii) Code enforcement inspections;
(iv) MS4 maintenance and inspections;
(v) Interagency coordination with sewer agencies; and

(vi) Proper education of its municipal staff and contractors conducting field operations on the MS4 or its municipal sanitary sewer (if applicable).

(8) Inspection of Municipal Areas and Activities

(a) At a minimum, each Copermittee must inspect the following high priority municipal areas and activities annually:

(i) Roads, Streets, Highways, and Parking Facilities;
(ii) Flood Management Projects and Flood Control Devices not otherwise inspected per Section F.3.a.(6)(b);
(iii) Areas and activities tributary to and within the same hydrologic subarea as a CWA section 303(d) impaired water body segment, where an area or activity generates pollutants for which the water body segment is impaired;
(iv) Areas and activities within or adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order);
(v) Municipal Facilities:
[a] Active or closed municipal landfills;
[b] Publicly owned treatment works (including water and wastewater treatment plants) and sanitary sewage collection systems;
[c] Solid waste transfer facilities;
[d] Land application sites;
[e] Corporate yards including maintenance and storage yards for materials, waste, equipment and vehicles; and
[f] Household hazardous waste collection facilities.
(vi) Municipal airfields;
(vii) Parks and recreation facilities;
(viii) Special event venues following special events (festivals, sporting events, etc.);
(ix) Power washing activities; and
(x) Other municipal areas and activities that the Copermittee determines may contribute a significant pollutant load to the MS4.

(b) Other municipal areas and activities must be inspected as needed and in response to water quality data, valid public complaints, and findings from municipal or contract staff.

(c) Based upon site inspection findings, each Copermittee must implement all follow-up actions necessary to comply with this Order.

(9) Enforcement of Municipal Areas and Activities

Each Copermittee must enforce its storm water ordinance for all its municipal areas and activities as necessary to maintain compliance with this Order.

(10) Copermittee Maintained Unpaved Roads Maintenance

(a) The Copermittees must develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control measures during their maintenance activities on Copermittee maintained unpaved roads, particularly in or adjacent to receiving waters.

(b) The Copermittees must develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during their unpaved road maintenance activities.

(c) The Copermittees must maintain as necessary their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport;

(d) Re-grading of unpaved roads during maintenance must be sloped outward where consistent with road engineering safety standards or alternative equally effective BMPs must be implemented to minimize erosion and sedimentation from unpaved roads; and

(e) Through their maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

b. COMMERCIAL / INDUSTRIAL

Each Copermittee must implement a commercial / industrial program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces commercial / industrial discharges of storm water pollutants from the MS4 to the MEP, and prevents commercial / industrial discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Source Identification

(a) Each Copermittee must maintain an updated watershed-based inventory of all industrial and commercial sites/sources within its jurisdiction (regardless of ownership) that could contribute a significant pollutant load to the MS4. The inventory must include the following minimum

information for each industrial and commercial site/source: name; address; pollutants potentially generated by the site/source; and identification of whether the site/source is tributary to a CWA §303(d) water body segment and generates pollutants for which the water body segment is impaired; and a narrative description including SIC codes which best reflects the principal products or services provided by each facility.

At a minimum, the following sites/sources must be included in the inventory:

(i) Commercial Sites/Sources:

[a] Automobile repair, maintenance, fueling, or cleaning;
[b] Airplane repair, maintenance, fueling, or cleaning;
[c] Boat repair, maintenance, fueling, or cleaning;
[d] Equipment repair, maintenance, fueling, or cleaning;
[e] Automobile and other vehicle body repair or painting;
[f] Mobile automobile or other vehicle washing;
[g] Automobile (or other vehicle) parking lots and storage facilities;
[h] Retail or wholesale fueling;
[i] Pest control services;
[j] Eating or drinking establishments, including such retail establishments with food markets;
[k] Mobile carpet, drape or furniture cleaning;
[l] Cement mixing or cutting;
[m] Masonry;
[n] Painting and coating;
[o] Botanical or zoological gardens and exhibits;
[p] Landscaping;
[q] Nurseries and greenhouses;
[r] Golf courses, parks and other recreational areas/facilities;
[s] Cemeteries;
[t] Pool and fountain cleaning;
[u] Marinas;
[v] Portable sanitary services;
[w] Building material retailers and storage;
[x] Animal boarding facilities and kennels;
[y] Mobile pet services;
[z] Power washing services;
[aa] Plumbing services; and
[bb] Other sites and sources with a history of un-authorized discharges to the MS4.

(ii) Industrial Sites/Sources:

[a] Industrial Facilities, as defined at 40 CFR § 122.26(b)(14), including those subject to the General Industrial Permit or other individual NPDES permit;
[b] Operating and closed landfills;
[c] Facilities subject to SARA Title III; and
[d] Hazardous waste treatment, disposal, storage and recovery facilities.

(iii) ESAs and 303(d) Listed Waterbodies: All other commercial or industrial sites/sources tributary to and within the same hydrologic subarea as a CWA Section 303(d) impaired water body segment, where the site/source generates pollutants for which the water body segment is impaired. All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) or that generate pollutants tributary to and within the same hydrologic subarea as an observed exceedance of an action level.

(iv) All other commercial or industrial sites/sources that the Copermittee determines may contribute a significant pollutant load to the MS4.

(2) General BMP Implementation

(a) Pollution Prevention: Each Copermittee must require the use of pollution prevention methods by the inventoried industrial and commercial sites/sources.

(b) Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all inventoried industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review and update its existing BMPs for adequacy no later than with the submittal of the JRMP. Copermittees may continue to regularly review and update their designated BMPs for adequacy and subsequently submit any updates in their Annual Report. The designated minimum BMPs must be specific to facility types and pollutant-generating activities, as appropriate.

(c) Designate Enhanced BMPs for ESAs and 303(d) Impairments: Each Copermittee must designate enhanced measures for inventoried industrial and commercial sites/sources tributary to and within the same hydrologic subarea as CWA section 303(d) impaired water body segments (where a site/source generates pollutants for which the water body segment is

impaired). Each Copermittee must also designate additional controls for industrial and commercial sites/sources within or directly adjacent to or discharging directly to coastal lagoons, the ocean, or other receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order). Copermittees may continue to regularly review and update their designated enhanced BMPs for adequacy and subsequently submit any updates in their next Annual Report.

(d) Implement BMPs: Each Copermittee must implement, or require the implementation of, the designated minimum and enhanced BMPs and any additional measures necessary based on inspections, incident responses, and water quality data to comply with this Order at each industrial and commercial site/source within its jurisdiction.

(3) Mobile Businesses Program

(a) Each Copermittee must develop and implement a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP and to prohibit non-storm water discharges pursuant to Section B of this Order. Each Copermittee must keep as part of its commercial source inventory a listing of mobile businesses known to operate within its jurisdiction that conduct services listed above in section F.3.b.(1)(a). The program must include:

(i) Development and implementation of minimum standards and BMPs to be required for each of the various types of mobile businesses;
(ii) Development and implementation of an enforcement strategy which specifically addresses the unique characteristics of mobile businesses;

(iii) Notification of those mobile businesses known to operate within the Copermittee's jurisdiction of the minimum standards and BMP requirements;
(iv) Development and implementation of an outreach and education strategy; and
(v) Inspection of mobile businesses as needed to implement the program.

(b) If they choose to, the Copermittees may cooperate in developing and implementing their programs for mobile businesses, including sharing of mobile business inventories, BMP requirements, enforcement action information, and education.

(4) Inspection of Industrial and Commercial Sites/Sources

Each Copermittee must conduct industrial and commercial site inspections for compliance with its ordinances, permits, and this Order. Mobile businesses must be inspected as needed pursuant to section F.3.b.(3).

(a) Inspection Procedures: Inspections must include but not be limited to:

(i) Review of BMP implementation plans not including SSMPs required pursuant to section F.1.d, if the site uses or is required to use such a plan;
(ii) Review of facility monitoring data, if the site monitors its runoff;
(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;
(iv) Assessment of compliance with Copermittee ordinances and Copermittee issued permits related to runoff;
(v) Assessment of the implementation, maintenance and effectiveness of the designated minimum and/or enhanced BMPs;
(vi) Visual observations for non-storm water discharges, potential illicit connections, and potential discharge of pollutants in storm water runoff; and
(vii) Education and training on storm water pollution prevention, as conditions warrant.

(b) Frequencies: At a minimum all sites determined to pose a high threat to water quality must be inspected each year. All inventoried sites must be inspected at least once during a five year period. In evaluating threat to water quality, each Copermittee must consider, at a minimum, the following:

(i) Type of activity (SIC code);
(ii) Materials used at the facility;
(iii) Wastes generated;
(iv) Pollutant discharge potential, including whether the facility generates a pollutant that exceeds an action level;
(v) Non-storm water discharges;
(vi) Size of facility;
(vii) Proximity to receiving water bodies;
(viii) Sensitivity of receiving water bodies;
(ix) Whether the facility is subject to the General Industrial Permit or an individual NPDES permit;
(x) Whether the facility has filed a No Exposure Certification/Notice of Non-Applicability;
(xi) Facility design;

(xii) Total area of the site, portion of the site where industrial or commercial activities occur, and area of the site exposed to rainfall and runoff;
(xiii) The facility's compliance history; and
(xiv) Any other relevant factors.

(c) Third-Party Certifications: Each Copermittee may propose to develop and implement a third party certification program subject to San Diego Water Board Executive Officer acceptance. This program would verify industrial and commercial site/source compliance with the Copermittees' ordinances, permits, and this Order. To the extent that third party certifications are conducted to fulfill the requirements of Section F.3.b.(4) above, the Copermittee retains responsibility for compliance with this Order and will be responsible for conducting and documenting quality assurance and quality control of the third-party certifications.

The Copermittee's proposed third party certification program must include the following:

(i) A description of the procedures and measures for quality assurance and quality control;
(ii) A listing of sites/sources that may and may not participate in the program;
(iii) The representative percentage of certifications that would qualify to satisfy the inspection requirements in section F.3.b(4)(c) above;
(iv) Photo documentation of potential storm water violations identified during the third party inspection;
(v) Reporting to the Copermittee of identified significant potential violations, including imminent or observed illegal discharges, within 24 hours of the third party inspection;
(vi) Reporting to the Copermittee of all findings within one week of the inspection being conducted; and
(vii) Copermittee follow-up and/or enforcement actions for identified potential storm water violations within two business days of the potential violation report receipt.

(d) Based upon site inspection findings, each Copermittee must implement all follow-up actions and enforcement necessary to comply with this Order.

(e) To the extent that the San Diego Water Board has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year is deemed satisfied.

(f) The Copermittees must track the number of inspections for the inventoried industrial and commercial sites/sources throughout the reporting period to verify that the sites/sources are inspected at the minimum frequencies listed in this Order.

(5) Enforcement of Industrial and Commercial Sites/Sources

Each Copermittee must enforce its storm water ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this Order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following tools or their equivalent: Non-monetary penalties, fines, bonding requirements, liens and/or permit denials for non-compliance.

(6) Reporting of Non-Compliant Sites

Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the wet season, of any unresolved high level enforcement action (as defined in the Copermittees' JRMP) that poses a significant threat to water quality in its jurisdiction as a result of violations of their storm water ordinances.

c. RESIDENTIAL

Each Copermittee must implement a residential program that meets the requirements of this section, prevents illicit discharges into the MS4, reduces residential discharges of storm water pollutants from the MS4 to the MEP, and prevents residential discharges from the MS4 from causing or contributing to a violation of water quality standards.

(1) Threat to Water Quality Prioritization

Each Copermittee must identify residential areas and activities that pose a high threat to water quality. At a minimum, these must include:

(a) Automobile repair, maintenance, washing, and parking;
(b) Home and garden care activities and product use (pesticides, herbicides, and fertilizers);
(c) Disposal of trash, pet waste, green waste, and household hazardous waste (e.g., paints, cleaning products);
(d) Any other residential source that the Copermittee determines may contribute a significant pollutant load to the MS4;

(e) Any residential areas tributary to and within the same hydrologic subarea as a CWA section 303(d) impaired water body, where the residence generates pollutants for which the water body is impaired; and

(f) Any residential areas within or directly adjacent to or discharging directly to receiving waters within an environmentally sensitive area (as defined in Attachment C of this Order)

(2) BMP Implementation

(a) Pollution Prevention: Each Copermittee must actively encourage the use of pollution prevention methods by residents.

(b) Designate BMPs: Each Copermittee must designate minimum BMPs for high-threat-to-water quality residential areas and activities. The designated minimum BMPs for high-threat-to-water quality residential areas and activities must be area or activity specific.

(c) Hazardous Waste BMPs: Each Copermittee must facilitate the proper management and disposal of used oil, toxic materials, and other household hazardous wastes. Such facilitation must include educational activities, public information activities, and establishment of collection sites operated individually and/or jointly by the Copermittee(s) or a private entity. Curbside collection of household hazardous wastes is encouraged.

(d) Implement BMPs: Each Copermittee must implement, or require implementation of, the designated minimum BMPs and any additional measures necessary to comply with Sections A and B of this Order.

(e) Each Copermittee must implement, or require implementation of, BMPs for residential areas and activities that have not been designated a high threat to water quality, as necessary.

(3) Enforcement of Residential Areas and Activities

Each Copermittee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this Order.

(4) Common Interest Areas (CIA) / Home Owner Association (HOA) Areas, and Mobile Home Parks

Each Copermittee must ensure that effective measures exist and are implemented or required to be implemented to ensure that runoff within and from common interest developments, including areas managed by associations and mobile home parks, and meets the objectives of this section and Order.

(a) BMP Implementation: Each Copermittee must implement or require implementation of management measures based on a review of pertinent factors, including:

(i) Maintenance duties and procedures typically used by CIA/HOA maintenance associations within its jurisdiction;
(ii) Whether streets and storm drains are publicly or privately owned within the CIA/HOA or mobile home park;
(iii) Whether the CIA/HOA area or mobile home park has been identified as a high priority residential area based on an evaluation of the site potential to generate pollutants contributing to a 303(d) listed waterbody or an observed action level exceedance; and
(iv) Other activities conducted or authorized by the HOA that may pose a significant risk to inland receiving waters.

(b) Legal Authority and Enforcement: By July 1, 2012, each Copermittee must review, and if necessary update, its Municipal Code to verify that they have the legal authority to implement and enforce its ordinances within CIA/HOA areas and mobile home parks.

d. RETROFITTING EXISTING DEVELOPMENT

Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section. The goals of the existing development retrofitting program are to address the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. Where feasible, at the discretion of the Copermittee, the existing development retrofitting program may be coordinated with flood control projects and other infrastructure improvement programs.

(1) The Copermittee(s) must identify and inventory existing areas of development (i.e. municipal, industrial, commercial, residential) as candidates for retrofitting. Potential retrofitting candidates must include but are not limited to:

(a) Areas of development that generate pollutants of concern to a TMDL or an ESA;
(b) Receiving waters that are channelized or otherwise hardened;
(c) Areas of development tributary to receiving waters that are channelized or otherwise hardened;

(d) Areas of development tributary to receiving waters that are significantly eroded; and
(e) Areas of development tributary to an ASBS or SWQPA.

(2) Each Copermittee must evaluate and rank the inventoried areas of existing developments to prioritize retrofitting. Criteria for evaluation must include but is not limited to:

(a) Feasibility;
(b) Cost effectiveness;
(c) Pollutant removal effectiveness, including reducing pollutants exceeding action level;
(d) Tributary area potentially treated;
(e) Maintenance requirements;
(f) Landowner cooperation;
(g) Neighborhood acceptance;
(h) Aesthetic qualities;
(i) Efficacy at addressing concern; and
(j) Potential improvements on public health and safety.

(3) Each Copermittee must consider the results of the evaluation in prioritizing work plans for the following year in accordance with Sections G.1 and J. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. Where feasible, the retrofit projects may be designed in accordance with the SSMP requirements within sections F.1.d.(3) through F.1.d.(8) and the Hydromodification requirements in Section F.1.h.

(4) The Copermittees must cooperate with private landowners to encourage site specific retrofitting projects. The Copermittee must consider the following practices in cooperating and encouraging private landowners to retrofit their existing development:

(a) Demonstration retrofit projects;
(b) Retrofits on public land and easements that treat runoff from private developments;
(c) Education and outreach;
(d) Subsidies for retrofit projects;
(e) Requiring retrofit projects as enforcement, mitigation or ordinance compliance;
(f) Public and private partnerships; and
(g) Fees for existing discharges to the MS4 and reduction of fees for retrofit implementation.

(5) The known completed retrofit BMPs must be tracked in accordance with Section F.1.f. Retrofit BMPs on publicly owned properties must be inspected per section F.1.f . Privately owned retrofit BMPs must be inspected as needed.

(6) Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters (as identified in section F.3.d.(1)), a Copermittee may propose a regional mitigation project to improve water quality. Such regional projects may include but are not limited to:

(a) Regional water quality treatment BMPs;
(b) Urban creek or wetlands restoration and preservation;
(c) Daylighting and restoring underground creeks;
(d) Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights;
(e) Hydromodification project; and
(f) Removal of invasive plant species.

(7) A retrofit project or regional mitigation project may qualify as a Watershed Water Quality Activity provided it meets the requirements in section G. Watershed Workplan.

4. ILLICIT DISCHARGE DETECTION AND ELIMINATION

Each Copermittee must implement a program that meets the requirements of this section to actively detect and eliminate illicit discharges and disposal into the MS4. The program must address all types of illicit discharges and connections excluding those non-storm water discharges not prohibited by the Copermittee in accordance with section B of this Order.

a. PREVENT AND DETECT ILLICIT DISCHARGES AND CONNECTIONS

Each Copermittee must implement measures to prevent and detect illicit discharges to the MS4.

(1) Legal Authority: Each Copermittee must retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.

(2) Inspections: Each Copermittee must include use of appropriate Copermittee personnel and contractors to assist in identifying illicit discharges and connections during their daily activities.

(a) Visual inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities.

(b) Copermittee staff and contractors conducting non-MS4 field operations must be trained to report suspected illegal discharges and connections to proper Copermittee staff.

b. **MAINTAIN MS4 MAP**

Each Copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is strongly encouraged. The MS4 map must include all segments of the storm sewer system owned, operated, and maintained by the Copermittee, as well as all known locations of inlets that discharge and/or collect runoff into the Copermittee's MS4, all known locations of connections with other MS4s (e.g. Caltrans), and all known locations of all the outfalls that discharge runoff from the Copermittee's MS4. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The MS4 map including any GIS layers must be submitted with the updated JRMP.

c. **FACILITATE PUBLIC REPORTING OF ILLICIT DISCHARGES AND CONNECTIONS - PUBLIC HOTLINE**

Each Copermittee must promote, publicize and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s. Each Copermittee must facilitate public reporting through development and operation of a public hotline. Public hotlines can be Copermittee-specific or shared by Copermittees. All storm water hotlines must be capable of receiving reports in both English and Spanish 24 hours per day and seven days per week. All reported incidents, and how each was resolved, must be summarized in each Copermittee's Annual Report.

d. **DRY WEATHER FIELD SCREENING AND ANALYTICAL MONITORING**

Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E of this Order.

e. **INVESTIGATION / INSPECTION AND FOLLOW-UP**

Each Copermittee must implement procedures to investigate and inspect portions of its MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.

(1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.

(2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.

(a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the Annual Report.

(c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittee(s) having jurisdiction must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation must be included in the Annual Report.

(3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) made to the Copermittee in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.

f. **ELIMINATION OF ILLICIT DISCHARGES AND CONNECTIONS**

Each Copermittee must take immediate action to initiate steps necessary to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections after detection within its jurisdiction. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately.

g. **ENFORCE ORDINANCES**

Each Copermittee must implement and enforce its ordinances, orders, or other legal authority to prevent illicit discharges and connections to its MS4 and to eliminate detected illicit discharges and connections to its MS4.

h. **PREVENT AND RESPOND TO SEWAGE SPILLS (INCLUDING FROM PRIVATE LATERALS AND FAILING SEPTIC SYSTEMS) AND OTHER SPILLS**

Each Copermittee must implement management measures and procedures (including a notification mechanism) to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems). Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate Copermittee departments, programs and agencies so that maximum water quality protection is available at all times.

5. PUBLIC PARTICIPATION COMPONENT

Each Copermittee must incorporate a mechanism for public participation in the updating, development, and implementation of the JRMP.

6. EDUCATION COMPONENT

Each Copermittee must implement education programs to (1) measurably increase the knowledge regarding MS4s, impacts of runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutants in storm water discharges and eliminate prohibited non-storm water discharges to MS4s and the environment. At a minimum, the education programs must meet the requirements of this section and address the following target communities:

- Copermittee Departments and Personnel
- New Development / Redevelopment Project Applicants, Developers, Contractors, Property Owners, and other Responsible Parties
- Construction Site Owners and Operators
- Commercial Owners and Operators
- Industrial Owners and Operators
- Residential Community and General Public

a. **GENERAL REQUIREMENTS**

(1) At a minimum, the Copermittee education programs must educate each target community on the following topics, as appropriate to the target community's potential storm water and non-storm water discharges to the MS4:

(a) Applicable water quality laws, regulations, permits, and requirements;
(b) Best management practices;
(c) General runoff concepts;
(d) Existing water quality, including local water quality conditions, impaired waterbodies and environmentally sensitive areas; and
(e) Other topics, as determined by the Copermittee(s), such as public reporting mechanisms, water conservation, low-impact development techniques, and public health and vector issues associated with runoff.

(2) Each Copermittee must implement educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials.

b. **SPECIFIC REQUIREMENTS**

(1) Copermittee Departments and Personnel

(a) Each Copermittee must implement an education program so its staff and contractors (and Planning Boards and Elected Officials, if applicable) responsible for implementing the requirements of this Order have an understanding of the following topics as applicable to their responsibilities:

(i) Applicable water quality laws and regulations;
(ii) The potential effects and impacts that Copermittee departments and personnel activities related to their job duties can have on water quality);
(iii) Plan review policies and procedures to verify consistent application;
(iv) Methods of minimizing impacts to receiving water quality resulting from development, construction, and other potential pollutant generating activities;

(v) Proper implementation of erosion and sediment control, source control, treatment control, and other BMPs to minimize the impacts to receiving water quality resulting from development, construction, and other potential pollutant generating activities;
(vi) Applicable recordkeeping and tracking mechanisms; and
(vii) Inspection and enforcement procedures, BMP implementation, and review of monitoring data.

(b) Each Copermittee must train its staff responsible for oversight and conducting storm water compliance inspections and enforcement of construction activities (e.g. construction, building, code enforcement, grading review staffs, inspectors, and other responsible construction staff) annually prior to the rainy season.

(c) Each Copermittee must train its staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year.

(2) New Development / Redevelopment and Construction Sites

As early in the planning and development process as possible and all through the permitting and construction process, each Copermittee must notify parties responsible for the project about the importance of educating all construction workers in the field about storm water issues and BMPs, in addition to the topics under Section F.6.a.(1).

(3) Commercial and Industrial Sites / Sources

At least once during the five-year period of this Order, each Copermittee must notify the owner/operator of each of its inventoried commercial and industrial site/source of the BMP requirements applicable to the site/source.

(4) Residential and General Public

Each Copermittee shall collaboratively conduct or participate in development and implementation of a program to educate residential and general public target communities. The Copermittee residential and general public education programs must address potential pollutant generating activities (e.g., car washing, mobile operations, yard maintenance) and pollutant generating products (e.g., pesticides, fertilizers, household chemicals). The target audiences of the residential and general public education programs must include underserved target audiences (e.g., disadvantaged communities), residents and managers of CIA/HOA areas, and owners and residents of mobile home parks.

G. WATERSHED WATER QUALITY WORKPLAN

Each Copermittee must collaborate with other Copermittees to develop and implement a Watershed Water Quality Workplan (Watershed Workplan) to identify, prioritize, address, and mitigate the highest priority water quality issues/pollutants in the Upper Santa Margarita Watershed.

1. Watershed Workplan Components

The work plan must, at a minimum:

a. Characterize the receiving water quality in the watershed. Characterization must include assessment and analysis of regularly collected water quality data, reports, monitoring and analysis generated in accordance with the requirements of the Receiving Waters Monitoring and Reporting Program, as well as applicable information available from other public and private organizations. This characterization must include an updated watershed map.

b. Identify and prioritize water quality problem(s) in terms of constituents by location, in the watershed's receiving waters. In identifying water quality problem(s), the Copermittees must, at a minimum, give consideration to TMDLs, receiving waters listed on the CWA section 303(d) list, waters with persistent violations of water quality standards, toxicity, or other impacts to beneficial uses, and other pertinent conditions.

c. Identify the likely sources, pollutant discharges and/or other factors causing the highest water quality problem(s) within the watershed. Efforts to determine such sources must include, but not be limited to: use of information from the construction, industrial/commercial, municipal, and residential source identification programs required within the JRMP of this Order; water quality monitoring data collected as part of the Receiving Water Monitoring and Reporting Program required by this Order, and additional focused water quality monitoring to identify specific sources within the watershed.

d. Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s) and locations. The BMP implementation strategy must include a schedule for implementation of the BMPs to abate specific receiving water quality problems and a list of criteria to be used to evaluate BMP effectiveness. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed. This implementation strategy must include a map of any implemented and/or proposed BMPs.

e. Develop a strategy to monitor improvements in receiving water quality directly

resulting from implementation of the BMPs described in the Watershed Workplan. The monitoring strategy must review the necessary data to report on the measured pollutant reduction that results from proper BMP implementation. Monitoring must, at a minimum, be conducted in the receiving water to demonstrate reduction in pollutant concentrations and progression towards attainment of receiving water quality objectives.

f. Establish a schedule for development and implementation of the Watershed strategy outlined in the Workplan. The schedule must, at a minimum, include forecasted dates of planned actions to address Provisions E.2(a) through E.2(e) and dates for watershed review meetings through the remaining portion of this Permit cycle. Annual watershed workplan review meetings must be open to the public and appropriately publically noticed such that interested parties may come and provide comments on the watershed program.

2. Watershed Workplan Implementation

Watershed Copermittee's must implement the Watershed Workplan within 90 days of submittal unless otherwise directed by the San Diego Water Board.

3. Copermittee Collaboration

Watershed Copermittees must collaborate to develop and implement the accepted Watershed Workplan. Watershed Copermittee collaboration must include frequent regularly scheduled meetings. The Copermittees must pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-Copermittee owners of the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4. The Copermittees must, as appropriate, participate in watershed management efforts to address water quality issues within the entire Santa Margarita Watershed (such as the County of San Diego and U.S. Marine Corps Camp Pendleton).

4. Public Participation

Watershed Copermittees must implement a watershed-specific public participation mechanism within each watershed. A required component of the watershed-specific public participation mechanism must be a minimum 30-day public review of and opportunity to comment on the Watershed Workplan prior to submittal to the San Diego Water Board. The Workplan must include a description of the public participation mechanisms to be used and identification of the persons or entities anticipated to be involved during the development and implementation of the Watershed Workplan.

5. Watershed Workplan Review and Updates

Watershed Copermittees must review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan must be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings must occur once every calendar year and be conducted by the Watershed Copermittees. Annual Watershed Review Meetings must be open to the public and adequately noticed. Individual Watershed Copermittees must also review and modify their jurisdictional programs and JRMP Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.

6. Pyrethroid Toxicity Reduction Evaluation

The Watershed Copermittees must incorporate the pyrethroid pollutant reduction program[18] into the Watershed Workplan. The pyrethroid pollutant reduction program must include the following elements:

a. Pursue state and federal regulatory change;
b. Implement a set of source controls targeted specifically at urban pyrethroid use;
c. Through the annual reporting process, monitor the implementation of those controls, assess effectiveness, and identify sources or areas where additional effort is needed;
d. Implement additional controls as needed; and
e. Continue to monitor implementation, as well as conditions within the target receiving waters, assess effectiveness, and re-evaluate control programs.

H. FISCAL ANALYSIS

1. Secure Resources: Each Copermittee must exercise its full authority to secure the resources necessary to meet all requirements of this Order.

2. Annual Analysis: Each Copermittee must conduct an annual fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs required by this Order. The analysis must include estimated expenditures for the current reporting period, the preceding period, and the next reporting period.

   a. Each analysis must include a description of the source of funds that are proposed to meet the necessary expenditures.
   b. Each analysis must include a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items.

[18] The pyrethroid pollutant reduction program is described in the "Riverside County – Santa Margarita Region Pyrethroid Source identification Toxicity Reduction Evaluation, Final Phase II Report", January 2009 by MACTEC.

3. Annual Reporting: Each Copermittee must submit its annual fiscal analysis with the annual JRMP report.

I. TOTAL MAXIMUM DAILY LOADS

1. The waste load allocations (WLAs) of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis. Early TMDL requirements, including monitoring, may be required and inserted into this Order pursuant to Finding E.10.

2. The Cities of Wildomar and Murrieta must comply with the requirements and WLAs assigned to the discharges from their MS4s contributing to the Lake Elsinore/Canyon Lake (San Jacinto Watershed) Nutrient TMDLs as specified in Section VI.D.2 of the Santa Ana Water Board's Order R8-2010-0033, including relevant sections of the fact sheet and findings, and subsequent revisions thereto.

J. PROGRAM EFFECTIVENESS ASSESSMENT AND REPORTING

Beginning with the Annual Report due in 2013, each Copermittee must annually assess and report upon the effectiveness of its JRMP and Watershed Workplan implementation to (1) reduce the discharge of storm water pollutants from its MS4 to the MEP; (2) prohibit non-stormwater discharges; and (3) prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.

1. Program Effectiveness Assessments

a. IDENTIFY EFFECTIVENESS ASSESSMENTS

With the JRMP and Watershed Workplan submittal, each Copermittee must establish assessment measures or methods for each of the six outcome levels described by CASQA[19], using data from each JRMP program component, the MRP, and the Watershed Workplan.

(1) Assessment interval: For each established assessment measure or method, an assessment interval must be established as appropriate to the measure or method.

(2) Projected Timeframe: For each established assessment measure or method, each Copermittee must identify the projected timeframe within which the associated outcome level can adequately assess change.

[19] Effectiveness assessment outcome levels as defined by CASQA are defined in Attachment C of this Order. See *"Municipal Stormwater Program Effectiveness Assessment Guidance"* (CASQA, May 2007) for guidance for assessing program activities at the various outcome levels.

b. **PERFORM ASSESSMENTS**

(1) Annually: Each year, the Copermittee must perform each applicable assessment based on the associated assessment interval, and determine whether the desired outcome has been met.

(2) With the submittal of the Report of Waste Discharge, the Copermittees must determine whether their program implementation is resulting in the protection and/or improvement of water quality through an Integrated Assessment.

2. Respond to Assessments

a. Where the assessments indicate that the desired outcome level has not been achieved at the end of the projected timeframe, the Copermittee must review its applicable activities and BMPs to identify any modifications and improvements needed to maximize effectiveness, as necessary to comply with this Order. If the Copermittee determines that the existing activities/BMPs are adequate, or that the projected timeframe should be extended, justification and an updated timeframe for attainment of the outcome level must be provided in the Annual Report.

b. Each Copermittee must develop and implement a work plan and schedule to address any program modifications and improvements in response to the findings of its assessment. The work plan and schedule must be provided and updated with the applicable Annual Report. The work plan must include, at a minimum, the following:

(1) The problems and priorities identified during the assessment;
(2) A list of priority pollutants and known or suspected sources;
(3) A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts;
(4) A description and schedule for new and/or modified BMPs. The schedule is to include dates for significant milestones;
(5) A description of how the selected activities will address an identified high priority problem. This will include a description of the expected effectiveness and benefits of the new and/or modified BMPs;
(6) A description of implementation effectiveness metrics;
(7) A description of how efficacy results will be used to modify priorities and implementation; and
(8) A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.

3. Assessment and Response Reporting

Each Copermittee must include a summary of its effectiveness assessments within each Annual Report. Beginning with the FY 2012-2013 Annual Report, the Program Effectiveness reporting must include:

a. The results of each of the effectiveness assessments performed pursuant to J.1.b, including the demonstrated CASQA effectiveness level(s);

b. Responses to effectiveness assessments: A description of any program modifications planned in accordance with section J.2, including the work plan and identified schedule for implementation. The description must include the basis for determining that each modified activity and/or BMP represents an improvement expected to result in improved water quality; and

c. A description of any steps to be implemented to improve the Copermittee's ability to assess program effectiveness.

K. REPORTING

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance.

1. Runoff Management Plans

a. JURISDICTIONAL RUNOFF MANAGEMENT PLANS

(1) The written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F of this Order is referred to as the Jurisdictional Runoff Management Plan (JRMP). Each Copermittee must revise and update its existing JRMP so that it describes all activities the Copermittee will undertake to implement the requirements of this Order. Each Copermittee must submit its updated and revised JRMP to the San Diego Water Board no later than June 30, 2012.

(2) At a minimum, each Copermittee's JRMP must be updated and revised to demonstrate compliance with each applicable section of this Order.

b. **WATERSHED WORKPLANS**

Copermittees must update and revise the Watershed Workplan to describe any changes in water quality problems or priorities, and any necessary change to actions Copermittees will take to implement jurisdictional or watershed BMPs to address those identified. The Copermittees must assemble and submit the Watershed Workplan to the San Diego Water Board no later than June 30, 2012, and must implement the Workplan within 90 days unless otherwise directed by the San Diego Water Board.

2. Other Required Reports and Plans

a. **SSMP UPDATES**

(1) Copermittees must submit their updated SSMP in accordance with the applicable requirements of section F.1 with the JRMP by June 30, 2012.

(2) Within 180 days of determination that the SSMP is in compliance with this Order's provisions, each Copermittee must amend its ordinances consistent with the SSMP and implement the updated SSMP. Any amended or new ordinances must be submitted to the San Diego Water Board the applicable Annual Report.

b. **HMP**

(1) By June 30, 2013, the Copermittees must submit to the San Diego Water Board Executive Officer a draft HMP that has been reviewed by the public, including identification of the appropriate limiting range of flow rates in accordance with the applicable requirements of section F.1.h.

(2) Within 180 of receiving San Diego Water Board comments on the draft HMP, the Copermittees must submit a final HMP that addressed the San Diego Water Board's comments.

(3) Within 90 days of receiving a finding of adequacy from the Executive Officer each Copermittee must incorporate and implement the HMP for all Priority Development Projects.

(4) Prior to acceptance of the HMP by the San Diego Water Board, the early implementation measures likely to be included in the HMP shall be encouraged by the Copermittees.

c. **REPORT OF WASTE DISCHARGE**

The Copermittees must submit to the San Diego Water Board, no later than 180 days in advance of the expiration date of this Order, a Report of Waste Discharge (ROWD) as an application for issuance of new waste discharge requirements. The fourth annual report for this Order may supplement the ROWD, provided the ROWD contains the minimum information below.

At a minimum, the ROWD must include the following: (1) Proposed changes to the Copermittees' runoff management programs; (2) Proposed changes to monitoring programs; (3) Justification for proposed changes; (4) Name and mailing addresses of the Copermittees; (5) Names and titles of primary contacts of the Copermittees; (6) Any other information necessary for the reissuance of this Order and (7) Any other information required by federal regulations for permit reapplications.

3. Annual Reports

JURISDICTIONAL RUNOFF MANAGEMENT PROGRAM (JRMP) ANNUAL REPORTS

a. Each Copermittee must generate individual JRMP Annual Reports that cover implementation of its jurisdictional activities during the past annual reporting period. Each Annual Report must verify and document compliance with this Order as directed in this section. Each Copermittee must retain records in accordance with the Standard Provisions in Attachment B of this Order, available for review, that document compliance with each requirement of this Order. The reporting period for these annual reports must be the previous fiscal year.

b. Each Copermittee must submit its JRMP Annual Reports to the San Diego Water Board by October 31of each year, beginning on October 31, 2013.

c. Each JRMP Annual Report must contain, at a minimum, the following information, as applicable to the Copermittee:

(1) Information required to be reported annually in Section H (Fiscal Analysis) of this Order;
(2) Information required to be reported annually in Section J (Program Effectiveness) of this Order;
(3) The completed Reporting Checklist found in Attachment D; and
(4) Information for each program component as described in the following Table 5:

Table 5. Annual Reporting Requirements

Program Component	Reporting Requirement
New Development	1. All updated relevant sections of the General Plan and environmental review process and a description of any planned updates within the next annual reporting period, if applicable;
	2. All revisions to the SSMP, including where applicable: (a) Identification and summary of where the SSMP fails to meet the requirements of this Order; (b) Updated procedures for identifying pollutants of concern for each Priority Development Project; (c) Updated treatment BMP ranking matrix; (d) Updated site design and treatment control BMP design standards;
	3. Number of Priority Development Projects reviewed and approved during the reporting period. Brief description of BMPs required at approved Priority Development Projects. Verification that site design, source control, and treatment BMPs were required on all applicable Priority Development Projects;
	4. Name and location of all Priority Development Projects that were granted a waiver from implementing LID BMPs pursuant to section F.1.d.(4) during the reporting period;
	5. Updated watershed-based BMP maintenance tracking database of approved treatment control BMPs and treatment control BMP maintenance within its jurisdiction, including updates to the list of high-priority Priority Development Projects; and verification that the requirements of this Order were met during the reporting period;

Table 5. Annual Reporting Requirements (Cont'd)

Program Component	Reporting Requirement
New Development (Cont'd)	6. Name and brief description of all approved Priority Development Projects required to implement hydrologic control measures in compliance with section F.1.h including a brief description of the management measures planned to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels;
	7. Number and description of all enforcement activities applicable to the new development and redevelopment component and a summary of the effectiveness of those activities.
Construction	1. All updated relevant ordinances and description of planned ordinance updates within the next annual reporting period, if applicable;
	2. A description of any changes to procedures used for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality;
	3. Any changes to the designated minimum and enhanced BMPs;
	4. Summary of the inspection program, including the following information: (a) Total number and date of inspections conducted at each facility; (b) Number, date, and types of enforcement actions by facility; (c) Brief description of each high-level enforcement actions at construction sites including the effectiveness of the enforcement. Supporting paper (or electronic) files must be maintained by the Copermittees and made available upon San Diego Water Board request. Supporting files must include a record of inspection dates, the results of each inspection, photographs (if any), and a summary of any enforcement actions taken.
Municipal	1. Updated source inventory;
	2. All changes to the designated municipal BMPs;
	3. Descriptions of any changes to procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies;
	4. Summary and assessment of BMP retrofits implemented at flood control structures, including: (a) List of projects retrofitted; (b) List and description of structures evaluated for retrofitting; (c) List of structures still needing to be evaluated and the schedule for evaluation;

Table 5. Annual Reporting Requirements (Cont'd)

Program Component	Reporting Requirement
Municipal (Cont'd)	5. Summary of the municipal structural treatment control operations and maintenance activities, including: (a) Number of inspections and types of facilities; (b) Summary of findings;
	6. Summary of the MS4 and MS4 facilities operations and maintenance activities, including: (a) Number and types of facilities maintained; (b) Amount of material removed; (c) List of facilities planned for bi-annual inspections and the justification;
	7. Summary of the municipal areas/programs inspection activities, including: (a) Number and date of inspections conducted at each facility; (b) The BMP violations identified during the inspection by facility; (c) Number, date and types of enforcement actions by facility; (d) Summary of inspection findings and follow-up activities for each facility;
	8. Description of activities implemented to address sewage infiltration into the MS4;
	9. Description of BMPs and their implementation for unpaved roads construction and maintenance.
Commercial / Industrial	1. Updated inventory of commercial / industrial sources;
	2. Summary of the inspection program, including the following information: (a) Number and date of inspections conducted at each facility or mobile business; (b) The BMP violations identified during the inspection by facility; (c) Number, date, and types of enforcement actions by facility or mobile business; (d) Brief description of each high-level enforcement actions at commercial/industrial sites including the effectiveness of the enforcement and follow-up activities for each facility;
	3. All changes to designated minimum and enhanced BMPs;
	4. A list of industrial sites, including each name, address, and SIC code, that the Copermittee suspects may require coverage under the General Industrial Permit, but has not submitted an NOI.

Table 5. Annual Reporting Requirements (Cont'd)

Program Component	Reporting Requirement
Residential	1. All updated minimum BMPs required for residential areas and activities;
	2. Quantification and summary of applicable runoff and storm water enforcement actions within residential areas and activities;
	3. Description of efforts to manage runoff and storm water pollution in common interest areas and mobile home parks.
Retrofitting Existing Development	1. Updated inventory and prioritization of existing developments identified as candidates for retrofitting;
	2. Description of efforts to retrofit existing developments during the reporting year;
	3. Description of efforts taken to encourage private landowners to retrofit existing development;
	4. A list of all retrofit projects that have been implemented, including site location, a description of the retrofit project, pollutants expected to be treated, and the tributary acreage of runoff that will be treated;
	5. Any proposed retrofit or regional mitigation projects and timelines for future implementation;
	6. Any proposed changes to the Copermittee's overall retrofitting program.
Illicit Discharge Detection and Elimination	1. Any changes to the legal authority to implement Illicit Discharge Detection and Elimination activities;
	2. Any Changes to the established investigation procedures;
	3. Any changes to public reporting mechanisms, including phone numbers and web pages;
	4. Summaries of illicit discharges (including spills and water quality data events) and how each significant case was resolved;
	5. A description of instances when field screening and analytical data exceeded action levels, including those instances for which no investigation was conducted;
	6. A description of follow-up and enforcement actions taken in response to investigations of illicit discharges and a description of the outcome of the investigation/enforcement actions.
Workplans	Updated workplans including priorities, strategy, implementation schedule and effectiveness evaluation.

d. Each JRMP Annual Report must also include the following information regarding non-storm water discharges (see Section B.2. of this Order):

(1) Identification of non-storm water discharge categories identified as a source of pollutants to waters of the U.S;
(2) A description of any updates to ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above ;
(3) Identification of any control measures to be required and implemented for

non-storm water discharge categories identified as needing controls by the San Diego Water Board; and

(4) A description of a program to address pollutants from non-emergency fire fighting flows identified by the Copermittee to be significant sources of pollutants.

4. Interim Reporting Requirements

For the reporting periods, prior to submittal of the JRMP, each JRMP Annual Report must be submitted in accordance with the requirements and deadlines described in Order No. 2004-001.

5. Universal Reporting Requirements

All submittals must include an executive summary, introduction, conclusion, recommendations, and signed certified statement. Each Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal. The Principal Copermittee must submit a signed certified statement covering its responsibilities for each applicable submittal and the sections of the submittals for which it is responsible.

L. MODIFICATION OF PROGRAMS

Modifications of JRMPs and/or Watershed Workplan may be initiated by the Executive Officer of the San Diego Water Board or by the Copermittees. Requests by Copermittees must be made to the Executive Officer, and must be submitted during the annual review process. Requests for modifications should be incorporated, as appropriate, into the Annual Reports or other deliverables required or allowed under this Order.

1. Minor modifications to JRMPs, and/or Watershed Workplan, may be accepted by the Executive Officer where the Executive Officer finds the proposed modification complies with all discharge prohibitions, receiving water limitations, and other requirements of this Order.

2. Proposed modifications that are not minor require amendment of this Order in accordance with this Order's rules, policies, and procedures.

M. PRINCIPAL COPERMITTEE RESPONSIBILITIES

Within 180 days of adoption of this Order, the Copermittees must designate the Principal Copermittee and notify the San Diego Water Board of the name of the Principal Copermittee. The Principal Copermittee must, at a minimum:

1. Serve as liaison between the Copermittees and the San Diego Water Board on general permit issues, and when necessary and appropriate, represent the Copermittees before the San Diego Water Board.

2. Coordinate permit activities among the Copermittees and facilitate collaboration on the development and implementation of programs required under this Order.

3. Coordinate the submittal of the documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E of this Order.

N. RECEIVING WATERS AND MS4 DISCHARGE MONITORING AND REPORTING PROGRAM

Pursuant to CWC section 13267, the Copermittees must comply with all the requirements contained in Receiving Waters and MS4 Discharge Monitoring and Reporting Program (MRP) No. R9-2010-0016 in Attachment E of this Order.

O. STANDARD PROVISIONS, REPORTING REQUIREMENTS, AND NOTIFICATIONS

1. Each Copermittee must comply with Standard Provisions, Reporting Requirements, and Notifications contained in Attachment B of this Order. This includes 24 hour/5 day reporting requirements for any instance of non-compliance with this Order as described in section 5.e of Attachment B.

2. All plans, reports and subsequent amendments submitted in compliance with this Order must be implemented immediately (or as otherwise specified). All submittals by Copermittees must be adequate to implement the requirements of this Order.

P. ADDITIONAL PROVISIONS

The Executive Officer shall meet with Camp Pendleton and other stakeholders at six (6) month intervals to identify and investigate water quality impacts, flow impacts, and impacts to water rights that may derive from the implementation of Low Impact Development BMPs required by Order R9-2010-0016 as they are developed by the storm water Copermittees. Any key issues or amendments to the Order that derive from those analyses and discussions will be promptly brought to the San Diego Water Board for their consideration.

I, David W. Gibson, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on November 10, 2010.

David W. Gibson
Executive Officer

TAB 3

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [*33 USCS §§ 1328,* 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [*33 USCS § 1311*(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [*33 USCS §§ 1311,* 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [*33 USCS § 407],* shall be deemed to be permits issued under this title [*33 USCS §§ 1341* et seq.], and permits issued under this title [*33 USCS §§ 1341* et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [*33 USCS §§ 1251* et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [*33 USCS § 407],* pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [*33 USCS §§ 1251* et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this

Act *[33 USCS § 1314*(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act *[33 USCS §§ 1251* et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act *[33 USCS § 1314*(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 *[33 USCS §§ 1311,* 1312, 1316, 1317, 1343];

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act *[33 USCS § 1318]* or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act *[33 USCS § 1318];*

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify

such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act *[33 USCS § 1317*(b)] into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 *[33 USCS § 1316]* if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 *[33 USCS § 1311]* if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308 *[33 USCS §§ 1284*(b), 1317, 1318].

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act *[33 USCS § 1314*(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act *[33 USCS § 1314*(i)(2)].

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The

Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) of the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act *[33 USCS §§ 1251* et seq.]. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph [enacted Dec. 27, 1977], the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act *[33 USCS §§ 1251* et seq.].

(e) Waiver of notification requirement. In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 [304(i)(2)] of this Act *[33 USCS § 1314*(i)(2)], the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories. The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants. Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works. In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act *[33 USCS § 1292]*) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act *[33 USCS § 1319*(a)] that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act *[33 USCS § 1319].*

(j) Public information. A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 *[33 USCS §§ 1319,* 1365], with sections 301, 302, 306, 307, and 403 *[33 USCS §§ 1311,* 1312, 1316, 1317, 1343], except any standard imposed under section 307 *[33 USCS § 1317]* for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act *[33 USCS § 1311,* 1316, or 1342], or (2) section 13 of the Act of March 3, 1899 *[33 USCS § 407],* unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972], in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899 *[33 USCS § 407],* the discharge by such source shall not be a violation of this Act *[33 USCS §§ 1251* et seq.] if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement.

(1) Agricultural return flows. The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations. The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities.

(A) NPDES permit requirements for silvicultural activities. The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) Other requirements. Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 404 *[33 USCS § 1344],* existing permitting requirements under section 402 *[33 USCS § 1342],* or from any other federal law.

(C) The authorization provided in Section 505(a) *[33 USCS § 1365*(a)] does not apply to any non-permitting program established under 402(p)(6) *[33 USCS § 1342*(p)(6)] for the silviculture activities listed in 402(l)(3)(A) *[33 USCS § 1342*(l)(3)(A)], or to any other limitations that might be deemed to apply to the silviculture activities listed in 402(l)(3)(A) *[33 USCS § 1342*(l)(3)(A)].

(m) Additional pretreatment of conventional pollutants not required. To the extent a treatment works (as defined in section 212 of this Act *[33 USCS § 1292])* which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 304(a)(4) of this Act *[33 USCS § 1314*(a)(4)] into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 307(b)(1) of this Act *[33 USCS § 1317*(b)(1)]. Nothing in this subsection shall affect the Administrator's authority under sections 307 and 309 of this Act *[33 USCS §§ 1317,* 1319], affect State and local authority under sections 307(b)(4) and 510 of this Act *[33 USCS §§ 1317*(b)(4), 1370], relieve such treatment works of its obligations to meet requirements established under this Act *[33 USCS §§ 1251* et seq.], or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program.

(1) State submission. The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage. A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval or major category partial permit programs. The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs. The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding.

(1) General prohibition. In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) *[33 USCS § 1314*(b)] subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 301(b)(1)(C) or section 303 (d) or (e) *[33 USCS § 1311*(b)(1)(C) or 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 303(d)(4) *[33 USCS § 1313*(d)(4)].

(2) Exceptions. A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)

(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a) *[33 USCS § 1311*(c), (g), (h), (i), (k), (n), or 1326(a)]; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act *[33 USCS §§ 1251* et seq.] or for reasons otherwise unrelated to water quality.

(3) Limitations. In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 *[33 USCS § 1313]* applicable to such waters.

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 *[33 USCS § 1311].*

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows.

(1) Requirement for permits, orders, and decrees. Each permit, order, or decree issued pursuant to this Act *[33 USCS §§ 1251* et seq.] after the date of enactment of this subsection [enacted Dec. 21, 2000] for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

(2) Water quality and designated use review guidance. Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report. Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels. No permit shall be required under this Act *[33 USCS §§ 1251* et seq.] by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

History

(June 30, 1948, ch 758, Title IV, § 402, as added Oct. 18, 1972, P.L. 92-500, § 2,*86 Stat. 880;* Dec. 27, 1977, P.L. 95-217, §§ 33(c), 54(c)(1), 65, 66, *91 Stat. 1577, 1591, 1599, 1600;* Feb. 4, 1987, P.L. 100-4, Title IV, §§ 401-403, 404(a), (c) [(d)], 405, *101 Stat. 65-69;* Oct. 31, 1992, P.L. 102-580, Title III, § 364, *106 Stat. 4862;* Dec. 21, 1995, P.L. 104-66, Title II, Subtitle B, § 2021(e)(2), *109 Stat. 727;* Dec. 21, 2000, P.L. 106-554, § 1(a)(4), *114 Stat. 2763;* July 30, 2008, P.L. 110-288, § 2, *122 Stat. 2650.)*

(As amended Feb. 7, 2014, P.L. 113-79, Title XII, Subtitle C, § 12313,*128 Stat. 992.)*

TAB 4

33 USCS § 1370

Current through PL 115-41, approved 6/23/17

United States Code Service - Titles 1 through 54 > TITLE 33. NAVIGATION AND NAVIGABLE WATERS > CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL > GENERAL PROVISIONS

§ 1370. State authority

Except as expressly provided in this Act [*33 USCS §§ 1251* et seq.], nothing in this Act [*33 USCS §§ 1251* et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [*33 USCS §§ 1251* et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [*33 USCS §§ 1251* et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

History

(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, *P.L. 92-500*, § 2, *86 Stat. 893*.)

End of Document

TAB 5

40 CFR 122.26

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) Permit requirement. (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i)A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii)A discharge associated with industrial activity (see § 122.26(a)(4));

(iii)A discharge from a large municipal separate storm sewer system;

(iv)A discharge from a medium municipal separate storm sewer system;

(v)A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at *40 CFR 122.2*.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems.

(i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C)A regional authority may be responsible for submitting a permit application under the following guidelines:

(1)The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2)The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3)Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv)One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v)Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi)Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4)Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5)Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6)Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States;

or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7)Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)

(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal

sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions.

(1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7)Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7)(i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under

State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at *40 CFR 122.2*.

(9) Outfall means a point source as defined by *40 CFR 122.2* at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings

and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in *40 CFR 122.27(b)(2)*-(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under *40 CFR 434.11(1)* because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment

cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE), pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with *5 U.S.C. 552*(a) and 1 CFR part 51. Copies may be obtained at EPA's Water Docket, 1200 Pennsylvania Avenue NW, Washington, DC 20460. For information on the availability of this material at National Archives and Records Administration, call 202-741-6030, or go to: *http://www.archives.gov/federal]register/code]of]federal]regula*

tions/ibr]locations.html. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a "total maximum daily load" (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(C) As of December 21, 2020 all certifications submitted in compliance with paragraphs (b)(15)(i)(A) and (B) of this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE

OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL

CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage	. Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres.
	. Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)

EXHIBIT 1 TO § 122.26(b)(15).--SUMMARY OF COVERAGE

OF "STORM WATER DISCHARGES ASSICIATED WITH SMALL

CONSTRUCTION ACTIVITY" UNDER THE NPDES STORM WATER PROGRAM

Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	. Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)
Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as "large" or "medium" municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as "large" or "medium" or "small" municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19)MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runon or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity -- (1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit, or any discharge of storm water which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)-(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A)A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under *40 CFR 262.34*); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C)A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description

of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under § 122.21(g)(7) (vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to *40 CFR 117.21* or *40 CFR 302.6* at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to *40 CFR 110.6* at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under § 122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2)[Reserved]

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification. (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B)A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(2)A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) Discharge characterization. (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C)A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts

shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(l)(1)(A)(i), section 304(l)(1)(A)(ii), or section 304(l)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR

part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1)A grid system consisting of perpendicular north-south and east-west lines spaced 1/4 mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7)Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced 1/4 mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs. (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B)A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources. (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with § 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2)A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii) (A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD[5]

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD[sub]5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C)A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D)A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A)A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit,

accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1)A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2)A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3)A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4)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;

(5)A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6)A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B)A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1)A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or

flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at *40 CFR 35.2005(20)*) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2)A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3)A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4)A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5)A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6)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; and

(7)A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C)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. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: Any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

(D)A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(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.

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity.

(i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) Part 1. (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2. (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submittted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) Rejected facilities. (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than

180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v)A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5)A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i)A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii)A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of *40 CFR 122.21* and *40 CFR 122.26(c)* (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)

(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) Petitions.

(1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by *40 CFR 35.2005(b)(11)* that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction,

based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for "no exposure" of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years. As of December 21, 2020 all certifications submitted in compliance with this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(iv) Allow the Director to inspect the facility to determine compliance with the "no exposure" conditions;

(v) Allow the Director to make any "no exposure" inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of "no exposure" to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak ("Sealed" means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations.

(i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be "no exposure" discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following 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 to storm water;

(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 process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: "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 under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, 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."

Statutory Authority

The Clean Water Act, *33 U.S.C. 1251* et seq.

History

[55 FR 48063, Nov. 16, 1990, as amended at *56 FR 12100,* Mar. 21, 1991; *56 FR 56554,* Nov. 5, 1991; *57 FR 11412,* Apr. 2, 1992; *57 FR 60447,* Dec. 18, 1992; *60 FR 40235,* Aug. 7, 1995; *64 FR 68722, 68838,* Dec. 8, 1999; *65 FR 30886, 30907,* May 15, 2000; *68 FR 11325, 11329,* Mar. 10, 2003; *70 FR 11560, 11563,* Mar. 9, 2005; *71 FR 33628, 33639,* June 12, 2006; *77 FR 72970, 72974,* Dec. 7, 2012; *80 FR 64064, 64096,* Oct. 22, 2015]

Annotations

Notes

[EFFECTIVE DATE NOTE:

77 FR 72970, 72974, Dec. 7, 2012, revised paragraph (b)(14)(ii), effective Jan. 7, 2013; *80 FR 64064, 64096,* Oct. 22, 2015, revised paragraphs (b)(15)(i)(A) and (g)(1)(iii) and added paragraph (b)(15)(i)(C), effective Dec. 21, 2015.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Constitutional Law : Congressional Duties & Powers : Reserved Powers
Energy & Utilities Law : Mining Industry : Coal : General Overview
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation
Energy & Utilities Law : Mining Industry : Surface Mining Control & Reclamation Act : General Overview
Energy & Utilities Law : Oil, Gas & Mineral Interests : General Overview
Energy & Utilities Law : Utility Companies : General Overview
Environmental Law : Hazardous Wastes & Toxic Substances : Resource Conservation & Recovery Act : General Overview
Environmental Law : Hazardous Wastes & Toxic Substances : Resource Conservation & Recovery Act :
Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances
Environmental Law : Natural Resources & Public Lands : Wetlands Management
Environmental Law : Solid Wastes : Permits : General Overview
Environmental Law : Solid Wastes : Resource Recovery & Recycling
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : General Overview
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Discharges
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Navigable Waters
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Point Sources
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Permits
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Storm Water Discharges

TAB 6

40 CFR 122.42

This document is current through the June 28, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through June 2, 2017.

§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).

The following conditions, in addition to those set forth in § 122.41, apply to all NPDES permits within the categories specified below:

(a) Existing manufacturing, commercial, mining, and silvicultural dischargers. In addition to the reporting requirements under § 122.41(l), all existing manufacturing, commercial, mining, and silvicultural dischargers must notify the Director as soon as they know or have reason to believe:

(1) That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(i) One hundred micrograms per liter (100 X mg/l);

(ii) Two hundred micrograms per liter (200 X mg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 X mg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

(iii) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.21(g)(7); or

(iv) The level established by the Director in accordance with § 122.44(f).

(2) That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(i) Five hundred micrograms per liter (500 X mg/l);

(ii) One milligram per liter (1 mg/l) for antimony;

(iii) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.21(g)(7).

(iv) The level established by the Director in accordance with § 122.44(f).

(b) Publicly owned treatment works. All POTWs must provide adequate notice to the Director of the following:

(1) Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to section 301 or 306 of CWA if it were directly discharging those pollutants; and

(2) Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

(3) For purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

(c) Municipal separate storm sewer systems. The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under § 122.26(a)(1)(v) must submit an annual report by the anniversary of the date of the issuance of the permit for such system. As of December 21, 2020 all reports submitted in compliance with this section must be submitted electronically by the owner, operator, or the duly authorized representative of the MS4 to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the owner, operator, or the duly authorized representative of the MS4 may be required to report electronically if specified by a particular permit or if required to do so by state law. The report shall include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions;

(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with § 122.26(d)(2)(iii) of this part; and

(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part;

(4)A summary of data, including monitoring data, that is accumulated throughout the reporting year;

(5) Annual expenditures and budget for year following each annual report;

(6)A summary describing the number and nature of enforcement actions, inspections, and public education programs;

(7) Identification of water quality improvements or degradation;

(d) Storm water discharges. The initial permits for discharges composed entirely of storm water issued pursuant to § 122.26(e)(7) of this part shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

(e) Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(iii) Ensure that clean water is diverted, as appropriate, from the production area;

(iv) Prevent direct contact of confined animals with waters of the United States;

(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

(2) Recordkeeping requirements.

(i) The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:

(A) All applicable records identified pursuant paragraph (e)(1)(ix) of this section;

(B) In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in § 412.37(b) and (c) and § 412.47(b) and (c).

(ii)A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

(3) Requirements relating to transfer of manure or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current

nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. As of December 21, 2020 all annual reports submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in *40 CFR 127.2(b)*, in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the permittee may be required to report electronically if specified by a particular permit or if required to do so by state law. The annual report must include:

(i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

(iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);

(vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including, for each discharge, the date of discovery, duration of discharge, and approximate volume; and

(v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;

(vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

(vii)A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

(viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) Terms of the nutrient management plan. Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, *40 CFR 412.4(c)*, must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

(i) Linear approach. An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) Narrative rate approach. An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in

chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: The CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D)CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(1)A field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(2) The results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) Changes to a nutrient management plan. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in *40 CFR 124.11* through *124.13*. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in *40 CFR 124.10*. The

Director must respond to all significant comments received during the comment period as provided in *40 CFR 124.17*, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) For EPA-issued permits only. Upon incorporation of the revised terms of the nutrient management plan into the permit, *40 CFR 124.19* specifies procedures for appeal of the permit decision. In addition to the procedures specified at *40 CFR 124.19*, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

Statutory Authority

The Clean Water Act, *33 U.S.C. 1251* et seq.

History

[48 FR 14153, Apr. 1, 1983, as amended at *49 FR 38049,* Sept. 26, 1984; *50 FR 4514,* Jan. 31, 1985; *55 FR 48073,* Nov. 16, 1990; *57 FR 60448,* Dec. 18, 1992; *68 FR 7176, 7268,* Feb. 12, 2003; *71 FR 6978, 6984,* Feb. 10, 2006; *72 FR 40245, 40250,* July 24, 2007; *73 FR 70418, 70483,* Nov. 20, 2008; *80 FR 64064, 64098,* Oct. 22, 2015]

Annotations

Notes

[EFFECTIVE DATE NOTE:

72 FR 40245, 40250, July 24, 2007, amended paragraph (e)(1), effective July 24, 2007; *73 FR 70418, 70483,* Nov. 20, 2008, amended paragraph (e), effective Dec. 22, 2008; *80 FR 64064, 64098,* Oct. 22, 2015, revised introductory text in paragraphs (c) and (e)(4) and paragraph (e)(4)(vi), effective Dec. 21, 2015.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances
Environmental Law : Hazardous Wastes & Toxic Substances : Treatment, Storage & Disposal
Environmental Law : Solid Wastes : Disposal Standards
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation
Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting

Case Notes Applicable to Entire Part

Part Note

Environmental Law : Hazardous Wastes & Toxic Substances : Toxic Substances

Mcclellan Ecological Seepage Situation (mess) v. Weinberger, 707 F. Supp. 1182, 1988 U.S. Dist. LEXIS 16103 (ED Cal June 20, 1988).

Overview: *A claim that an airforce base used treated wastewater in its cooling towers was moot because the base discontinued its use. The harm sought to be addressed by the claim should have been in the present or future, not in the past.*

TAB 7

40 CFR 123.1

This document is current through the June 28, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through June 2, 2017.

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System -- NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)

(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The

authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)

(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2)A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(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. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Clean Water Act, *33 U.S.C. 1251* et seq.

History

[48 FR 14178, Apr. 1, 1983, as amended at *54 FR 256,* Jan. 4, 1989; *54 FR 18784,* May 2, 1989; *58 FR 67981,* Dec. 22, 1993; *59 FR 64343,* Dec. 14, 1994; *63 FR 45114, 45122,* Aug. 24, 1998]

Annotations

Notes

[EFFECTIVE DATE NOTE:

63 FR 45114, 45122, Aug. 24, 1998, revised paragraphs (a) and (c), effective Sept. 23, 1998.]

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

Riverkeeper, Inc. v United States EPA (2004, CA2) 358 F3d 174, 57 Envt Rep Cas 1961, 34 ELR 20017

Waterkeeper Alliance, Inc. v United States EPA (2005, CA2) 399 F3d 486, 59 Envt Rep Cas 2089, 35 ELR 20049, amd (2005, CA2) *2005 US App LEXIS 6533*

LexisNexis® Notes

Case Notes Applicable to Entire Part
Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview
Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
Environmental Law : Natural Resources & Public Lands : Fish & Wildlife Protection
Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Effluent Limitations
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : State Water Quality Certifications
Environmental Law : Water Quality : Clean Water Act : Enforcement : General Overview
Environmental Law : Water Quality : Clean Water Act : Enforcement : Citizen Suits : General Overview
Environmental Law : Water Quality : Clean Water Act : Recordkeeping & Reporting

Case Notes Applicable to Entire Part

TAB 8

40 CFR 124.8

§ 124.8 Fact sheet.

(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)

(a)A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under *40 CFR 501.15(a)(2)(ix)*, and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1)A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4)A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6)A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the final decision.

(7) Name and telephone number of a person to contact for additional information.

(8) For NPDES permits, provisions satisfying the requirements of § 124.56.

(9) Justification for waiver of any application requirements under § 122.21(j) or (q) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, *42 U.S.C. 6901* et seq.; Safe Drinking Water Act, *42 U.S.C. 300f* et seq.; Clean Water Act, *33 U.S.C. 1251* et seq.; Clean Air Act, *42 U.S.C. 7401* et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at *54 FR 18786,* May 2, 1989; *64 FR 42434, 42470,* Aug. 4, 1999, as corrected at *64 FR 43426,* Aug. 10, 1999; *65 FR 43586, 43661,* July 13, 2000, withdrawn at *68 FR 13608, 13614,* Mar. 19, 2003; *66 FR 53044, 53048,* Oct. 18, 2001]

Annotations

Case Notes

LexisNexis® Notes

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview
Administrative Law : Judicial Review : Administrative Record : General Overview
Contracts Law : Negotiable Instruments : General Overview
Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

Overview: *A publicly owned treatment works was enjoined from further discharge of sludge into navigable waterways because it failed to voluntarily comply with an administrative order, a permit, and statutory prohibitions against such discharge.*

TAB 9

40 CFR 130.7

This document is current through the June 28, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through June 2, 2017.

§ 130.7 Total maximum daily loads (TMDL) and individual water quality-based effluent limitations.

(a) General. The process for identifying water quality limited segments still requiring wasteload allocations, load allocations and total maximum daily loads (WLAs/LAs and TMDLs), setting priorities for developing these loads; establishing these loads for segments identified, including water quality monitoring, modeling, data analysis, calculation methods, and list of pollutants to be regulated; submitting the State's list of segments identified, priority ranking, and loads established (WLAs/LAs/TMDLs) to EPA for approval; incorporating the approved loads into the State's WQM plans and NPDES permits; and involving the public, affected dischargers, designated areawide agencies, and local governments in this process shall be clearly described in the State Continuing Planning Process (CPP).

(b) Identification and priority setting for water quality-limited segments still requiring TMDLs.

(1) Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which:

(i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;

(ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty); and

(iii) Other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.

(2) Each State shall also identify on the same list developed under paragraph (b)(1) of this section those water quality-limited segments still requiring TMDLs or parts thereof within its boundaries for which controls on thermal discharges under section 301 or State or local requirements are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife.

(3) For the purposes of listing waters under § 130.7(b), the term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality

standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

(4) The list required under §§ 130.7(b)(1) and 130.7(b)(2) of this section shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards. The priority ranking shall specifically include the identification of waters targeted for TMDL development in the next two years.

(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§ 1A130.7(b)(1) and 130.7(b)(2). At a minimum "all existing and readily available water quality-related data and information" includes but is not limited to all of the existing and readily available data and information about the following categories of waters:

(i) Waters identified by the State in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened";

(ii) Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards;

(iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and

(iv) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

(6) Each State shall provide documentation to the Regional Administrator to support the State's determination to list or not to list its waters as required by §§ 130.7(b)(1) and 130.7(b)(2). This documentation shall be submitted to the Regional Administrator together with the list required by §§ 130.7(b)(1) and 130.7(b)(2) and shall include at a minimum:

(i)A description of the methodology used to develop the list; and

(ii)A description of the data and information used to identify waters, including a description of the data and information used by the State as required by § 130.7(b)(5); and

(iii)A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in § 130.7(b)(5); and

(iv) Any other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in § 130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.

(c) Development of TMDLs and individual water quality based effluent limitations.

(1) Each State shall establish TMDLs for the water quality limited segments identified in paragraph (b)(1) of this section, and in accordance with the priority ranking. For pollutants other than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.

(i)TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.

(ii)TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section. Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

(2) Each State shall estimate for the water quality limited segments still requiring TMDLs identified in paragraph (b)(2) of this section, the total maximum daily thermal load which cannot be exceeded in order to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the identified waters or parts thereof.

(d) Submission and EPA approval.

(1) Each State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section. For the 1992 biennial submission, these lists are due no later than October 22, 1992. Thereafter, each State shall submit to EPA lists required under paragraph (b) of this section on April 1 of every even-numbered year. For the year 2000 submission, a State must submit a list required under paragraph (b) of this section only if a court order or consent decree, or commitment in a settlement agreement dated prior to January 1, 2000, expressly requires EPA to take action related to that State's year 2000 list. For the year 2002 submission, a State must submit a list required under paragraph (b) of this section by October 1, 2002, unless a court order, consent decree or commitment in a settlement agreement expressly requires EPA to take an action related to that State's 2002 list prior to October 1, 2002, in which case, the State must submit a list by April 1, 2002. The list of waters may be submitted as part of the State's biennial water quality report required by § 130.8 of this part and section 305(b) of the CWA or submitted under separate cover. All and TMDLs established under paragraph (c) for water quality limited segments shall continue to be submitted to EPA for review and approval. Schedules for submission of TMDLs shall be determined by the Regional Administrator and the State.

(2)The Regional Administrator shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission. The Regional Administrator shall approve a list developed under § 130.7(b) that is submitted after the effective date of this rule only if it meets the requirements of § 130.7(b). If the Regional Administrator approves such listing and loadings, the State shall incorporate them into its current WQM plan. If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS. The Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings. After considering public comment and making any revisions he deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan.

(e)For the specific purpose of developing information and as resources allow, each State shall identify all segments within its boundaries which it has not identified under paragraph (b) of this section and estimate for such waters the TMDLs with seasonal variations and margins of safety, for those pollutants which the Regional Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife. However, there is no requirement for such loads to be submitted to EPA for approval, and establishing TMDLs for those waters identified in paragraph (b) of this section shall be given higher priority.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

33 U.S.C. 1251 et seq.

History

[50 FR 1779, Jan. 11, 1985, as amended at *57 FR 33049,* July 24, 1992; *65 FR 17166, 17170,* Mar. 31, 2000; *65 FR 43586, 43663,* July 13, 2000, withdrawn at *68 FR 13608, 13614,* Mar. 19, 2003; *66 FR 53044, 53048,* Oct. 18, 2001]

Annotations

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

SUPPLEMENTAL SECTION 7 DOCUMENTATION

IN SUPPORT OF JOINT TEST CLAIM OF RIVERSIDE CO. FLOOD CONTROL AND WATER CONSERVATION DIST. ET AL, TO SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R9-2015-0100, AMENDING ORDER NO. R9-2013-0001, AS AMENDED BY ORDER NO. R9-2015-0001

SUPPLEMENTAL SECTION 7 DOCUMENTATION

INDEX

TAB 10

Pud No. 1 v. Wash. Dep't of Ecology

Supreme Court of the United States

February 23, 1994, Argued ; May 31, 1994, Decided

No. 92-1911

Reporter
511 U.S. 700 *; 114 S. Ct. 1900 **; 128 L. Ed. 2d 716 ***; 1994 U.S. LEXIS 4271 ****; 62 U.S.L.W. 4408; 94 Cal. Daily Op. Service 3843; 94 Daily Journal DAR 7236; 24 ELR 20945; 38 ERC (BNA) 1593; 8 Fla. L. Weekly Fed. S 172

PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA, PETITIONERS v. WASHINGTON DEPARTMENT OF ECOLOGY, ET AL.

Prior History: [****1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

Disposition: *121 Wash. 2d 179, 849 P.2d 646*, affirmed.

Core Terms

certification, license, conditions, stream flow, water quality, requirements, limitations, water quality standards, discharges, designated, state law, regulations, waters, state water, provisions, quality standards, petitioners', river, antidegradation, pollution, effluent limitation, navigable waters, provides, impose conditions, fish, ensuring compliance, hydroelectric, set forth, quantity, recreation

Case Summary

Procedural Posture
Petitioners, a city and a local utility district, desired to build a hydroelectric project on the Dosewallips River in Washington State. Respondent state environmental agency conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The Supreme Court of Washington upheld the agency's decision. Petitioners sought certiorari.

Overview

Because a Federal Energy Regulatory Commission license was required and because the project might result in discharges into the Dosewallips River, petitioners were required to obtain state certification of the project pursuant to § 401 (*33 U.S.C.S. § 1341*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), *33 U.S.C.S. § 1251 et seq.* The principal dispute was whether the minimum stream flow requirement that the state imposed on the hydroelectric project was a permissible condition of a § 401 certification under the Act. The Court concluded that it was, upholding the state supreme court's judgment. The Court held that a state may include minimum stream flow requirements in a § 401 certification insofar as necessary to enforce a designated use contained in a state water quality standard. In so doing, the Court rejected petitioners' assertion that the Act was only concerned with water quality and did not allow the regulation of water quantity. Indeed, there was recognition in the Act itself that reduced stream flow, or diminishment of water quantity, could constitute water pollution.

Outcome
The Court affirmed the judgment of the state supreme court.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Real Property Law > Water Rights > Beneficial Use

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Real Property Law > Water Rights > Nonconsumptive Uses > General Overview

HN1[↓] **Clean Water Act, Water Quality Standards**

Pursuant to § 303 (*33 U.S.C.S. § 1313*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), *33 U.S.C.S. § 1251 et seq.*, a state water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. *33 U.S.C.S. § 1313(c)(2)(A)*. In setting standards, the state must comply with the following broad requirements: such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational, and other purposes. Section 303 also contains an "antidegradation policy," a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Governments > State & Territorial Governments > Licenses

HN2[↓] **Clean Water Act, Water Quality Standards**

States are responsible for enforcing water quality standards on intrastate waters. *33 U.S.C.S. § 1319(a)*. In addition to these primary enforcement responsibilities, § 401 of the Federal Water Pollution Control Act, *33 U.S.C.S. § 1341*, requires states to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable waters to obtain from the state a certification that any such discharge will comply with the applicable provisions of *33 U.S.C.S. §§ 1311*, *1312*, *1313*, *1316*, and *1317*. *33 U.S.C.S. § 1341(a)*. Section 401(d) further provides

that any certification shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant will comply with any applicable effluent limitations and other limitations, under *33 U.S.C.S. § 1311* or *1312*, and with any other appropriate requirement of State law set forth in such certification. *33 U.S.C. § 1341(d)*. The limitations included in the certification become a condition on any federal license.

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Environmental Law > Water Quality > General Overview

***HN3*[↓] Discharge Permits, State Water Quality Certifications**

See *33 U.S.C.S. § 1341*.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Wetlands

***HN4*[↓] Clean Water Act, Water Quality Standards**

State water quality standards adopted pursuant to § 303 (*33 U.S.C.S. § 1313*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), *33 U.S.C.S. § 1251 et seq.*, are among the "other limitations" with which a state may ensure compliance through the certification process under § 401 (*33 U.S.C.S. § 1341*) of the Act.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Environmental Law > Water Quality > General Overview

***HN5*[↓] Clean Water Act, Water Quality Standards**

Pursuant to § 401 (*33 U.S.C.S. § 1341*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, states may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Governments > State & Territorial Governments > Licenses

HN6[⬇] **Clean Water Act, Water Quality Standards**

Pursuant to § 401(d) (*33 U.S.C.S. § 1341(d)*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), *33 U.S.C.S. § 1251 et seq.*, a state may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the state shall set forth any limitations necessary to assure that the applicant will comply with any limitations under § 303 (*33 U.S.C.S. § 1313*) of the Act and with any other appropriate requirement of state law. A certification requirement that an applicant operate the project consistently with state water quality standards, consistently with the designated uses of the water body and the water quality criteria, is both a "limitation" to assure compliance with limitations imposed under § 303, and an "appropriate" requirement of state law.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Real Property Law > Water Rights > Nonconsumptive Uses > Fishing

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Nonconsumptive Uses > General Overview

HN7[⬇] **Clean Water Act, Coverage & Definitions**

Under the Federal Water Pollution Control Act, commonly known as the Clean Water Act (Act), *33 U.S.C.S. § 1251 et seq.*, reduced stream flow, specifically diminishment of water quantity, can constitute water pollution. In particular, the Act's definition of pollution as the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water encompasses the effects of reduced water quantity. *33 U.S.C.S. § 1362(19)*.

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

Real Property Law > Water Rights > Administrative Allocations

Environmental Law > Water Quality > General Overview

HN8[⬇] **Electric Power Industry, Federal Power Act**

Sections 101(g) and 510(2) (*33 U.S.C.S. §§ 1251(g)* and *1370(2)*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, preserve the authority of each state to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > State Water Quality Certifications

HN9[⬇] **Clean Water Act, Water Quality Standards**

A state may include minimum stream flow requirements in a certification issued pursuant to § 401 (*33 U.S.C.S. § 1341*) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, insofar as necessary to enforce a designated use contained in a state water quality standard.

Lawyers' Edition Display

Decision

State's minimum stream flow requirement held to be permissible condition of certification under *33 USCS 1341* to build hydroelectric project.

Summary

The Clean Water Act (*33 USCS 1251 et seq.*) requires (1) under 303 of the Act (*33 USCS 1313*), that each state, subject to federal approval, institute comprehensive water quality standards establishing water quality goals for all intrastate waters, (2) under 401 of the Act (*33 USCS 1341*), that states provide a water quality certification before a federal license or permit is issued for activities that might result in any discharge into intrastate navigable waters, and (3) under 401(d) of the Act (*33 USCS 1341(d)*), that any certification shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions of the Act and appropriate state law requirements, which limitations will become a condition on any federal license. The state of Washington adopted comprehensive water quality standards intended to regulate all of the state's navigable waters under an administrative scheme that classified certain waters as extraordinary, which waters had characteristic uses including fish migration, rearing, and spawning. A city and a local utility district proposed to build on a river that had been classified as extraordinary a hydroelectric project that would divert water from a 1.2-mile bypass reach of the river, run the water through turbines to generate electricity, and then return the water to the river below the bypass reach. The state ecology department issued a 401 water quality certification imposing on the project conditions that included a minimum stream flow requirement of between 100 and 200 cubic feet per second, depending on the season. The state Pollution Control Hearings Board determined that the flow requirement, by being intended to enhance rather than maintain the fishery in the river, exceeded the ecology department's authority under state law, but the Thurston County Superior Court, holding that the Board had erred, reinstated the department's flow requirement. The Supreme Court of Washington, holding that the antidegradation provisions of the state water quality standards required the imposition of minimum stream flows, and that 401(d) authorized the flow requirement imposed by the ecology department, affirmed the Superior Court judgment (*121 Wash 2d 179, 849 P2d 646*).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Blackmun, Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that the minimum flow requirement was a permissible condition of a 401 certification, because (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement was such a limitation; and (3) the court was unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (FPA) (*16 USCS 791a et seq.*), to license hydroelectric projects, since (a) 401's certification requirement applied to statutes and regulatory schemes other than those concerning FERC's authority under the FPA, and (b) any conflict with such authority was hypothetical, where FERC had not yet acted on the license application from the city and the local utility district.

Stevens, J., concurring, expressed the view that the Clean Water Act (1) did not purport to place any constraint on a state's power to regulate the quality of its own waters more stringently than federal law might require, and (2) explicitly recognized states' ability to impose stricter standards.

Thomas, J., joined by Scalia, J., dissenting, expressed the view that (1) the majority opinion fundamentally altered the federal-state balance Congress had carefully crafted in the Federal Power Act (*16 USCS 791a et seq.*), and (2) such a result was neither mandated nor supported by the text of 401.

Headnotes

ENERGY §30 > ENVIRONMENTAL LAW §32 > WATERS §20 > hydroelectric power -- federal license -- state minimum flow requirement -- protection of fisheries -- > Headnote:
LEdHN[1A][⬇] [1A]***LEdHN[1B]***[⬇] [1B]***LEdHN[1C]***[⬇] [1C]***LEdHN[1D]***[⬇] [1D]

A minimum stream flow requirement of between 100 and 200 cubic feet per second imposed, in order to protect a river's fisheries, by a state environmental agency under a water quality certification issued, with respect to a proposed hydroelectric project on the river, pursuant to 401 of the Clean Water Act (*33 USCS 1341*)--which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters--is a permissible condition of 401 certification, because the United States Supreme Court has determined that (1) pursuant to 401, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law; (2) the minimum flow requirement is such a limitation; and (3) the court is unwilling to read implied limitations into 401 based on a purported conflict with the authority of the Federal Energy Regulatory Commission (FERC), under the Federal Power Act (FPA) (*16 USCS 791a et seq.*), to license hydroelectric projects, since (a) 401's certification requirement applies to other statutes and regulatory schemes in addition to that concerning FERC's authority under the FPA, and (b) any conflict with such authority is hypothetical, where FERC has not yet acted on the license application for the project in question. (Thomas and Scalia, JJ., dissented from this holding.)

ENVIRONMENTAL LAW §32 > Clean Water Act -- federal license -- state water quality certification -- > Headnote:
LEdHN[2A][⬇] [2A]***LEdHN[2B]***[⬇] [2B]

Pursuant to 401 of the Clean Water Act (*33 USCS 1341*), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, rather than on only water quality standards specifically tied to a discharge, because (1) the text of 401(d) of the Act (*33 USCS 1341(d)*), providing that any certification shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions of the Act and appropriate state law requirements, refers to the compliance of the applicant, not the discharge, (2) the conclusion of the Environmental Protection Agency (EPA)--whose regulations implementing 401 expressly interpret 401 as requiring the state to find that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards--that activities, not merely discharges, must comply with state water quality standards is a reasonable interpretation of 401 and is entitled to deference, (3) consistent with the EPA's view of the Act, state

water quality standards adopted pursuant to 303 of the Act (*33 USCS 1313*), which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, are among the "other limitations" with which a state may insure compliance through the 401 certification process, (4) limitations to assure compliance with state water quality standards are permitted by 401(d)'s reference to any other appropriate requirement of state law, and (5) at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to 303 are "appropriate" requirements of state law. (Thomas and Scalia, JJ., dissented from this holding.)

ENVIRONMENTAL LAW §32 > Clean Water Act -- federal license -- compliance with state standards -- > Headnote:
LEdHN[3A][⬇] [3A]***LEdHN[3B]***[⬇] [3B]

Although 401(d) of the Clean Water Act (*33 USCS 1341(d)*)--providing that any certification under 401 of the Act (*33 USCS 1341*), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, shall set forth any effluent limitations and other limitations necessary to assure that any applicant will comply with various provisions, including certain specified statutory provisions, of the Act, and with appropriate state law requirements--authorizes a state to place restrictions on the activity as a whole, that authority is not unbounded; however, insuring compliance with 303 of the Act (*33 USCS 1313*), which requires each state, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, is a proper function of the 401 certification, because, although 303 is not one of the statutory provisions listed in 401(d), the statute allows states to impose limitations to insure compliance with 301 of the Act (*33 USCS 1311*), and 301 in turn incorporates 303 by reference.

ENVIRONMENTAL LAW §32 > Clean Water Act -- federal license -- state minimum stream flow requirement -- protection of fish habitat -- > Headnote:
LEdHN[4A][⬇] [4A]***LEdHN[4B]***[⬇] [4B]

With respect to the determination of the United States Supreme Court that pursuant to 401 of the Clean Water Act (*33 USCS 1341*), which requires states to provide a water quality certification before a federal license or permit can be issued for activities that might result in any discharge into intrastate navigable waters, states may condition certification upon any limitations necessary to insure compliance with state water quality standards or any other appropriate requirement of state law, a minimum stream flow requirement of between 100 and 200 cubic feet per second imposed by a state environmental agency for certification for a proposed hydroelectric project on a river with a state-designated use as a fish habitat is such a necessary limitation, because (1) the designated use directly reflects the Act's goal (stated in *33 USCS 1251(a)*) of maintaining the chemical, physical, and biological integrity of the nation's waters, (2) pursuant to 401(d), the state may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards, and a certification requirement that an applicant operate the project consistently with the designated uses of the water body and the water quality criteria is both a limitation to assure compliance with limitations imposed under 303 of the Act (*33 USCS 1313*), which requires each state to institute standards establishing water quality goals for intrastate waters, and an appropriate requirement of state law, (3) Environmental Protection Agency (EPA) regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use, (4) the Act permits enforcement of broad, narrative criteria which cannot reasonably be expected to anticipate all the

water quality issues arising from every activity which can affect the state's hundreds of individual water bodies, (5) the minimum flow requirement is a proper application of the state and federal antidegradation regulations, as the requirement insures that an existing instream water use will be maintained and protected, (6) there is recognition in the Act itself that reduced stream flow can constitute water pollution, where the Act's definition of water pollution (under *33 USCS 1362(19)*) encompasses the effects of reduced water quantity and 304 of the Act (*33 USCS 1314(f)*) expressly recognizes that water pollution may result from changes in the flow of navigable waters, which concern is also embodied in the EPA regulations, (7) 101(g) and 510(2) of the Act (*33 USCS 1251(g), 1370(2)*) preserve the authority of each state to allocate water quantity as between users, (8) the certification merely determines the nature of the use to which that proprietary right of the parties seeking to build the hydroelectric project may be put under the Act, and (9) this view is reinforced by the legislative history of the 1977 amendment to the Act adding 101(g), which history indicates that the purpose of the amendment is not to prohibit incidental effects of the requirements of the Act on individual water rights, but to insure that state allocation systems are not subverted and that any effects on individual rights are prompted by legitimate and necessary water quality standards. (Thomas and Scalia, JJ., dissented from this holding.)

Syllabus

Section 303 of the Clean Water Act requires each State, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, and requires that such standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Under Environmental Protection Agency (EPA) regulations, the standards must also include an antidegradation policy to ensure that "existing instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." States are required by § 401 of the Act to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters. As relevant here, the certification must "set forth any effluent limitations and other limitations . . . necessary to assure that any applicant" will comply with various provisions of the Act and "any other appropriate" state law requirement. § 401(d). Under Washington's **[****2]** comprehensive water quality standards, characteristic uses of waters classified as Class AA include fish migration, rearing, and spawning. Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River, a Class AA water, which would reduce the water flow in the relevant part of the river to a minimal residual flow of between 65 and 155 cubic feet per second (cfs). In order to protect the river's fishery, respondent state environmental agency issued a § 401 certification imposing, among other things, a minimum stream flow requirement of between 100 and 200 cfs. A state administrative appeals board ruled that the certification condition exceeded respondent's authority under state law, but the State Superior Court reversed. The State Supreme Court affirmed, holding that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows, and that § 401 authorized the stream flow condition and conferred on States power to consider all state action related to water quality in imposing conditions on § 401 certificates.

Held:

Washington's minimum stream flow requirement is a permissible **[****3]** condition of a § 401 certification. Pp. 710-723.

(a) A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard. Petitioners' claim that the State may only impose

water quality limitations specifically tied to a "discharge" is contradicted by § 401(d)'s reference to an applicant's compliance, which allows a State to impose "other limitations" on a project. This view is consistent with EPA regulations providing that activities -- not merely discharges -- must comply with state water quality standards, a reasonable interpretation of § 401 which is entitled to deference. State standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. Although § 303 is not specifically listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, and § 301 in turn incorporates § 303 by reference. EPA's view supports this interpretation. Such limitations are also permitted by § 401(d)'s reference to "any other appropriate" state law requirement. Pp. 710-713.

(b) [****4] Washington's requirement is a limitation necessary to enforce the designated use of the river as a fish habitat. Petitioners err in asserting that § 303 requires States to protect such uses solely through implementation of specific numerical "criteria." The section's language makes it plain that water quality standards contain two components and is most naturally read to require that a project be consistent with both: the designated use and the water quality criteria. EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. Moreover, the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics." There is no anomaly in the State's reliance on both use designations and criteria to protect water quality. Rather, it is petitioners' reading that leads to an unreasonable interpretation of the Act, since specified criteria cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect a State's hundreds of individual water bodies. Washington's requirement also is a proper application of the state and federal antidegradation regulations, [****5] as it ensures that an existing instream water use will be "maintained and protected." Pp. 713-719.

(c) Petitioners' assertion that the Act is only concerned with water quality, not quantity, makes an artificial distinction, since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution. Moreover, §§ 101(g) and 510(2) of the Act do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. Those provisions preserve each State's authority to allocate water quantity as between users, but the § 401 certification does not purport to determine petitioners' proprietary right to the river's water. In addition, the Court is unwilling to read implied limitations into § 401 based on petitioners' claim that a conflict exists between the condition's imposition and the Federal Energy Regulatory Commission's authority to license hydroelectric projects under the Federal Power Act, since FERC has not yet acted on petitioners' license application and since § 401's certification requirement also applies to [****6] other statutes and regulatory schemes. Pp. 719-723.

Counsel: Howard E. Shapiro argued the cause for petitioners. With him on the briefs were Michael A. Swiger, Gary D. Bachman, Albert R. Malanca, and Kenneth G. Kieffer.

Christine O. Gregoire, Attorney General of Washington, argued the cause for respondents. With her on the briefs were Jay J. Manning, Senior Assistant Attorney General, and William C. Frymire, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Days, Acting Assistant Attorney General Schiffer, James A. Feldman, and Anne S. Almy. *

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* Briefs of amici curiae urging reversal were filed for the American Forest & Paper Association et al. by John R. Molm, Winifred D. Simpson, and James A. Lamberth; for Niagara Mohawk Power Corp. by Edward Berlin, Kenneth G. Jaffe, Paul J. Kaleta, Brian K.

[****7]

Judges: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 724.

Billinson, and Timothy P. Sheehan; for the Northwest Hydroelectric Association by Richard M. Glick and Lory J. Kraut; for Pacific Northwest Utilities by Sherilyn Peterson and R. Gerard Lutz; and for the Western Urban Water Coalition by Benjamin S. Sharp and Guy R. Martin.

Briefs of amici curiae urging affirmance were filed for the State of Vermont et al. by Jeffrey L. Amestoy, Attorney General of Vermont, and Ronald A. Shems, Assistant Attorney General, Robert Abrams, Attorney General of New York, and Kathleen Liston Morrison, Assistant Attorney General, Grant Woods, Attorney General of Arizona, Winston Bryant, Attorney General of Arkansas, Daniel E. Lungren, Attorney General of California, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Michael J. Bowers, Attorney General of Georgia, Robert A. Marks, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Roland A. Burris, Attorney General of Illinois, Pamela Fanning Carter, Attorney General of Indiana, Bonnie J. Campbell, Attorney General of Iowa, Robert T. Stephan, Attorney General of Kansas, Chris Gorman, Attorney General of Kentucky, Michael E. Carpenter, Attorney General of Maine, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Jeremiah W. Nixon, Attorney General of Missouri, Joseph P. Mazurek, Attorney General of Montana, Don Stenberg, Attorney General of Nebraska, Frankie Sue Del Papa, Attorney General of Nevada, Jeffrey R. Howard, Attorney General of New Hampshire, Fred DeVesa, Acting Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Michael F. Easley, Attorney General of North Carolina, Heidi Heitkamp, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, Theodore R. Kulongoski, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Jefferey B. Pine, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Charles W. Burson, Attorney General of Tennessee, Dan Morales, Attorney General of Texas, Jan Graham, Attorney General of Utah, Stephen D. Rosenthal, Attorney General of Virginia, Darrell V. McGraw, Jr., Attorney General of West Virginia, James E. Doyle, Attorney General of Wisconsin, Joseph B. Meyer, Attorney General of Wyoming, and John Payton, Corporation Counsel of the District of Columbia; and for American Rivers et al. by Paul M. Smith.

Opinion by: O'CONNOR

Opinion

[*703] [*723] [**1905]** JUSTICE O'CONNOR delivered the opinion of the Court.

LEdHN[1A][↑] [1A]Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

[*704] I

This case involves the complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, *33 U.S.C. § 1251 et seq.*, is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the **[****8]** Nation's waters." *§ 1251(a)*. The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." *§ 1251(a)(2)*.

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See *§§ 1311, 1314*. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. *§§ 1311(b)(1)(C), 1313*. These state water quality standards provide "a supplementary basis . . . so

that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205, n. 12, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976)*.

HN1[↑] A state water quality standard "shall **[****9]** consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *33 U.S.C. § 1313(c)(2)(A)*. In setting standards, the State must comply with the following broad requirements:

> "Such standards shall be such as to protect the public health or welfare, enhance the quality of water and **[*705]** serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" *Ibid.*

See also *§ 1251(a)(2)*.

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy" -- that is, a policy requiring **[**1906]** that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality **[***724]** standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." *§ 1313(d)(4)(B)*. Accordingly, EPA's regulations implementing the Act **[****10]** require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *40 CFR § 131.12 (1993)*. At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See *33 U.S.C. §§ 1311(b)(1)(C), 1370*. See also *40 CFR § 131.4(a) (1993)* ("As recognized by section 510 of the Clean Water Act[, *33 U.S.C. § 1370*], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173-201-010 to 173-201-120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173-201-045. Each individual fresh surface water of the State is placed into one of these classes. 173-201-080. The Dosewallips River is classified AA, extraordinary. 173-201-080(32). The water quality **[*706]** standard for Class **[****11]** AA waters is set forth at 173-201-045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters. [1]

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[1] WAC 173-201-045(1) (1986) provides in pertinent part:

"(1) Class AA (extraordinary).

"(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

"(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

"(i) Water supply (domestic, industrial, agricultural).

"(ii) Stock watering.

"(iii) Fish and shellfish:

"Salmonid migration, rearing, spawning, and harvesting.

"Other fish migration, rearing, spawning, and harvesting.

. . .

"(iv) Wildlife habitat.

"(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

"(vi) Commerce and navigation.

"(c) Water quality criteria

"(i) Fecal coliform organisms.

"(A) Freshwater -- fecal coliform organisms shall not exceed a

[**12]** **[*707]** In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide **[***725]** antidegradation policy. That policy provides:

> "(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.
>
> "(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.
>
> . . .
>
> "(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term **[**1907]** and irreparable harm to the environment." 173-201-035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See *33 U.S.C. § 1313(c)(3)*; *42 Fed. Reg. 56792 (1977)*. Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." *33 U.S.C. § 1313(c)(3)*.

HN2[↑] States are responsible for enforcing water quality standards on intrastate waters. *§ 1319(a)*. In addition to **[****13]** these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. *33 U.S.C. § 1341*. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of *sections [1311*, *1312*, *1313*, *1316*, and *1317* of this title]." *33 U.S.C. § 1341(a)*. Section 401(d) further provides that "any certification **[*708]** . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under *section [1311* or *1312* of this title] . . . and with any other appropriate requirement of State law set forth in such certification." *33 U.S.C. § 1341(d)*. The limitations included in the certification become a condition on any federal license. *Ibid.* [2]

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geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

"(B) Marine water -- fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

"(ii) Dissolved oxygen [shall exceed specific amounts].

. . .

"(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

"(iv) Temperature shall not exceed [certain levels].

. . .

"(v) pH shall be within [a specified range].

"(vi) Turbidity shall not exceed [specific levels].

"(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

"(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

[2] Section 401, as set forth in ***HN3***[↑] *33 U.S.C. § 1341*, provides in relevant part:

"(a) Compliance with applicable requirements; application; procedures; license suspension

"(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of *sections 1311*, *1312*, *1313*, *1316*, and *1317* of this title.

. . .

"(d) Limitations and monitoring requirements of certification

"Any certification provided under this section shall set forth any

[**14] [***726]** II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the **[*709]** water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, *16 U.S.C. § 791a et seq.*, the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, *33 U.S.C. § 1341*.

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports **[****15]** two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block **[**1908]** the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App. to Pet. for Cert. 55a-57a. On appeal, the **[*710]** State Superior Court concluded **[****16]** that respondent could require compliance with the minimum flow conditions. *Id.*, at 29a-45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. *Id.*, at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. *121 Wash. 2d 179, 186-187, 849 P.2d 646, 650 (1993)*. **[***727]** The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," *33 U.S.C. § 1341(d)*, authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." *121 Wash. 2d at 192, 849 P.2d at 652*. We granted certiorari, *510 U.S. 810 (1993)*, to resolve a conflict among the state courts of last resort. See *121 Wash. 2d 179, 849 P.2d [****17] 646 (1993)*; *Georgia Pacific Corp. v. Dept. of Environmental Conservation, 159 Vt. 639, 628 A.2d 944 (1992)*

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effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under *section 1311* or *1312* of this title, standard of performance under *section 1316* of this title, or prohibition, effluent standard, or pretreatment standard under *section 1317* of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

(table); *Power Authority of New York v. Williams, 60 N.Y.2d 315, 457 N.E.2d 726, 469 N.Y.S.2d 620 (1983)*. We now affirm.

III

LEdHN[1B][↑] [1B]The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

[*711] A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges -- the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity. Brief for Petitioners 27-28. Petitioners contend, however, that **[****18]** the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

LEdHN[2A][↑] [2A]If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a **[**1909]** project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. *33 U.S.C. § 1341(d)* (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section **[****19]** 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate **[***728]** requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities **[*712]** subject to certification -- namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Our view of the statute is consistent with EPA's regulations implementing § 401. The regulations expressly interpret § 401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." *40 CFR § 121.2(a)(3) (1993)* (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr. 1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality **[****20]** certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law'"). EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, *e. g., Arkansas v. Oklahoma, 503 U.S. 91, 110, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992)*; *Chevron* U.S. *A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778*

(1984).

LEdHN[3A][↑] [3A]Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [*33 U.S.C. §§ 1311, 1312*]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." *33 U.S.C. § 1341(d)*. The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act, *33 U.S.C. [****21] § 1313*.

LEdHN[2B][↑] [2B] ***LEdHN[3B]***[↑] [3B]We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), **[*713]** the statute allows States to impose limitations to ensure compliance with § 301 of the Act, *33 U.S.C. § 1311*. Section 301 in turn incorporates § 303 by reference. See *33 U.S.C. § 1311(b)(1)(C)*; see also H. R. Conf. Rep. No. 95-830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, ***HN4***[↑] state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See *40 CFR § 121.2(a)(3) (1992)*; EPA, Wetlands and 401 Certification, *supra*. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language. [3] **[***729]** **[**1910]** But at a minimum, limitations imposed **[****22]** pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9, 21.

[**23]** B

LEdHN[1C][↑] [1C] ***LEdHN[4A]***[↑] [4A]Having concluded that, ***HN5***[↑] pursuant to § 401, States may condition certification upon any limitations necessary to ensure **[*714]** compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *33 U.S.C. § 1313(c)(2)(A)*. In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "salmonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a-84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a)*. Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." *§ 1362(19)*. **[****24]** Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." *§*

[3] The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, n. 2. Although § 301 does make certain discharges unlawful, see *33 U.S.C. § 1311(a)*, it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . . ." *33 U.S.C. § 1311(b)(1)(C)*. This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

1313(c)(2)(A).

Petitioners assert, however, that § 303 requires the State to protect designated uses solely through implementation of specific "criteria." According to petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

LEdHN[4B][⬆] [4B]We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." *33 U.S.C. § 1313(c)(2)(A)* (emphasis added). The text makes it plain that water quality standards contain two components. We think the language **[*715]** of § 303 is most naturally read to require **[***730]** that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria. Accordingly, **[****25]** under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

Consequently, ***HN6***[⬆] pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards -- *i. e.*, consistently with the designated uses of the water body and the water quality criteria -- is both a "limitation" to assure "compl[iance] with . . . **[**1911]** limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "*elements* **[****26]** of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." *40 CFR § 131.3(b) (1993)* (emphasis added). The regulations further provide that "when criteria are met, water quality will *generally* protect the designated use." *Ibid.* (emphasis added). Thus, the EPA regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.

Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria **[*716]** themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as "'there shall be no discharge of toxic pollutants in toxic amounts.'" Brief for United States as *Amicus Curiae* 18. See *American Paper Institute, Inc. v. EPA, 302 U.S. App. D.C. 80, 996 F.2d 346, 349 (CADC 1993)*. In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed **[****27]** pursuant to *section 1317(a)(1)*," need be rendered in numerical form. See *33 U.S.C. § 1313(c)(2)(B)*; *40 CFR § 131.11(b)(2) (1993)*.

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173-201-045(1)(c)(vii) (1986). Similarly, the state standards specify that "aesthetic values shall not be impaired by the presence of materials or their effects,

excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173-201-045(1)(c)(viii). We think petitioners' [***731] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Petitioners further argue that enforcement of water quality standards through use designations [****28] renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the [*717] designated use. See *40 CFR § 131.3(b) (1993)*. Water quality standards, however, apply to an entire class of water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173-201-070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, [****29] a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity -- even if not foreseen by the criteria -- will be consistent with the specific uses and attributes of a particular body of water.

Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list [**1912] contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria [****30] component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the [*718] water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, *33 U.S.C. § 1313(d)(4)(B)*. When the Clean Water Act was enacted in 1972, the water quality standards of [***732] all 50 States had antidegradation provisions. These provisions were required by federal law. See U.S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1-2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658-660 (1977). By providing in 1972 that existing state water quality [****31] standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See *33 U.S.C. § 1313(a)*. EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly

recognized the existence of an "antidegradation policy established under [§ 303]." *§ 1313(d)(4)(B)*.

EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." *40 CFR § 131.12 (1993)*. These "implementation methods shall, at a minimum, be consistent with the . . . existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and **[*719]** Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation **[****32]** policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as *Amicus Curiae* 18-21, and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "existing instream water use" will be "maintained and protected." *40 CFR § 131.12(a)(1) (1993)*.

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the **[**1913]** water quantity in a body of water could destroy all of its designated uses, be it for drinking water, **[****33]** recreation, navigation or, as here, as a fishery. In any event, ***HN7***[↑] there is recognition in the Clean Water Act itself that reduced stream flow, *i. e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. *33 U.S.C. § 1362(19)*. This broad conception of pollution -- one which **[***733]** expressly evinces Congress' concern with the physical and biological integrity of water -- refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes **[*720]** in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams." *33 U.S.C. § 1314(f)*. This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. *40 CFR § 131.10(g)(4) [****34] (1992)*.

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), *33 U.S.C. §§ 1251(g)* and *1370(2)*, exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." *33 U.S.C. § 1251(g)*. Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." *33 U.S.C. § 1370*. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that

petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. ***HN8***[↑] Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between **[****35]** users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California v. FERC, 495 U.S. 490, 498, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990)*, construing an analogous provision of the Federal Power Act, [4] we explained that "minimum stream **[*721]** flow requirements neither reflect nor establish 'proprietary rights'" to water. Cf. *First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (1946)*. Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (*Chapters 90.03.250 RCW* and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 **[***734]** amendment to the Clean Water Act adding § 101(g). See **[****36]** 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . **[**1914]** It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

IV

Petitioners contend that we should limit the State's **[****37]** authority to impose minimum flow requirements because FERC has comprehensive authority to license hydroelectric projects pursuant to the FPA, *16 U.S.C. § 791a et seq.* In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

[*722] The FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." *§ 797(e)*. The FPA also requires FERC to consider a project's effect on fish and wildlife. *§§ 797(e), 803(a)(1)*. In *California v. FERC, supra*, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. *Id., 495 U.S. at 498*.

LEdHN[1D][↑] [1D]No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, **[****38]** it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43-44.

Finally, the requirement for a state certification

[4] The relevant text of the Federal Power Act provides: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, *16 U.S.C. § 821*.

applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, *33 U.S.C. § 403*. Similarly, a permit must be obtained from the Army Corps of Engineers **[*723]** for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture **[****39]** for the construction of reservoirs, canals, and other water storage systems on federal land. See *33 U.S.C. §§ 1344(a), (e); 43 U.S.C. § 1761 (1988 ed. and Supp. IV)*. **[***735]** We assume that a § 401 certification would also be required for some licenses obtained pursuant to these statutes. Because § 401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into § 401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778, n. 20, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984)*.

In summary, we hold that ***HN9***[↑] the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

So ordered.

Concur by: STEVENS

Concur

JUSTICE STEVENS, concurring.

While I agree **[****40]** fully with the thorough analysis in the Court's opinion, I add this comment **[**1915]** for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, *e. g.*, § 301(b)(1)(C), *33 U.S.C. § 1311(b)(1)(C)*.

Dissent by: THOMAS

Dissent

[*724] JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. **[****41]** Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I

A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), *33 U.S.C. § 1251 et seq.*, provides that "any applicant for a Federal license or permit to conduct any activity . . ., which may

result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such **[***736]** discharge will comply with . . . applicable provisions of [the CWA]." *33 U.S.C. § 1341(a)(1)*. The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail **[****42]** to comply, the State may "deny" the certification. *Ibid.* In addition, under § 401(d), a State may place conditions on a **[*725]** § 401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." *§ 1341(d)*.

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. *33 U.S.C. § 1362(16)* ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See *ante*, at 709. That is, a minimum stream flow requirement is a limitation on intake -- the opposite of discharge. Imposition of such a **[****43]** requirement would thus appear to be beyond a State's authority as it is defined by § 401(a)(1).

The Court remarks that this reading of § 401(a)(1) would have "considerable force," *ante*, at 711, were it not for what the Court understands to be the expansive terms of § 401(d). That subsection, as set forth in *33 U.S.C. § 1341(d)*, provides:

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit **[**1916]** will comply with any applicable effluent limitations and other limitations, under *section 1311* or *1312* of this title, standard of performance under *section 1316* of this title, or prohibition, effluent standard, or pretreatment standard under *section 1317* of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal **[*726]** license or permit subject to the provisions of this section." (Emphasis added.)

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions **[****44]** of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Ante*, at 711. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), *ibid.*, **[***737]** thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, *ante*, at 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante*, at 711-712.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, § 401(d) permits States to impose conditions unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1) -- the provision that describes the scope and function of the certification process --

was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons [****45] unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988)* (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable [*727] to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. [****46] Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law -- that is, with "applicable effluent limitations and other limitations, under *section 1311* or *1312* of this title, standard[s] of performance under *section 1316* of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under *section 1317* of this title, [or] . . . any other appropriate requirement[s] of State law" -- one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See *§ 1311* (making it unlawful to discharge any pollutant except in compliance [****47] with enumerated provisions of the Act); *§ 1312* (establishing effluent limitations on point source discharges); [***738] *§ 1316* (setting national standards of performance [**1917] for the control of discharges); and *§ 1317* (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list -- "appropriate requirement[s] of State law" -- appears to be more general in scope. Because [*728] this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland v. United States, 329 U.S. 14, 18, 91 L. Ed. 12, 67 S. Ct. 13 (1946)* ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia v. Ohio Power Co., 498 U.S. 73, 84, 112 L. Ed. 2d 374, 111 S. Ct. 415 (1990)*. In sum, the text and structure of [****48] § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

B

The Court adopts its expansive reading of § 401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. *Ante*, at 712. The agency regulation to which the Court defers is *40 CFR § 121.2(a)(3) (1993)*, which provides that

the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante*, at 712. According to the Court, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards . . . is entitled to deference" under *Chevron* U.S. *A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. *Ante*, at 712.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron,* **[****49]** *supra*, 467 U.S. at 842-843. More importantly, the Court invokes *Chevron* deference to support its interpretation even though the Government does not seek **[*729]** deference for the EPA's regulation in this case. [1] That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agency construction" directly addressing the question. *Chevron, supra*, at 842.

In fact, the regulation **[****50]** to which the **[***739]** Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement *of any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity.*" *40 CFR § 121.2(a)(4) (1993)* (emphases added). In my view, *§ 121.2(a)(4)* should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

II

The Washington Supreme Court held that the State's water quality standards, promulgated **[**1918]** pursuant to § 303 of the Act, *33 U.S.C. § 1313*, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that § 401(d) **[****51]** conditions must be discharge related, petitioners assert that **[*730]** the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). *Ante*, at 713. [2] A water quality standard promulgated

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[1] The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo*, that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

[2] In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." *Ante*, at 713 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Ibid.* Yet § 301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." *33 U.S.C. § 1311(a)* (emphasis added); cf. *supra*, 511 U.S. at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is

pursuant to § 303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *33 U.S.C. § 1313(c)(2)(A)*. The Court asserts that this language "is most naturally read to require that a project be **[****52]** consistent with *both* components, namely, the designated use *and* the water quality criteria." *Ante*, at 715. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. *Ibid.*

[*740]** The Court's reading strikes **[****53]** me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the **[*731]** corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, . . . salmonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173-201-045(1)(b)(iii) (1986). The corresponding criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. 173-201-045(1)(c)(i) and (ii). [3] Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." *40 CFR §§ 131.10(a), 131.11(a)(1) (1993)*.

[**54]** The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 713-714, 715 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to **[**1919]** make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "characteristic uses," **[*732]** including "recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). **[****55]** Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville, 60 F.E.R.C. P61,291*, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . ., and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today. [4] In the end, it is difficult to conceive of a condition that would fall outside a **[***741]** State's § 401(d) authority under the Court's approach.

III

The Court's interpretation **[****56]** of § 401 significantly disrupts the careful balance between state and federal interests that Congress struck in

misplaced.

[3] Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

[4] Indeed, as the § 401 certification stated in this case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

the Federal Power Act (FPA), 16 U.S.C. § 791 et seq. Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e). In the licensing process, FERC must balance a number of considerations: "In addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational **[*733]** opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U.S.C. § 803(a); **[****57]** *California v. FERC*, 495 U.S. 490, 494-495, 506, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990).

In *California* v. *FERC*, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id., at 493*. In concluding that California lacked authority to impose such flow rates, we stated:

> "As Congress directed in FPA § 10(a), FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged **[****58]** requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by **[**1920]** FERC." *Id., 495 U.S. at 506-507* (citations and internal quotation marks omitted).

California v. *FERC* reaffirmed our decision in *First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 164, 90 L. Ed. 1143, 66 S. Ct. 906 (1946)*, in which we warned against "vesting in [state authorities] **[*734]** a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' **[***742]** planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California* v. *FERC* and *First Iowa* they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "*shall* become a condition on **[****59]** any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "term . . . of the license as a matter of law," *Department of Interior v. FERC, 293 U.S. App. D.C. 182, 952 F.2d 538, 548 (CADC 1992)* (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is

state court. [5] Section 401(d) conditions imposed by States are [*735] therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California* v. *FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device -- that is, the § 401 certification -- through which to achieve its objectives.

[****60] Although the Court notes in passing that "the limitations included in the certification become a condition on any federal license," *ante*, at 708, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification." *Ibid.*

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy conservation, [***743] irrigation, flood control, fish and wildlife protection, and recreation. 16 U.S.C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental [****61] interests. Cf., *e. g.*, Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a [**1921] FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U.S.C. § 803(j)(1), which was added as part [*736] of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damage to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA -- that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental [****62] concerns -- it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid.* After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the

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[5] See, *e. g.*, ***Keating v. FERC, 288 U.S. App. D.C. 344, 927 F.2d 616, 622 (CADC 1991)*** (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law -- an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence"); ***Department of Interior v. FERC, 952 F.2d at 548***; United States v. Marathon Development Corp., 867 F.2d 96, 102 (CA1 1989); Proffitt v. Rohm & Haas, 850 F.2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See Town of Summersville, 60 F.E.R.C. P61,291, p. 61,990 (1992) ("Since pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, Central Maine Power Co., 52 F.E.R.C. P61,033, pp. 61,172-61,173 (1990).

FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California v. FERC [****631 , 495 U.S. at 499*. As the Ninth Circuit observed in the course of rejecting California's effort to give *California* v. *FERC* a narrow reading, "there would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and **[*737]** make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates v. Maughan, 985 F.2d 451, 456 (1993).*

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the **[***744]** Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of § 401, I respectfully dissent.

References

[**64]** To Full Text Opinion

61A Am Jur 2d, Pollution Control 133, 142, 144, 151, 158; 78 Am Jur 2d, Waters 292

11 Federal Procedure, L Ed, Environmental Protection 32:262; 24 Federal Procedure, L Ed, Natural and Marine Resources 56:313, 56:315

9 Federal Procedural Forms, L Ed, Environmental Protection 29:91

20 Am Jur Pl & Pr Forms (Rev), Pollution Control, Form 81

33 USCS 1341

L Ed Digest, Energy 30; Environmental Law 32, 40; Waters 20

L Ed Index, Hydroelectric Power; Water Pollution

ALR Index, Federal Water Pollution Control Act; Hydroelectric Power; Water Pollution

Annotation References:

Supreme Court's views as to construction and application of Federal Water Pollution Control (Clean Water) Act (33 USCS 1251-1376). *84 L Ed 2d 895*.

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TAB 11

Rice v. Harken Exploration Co.

United States Court of Appeals for the Fifth Circuit

April 25, 2001, Decided

No. 99-11229

Reporter

250 F.3d 264 *; 2001 U.S. App. LEXIS 7462 **; 31 ELR 20599; 52 ERC (BNA) 1321

D.E. RICE, Trustee for the Rice Family Living Trust; KAREN RICE, Trustee for the Rice Family Living Trust, Plaintiffs-Appellants, versus HARKEN EXPLORATION COMPANY, Defendant-Appellee.

Subsequent History: [**1] Rehearing and Rehearing En Banc Denied June 14, 2001, Reported at: *2001 U.S. App. LEXIS 15970*.

Prior History: Appeal from the United States District Court for the Northern District of Texas. 2:97-CV-402. Mary Lou Robinson, US District Judge.

Disposition: AFFIRMED.

Core Terms

oil, Creek, groundwater, navigable waters, discharges, Ranch, waters, surface water, River, contamination, summary judgment, body of water, pollutants, wetlands, district court, groundwater, regulation, spills, navigable, legislative history, commerce, samples, streams, surface, intermittent, adjacent, Lake, interstate, operations, subsurface

Case Summary

Procedural Posture

Plaintiffs, trustees for a family trust, appealed from an order of the United States District Court for the Northern District of Texas granting defendant oil lessee's motion for summary judgment in part and holding that the Oil Pollution Act of 1990, *33 U.S.C.S. §§ 2701-2720*, did not apply to alleged pollution of ground water. The district court remanded plaintiffs' other claims to state court.

Overview

Plaintiff trustees for a family trust that owned the surface rights to ranch property sued defendant, the oil and gas properties operator on the ranch, asserting that defendant was discharging hydrocarbons, produced brine, and other pollutants onto the property, in violation of Oil Pollution Act of 1990 (OPA), *33 U.S.C.S. §§ 2701-2720*. Plaintiffs appealed the district court's determination that the term "navigable waters" excluded groundwater, and also claimed the pollution would reach a nearby river. The court of appeals relied on judicial interpretation and Congressional intent expressed with respect to the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, which used analogous language to the OPA. While an inland river would qualify as navigable waters, ground water did not, and the court declined to extend the reach of the statute to cover pollutants that were not directly affecting navigable waters.

Outcome

Summary judgment affirmed, because the clear Congressional intent of the federal statute in issue was not to govern discharges on to dry land that seeped into ground water, and there was no evidence in the record of any discharge of oil directly into any body of surface water, which would have violated the statute.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

HN1[↓] **Entitlement as Matter of Law, Appropriateness**

An appellate court reviews an order granting summary judgment de novo. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Summary judgment is appropriate if a non-moving party has failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to that party, does not suffice to establish a viable claim. Where a proper motion for summary judgment has been made, the non-moving party, in order to avoid summary judgment, must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial.

Energy & Utilities Law > Oil & Petroleum Products > General Overview

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > Liability

Energy & Utilities Law > Federal Oil & Gas Leases > Alaskan Interests & Leases > General Overview

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview

HN2[↓] **Energy & Utilities Law, Oil & Petroleum Products**

The Oil Pollution Act of 1990 (OPA), *33 U.S.C.S. §§ 2701-2720* imposes strict liability on parties responsible for the discharge of oil. Each responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for the removal costs and damages specified in subsection (b) that result from such incident. *33 U.S.C.S. § 2702(a)*. The OPA thus concerns facilities which discharge, or pose a substantial threat to discharge, oil into or upon navigable waters, and liability under the OPA is therefore governed by the impact of such a discharge on navigable waters. The OPA and its

related regulations define navigable waters to mean the waters of the United States, including the territorial sea. *33 U.S.C.S. § 2701(21)*; *15 C.F.R. § 990.30*.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Wetlands

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN3[] **Clean Water Act, Wetlands**
The Supreme Court has endorsed an interpretation of "navigable waters" as used in the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, under which waters and wetlands need not always actually be navigable in fact to be protected.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Wetlands

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN4[] **Clean Water Act, Wetlands**
See *33 C.F.R. § 328.3(b) (2000)*.

Environmental Law > Natural Resources & Public Lands > Oil Pollution Act > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Navigable Waters

HN5[] **Natural Resources & Public Lands, Oil Pollution Act**
Ground waters are not protected waters under the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Environmental Law > Water Quality > General Overview

HN6[] **Clean Water Act, Enforcement**
Congress did not intend the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states.

Counsel: For D M RICE, KAREN RICE, Plaintiffs - Appellants: James H Wood, Channy Ferris Wood, The Wood Law Firm, Amarillo, TX.

For HARKEN EXPLORATION COMPANY, Defendant - Appellee: Kenneth Edwin Carroll, Kelli Michelle Hinson, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX.

UNITED STATES OF AMERICA, Amicus Curiae: Joan M Pepin, US Department of Justice, Environment & Natural Resources Division, Washington, DC. Anne R Traum, US Attorney's Office, Las Vegas, NV.

THE STATE OF TEXAS, Amicus Curiae: Thomas H Edwards, Office of the Attorney General of Texas, Austin, TX.

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, TEXAS OIL AND GAS

ASSOCIATION, NORTH TEXAS OIL & GAS ASSOCIATION, Amicus Curiae: Joseph D Lonardo, John W Wilmer, Jr, Vorys, Sater, Seymour & Pease, Washington, DC.

Judges: Before GARWOOD, HIGGINBOTHAM, and STEWART, Circuit Judges.

Opinion by: GARWOOD

Opinion

[*265] GARWOOD, Circuit Judge:

Plaintiffs-appellants D.E. and Karen Rice (the Rices) filed this suit against defendant-appellee Harken Exploration Company (Harken) alleging that Harken discharged oil into or upon "navigable waters" in violation of the Oil Pollution Act of 1990, *33 U.S.C. §§ 2701-2720 (OPA)*, and also asserting several related state law claims. Harken moved for summary judgment on all claims and the district court granted its motion in part, on the ground that under the court's interpretation of the OPA and the facts alleged plaintiffs could not sustain a cause of action under the OPA. In the same order the district court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and remanded those claims to state court. The Rices now appeal the district court's grant of summary judgment, and request that their OPA claim be remanded for trial. We affirm.

Facts and Proceedings Below

Plaintiffs D.E. Rice and Karen Rice are trustees for the [**2] Rice Family Living Trust. The trust owns the surface rights to the property known as Big Creek Ranch in Hutchinson County, Texas. Harken Exploration Company is a Delaware corporation with its principal place of business in Irving, Texas. The Rice Family Living Trust purchased Big Creek Ranch for $ 255,000 in 1995.

Harken owns and operates oil and gas properties pursuant to leases on Big Creek Ranch. Under these leases, Harken maintains various structures and equipment on the property for use in exploration and pumping, processing, transporting, and drilling for oil. Harken began its operations on Big Creek Ranch in January 1996. Prior to Harken's operations, the Big Creek Ranch property had been used for oil and gas production for several decades.

Big Creek is a small seasonal creek on the Rices' property. Big Creek runs across the ranch to the Canadian River, which is the southern boundary of Big Creek Ranch. The Canadian River is down gradient from Harken's oil and gas flow lines, tank batteries, and other production equipment. The Canadian River flows into the Arkansas River, which flows into the Mississippi River, which empties into the Gulf of Mexico. While the exact nature [**3] of Big Creek is unclear from the record, Harken does not dispute that the Canadian River is legally a "navigable water."

The Rices allege that Harken has discharged and continues to discharge hydrocarbons, produced brine, and other pollutants onto Big Creek Ranch and into "Big Creek," "unnamed tributaries of Big Creek" and other "independent ground and surface waters." They claim that Harken has contaminated or threatened 9,265.24 acre feet of groundwater and over ninety noncontiguous surface areas of the ranch. The plaintiffs do not allege that there has been any major event or events resulting in the discharge of oil onto Big Creek Ranch. Rather, the Rices allege that Harken damaged their land as a result of a series of smaller discharges that occurred over a considerable period of time. They allege that the cost to remediate the contamination of the soil and groundwater is $ 38,537,500.

Harken admits that there have been instances in which oil or produced brine was [*266] spilled or leaked from their tanks and other oil production equipment. Harken claims, however, that these discharges were of the sort that inevitably accompany any oil production operation and that in any case none [**4] of the discharges ever threatened "navigable waters" within the meaning

of the OPA.

Harken moved for summary judgment in the district court, claiming, *inter alia*, that the OPA was not intended to cover spills of oil onto dry land that occurred hundreds of miles from any coast or shoreline. The district court essentially agreed, and held that the Rices could not sustain a cause of action under the OPA on the facts shown. The district court dismissed the Rices' related state law claims without prejudice. This appeal followed.

Discussion

HN1[↑] We review an order granting summary judgment *de novo*. *Hernandez v. Reno, 91 F.3d 776, 779 (5th Cir. 1996)*. Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Summary judgment is appropriate in this case if the Rices have failed to produce summary judgment evidence of facts which, if viewed in the reasonable light most favorable to the Rices, do not suffice to establish a viable OPA claim. Where, as here, a proper motion for summary judgment has been made, the non-movant, in order to avoid summary judgment, [**5] must come forward with appropriate summary judgment evidence sufficient to sustain a finding in its favor on all issues on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994)*. On all material matters at issue here the Rices would bear the burden of proof at trial.

The OPA was enacted in 1990 in response to the Exxon Valdez oil spill in Prince William Sound, Alaska, and was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry. Senate Report No. 104-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723. *HN2*[↑] The OPA imposes strict liability on parties responsible for the discharge of oil: "Each responsible party for ... a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines ... is liable for the removal costs and damages specified in subsection (b) that result from such incident. [**6] " [1] *33 U.S.C. § 2702(a)*. The OPA thus concerns facilities which discharge (or pose a substantial [*267] threat to discharge) oil "into or upon . . . navigable waters," and liability under the OPA is therefore governed by the impact of such a discharge on "navigable waters." The OPA and its related regulations define navigable waters to mean "the waters of the United States, including the territorial sea." *33 U.S.C. § 2701(21)*; *15 C.F.R. § 990.30*. The scope of the OPA is an issue of first impression for this Court.

[**7] The Rices argue that the district court's interpretation of the term "navigable waters" in the OPA was erroneous. They claim the court erred by refusing to apply the OPA to inland areas. [2] Since Congress used the same language in both the OPA

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[1] Removal costs incurred by an injured party are only recoverable by a private party if they are consistent with the National Contingency Plan. *33 U.S.C. § 2702(b)(1)(B)*. The "National Contingency Plan" refers to the responsibility of the President of the United States under *33 U.S.C. § 1321 (c)* and *(d)* to publish a national plan for the removal of oil and hazardous substances from the waters of the United States where "a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States...." *33 U.S.C. § 1321(c)(2)(A)*. The purpose of the Plan is to "provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges...." *Id.* at *§ 1321(d)(2)*. Because of our resolution of this case, we do not reach the question of whether the Rices' proposed remediation is consistent with the National Contingency Plan.

[2] The district court appears to have construed the OPA as applying only to coastal or marine oil spills: "The Panhandle of Texas is hundreds of miles from costal waters or ocean beaches. Discharges of oil and salt water onto land in the Panhandle of Texas are not the type of oil and waste-water spills targeted by the OPA. ... Plaintiffs have no Oil Pollution Act cause of action under the facts of this case." *Rice v. Harken Exploration Co., 89 F. Supp. 2d 820, 827 (N.D. Tex. 1999)*.

and the Clean Water Act, [3] the Rices argue, the scope of both Acts should be similar and the OPA should apply to discharges into "waters of the United States" regardless of the distance of those waters from an ocean or similar body of water. The Rices also argue that the district court improperly excluded groundwater from "waters of the United States." Congress, the Rices claim, intended to extend its regulatory power to all waters that could affect interstate commerce when it enacted the OPA. Accordingly, the Rices would have this Court construe the OPA as imposing liability on facilities that discharge oil and related wastes into groundwater (or any other body of water) that affects interstate commerce. The Rices argue that under the proper interpretation of "navigable waters" they have a viable OPA claim since the groundwater under the ranch and the surface waters on the ranch have been impacted by Harken's discharges of oil. The Rices request **[**8]** that we remand this case to the district court for trial.

Although there have been few cases construing the OPA definition of "navigable waters," there is a substantial body of law interpreting that term as used in the Clean Water Act, *33 U.S.C. § 1251 et seq. (CWA)*. The CWA is also limited to "navigable waters," which is defined in both statutes as "waters of the United States." *Compare 33 U.S.C. § 2701* **[**9]** *(21) with 33 U.S.C. § 1362(7)*. The House Conference Report on the OPA reads: "The terms 'navigable waters,' 'person,' and 'territorial seas' are re-stated verbatim from section 502 of the [CWA]. ... In each case, these [CWA] definitions shall have the same meaning in this legislation as they do under the [CWA] and shall be interpreted accordingly." House Conference Report No. 101-653, *reprinted in* 1990 U.S.C.C.A.N. 779, 779-80. The Senate Report is similar, and adds that the OPA is intended to cover inland waters as well: "The [OPA] covers all the bodies of water and resources covered by section 311 [of the CWA], including the inland waters of the United States...." Senate Report No. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 733.

The legislative history of the OPA and the textually identical definitions of "navigable waters" in the OPA and the CWA strongly indicate that Congress generally intended the term "navigable waters" to have the same meaning in both the OPA and the CWA. Accordingly, the existing case law interpreting the CWA is a significant **[*268]** aid in our present task of interpreting the OPA.

HN3[↑] The Supreme Court has endorsed an interpretation **[**10]** of "navigable waters" as used in the CWA under which waters and wetlands need not always actually be navigable in fact to be protected under that Act. *See United States v. Riverside Bayview Homes, 474 U.S. 121, 133, 106 S. Ct. 455, 462-63, 88 L. Ed. 2d 419 (1985)* (upholding regulations that CWA restricts discharges into non-navigable "wetlands" adjacent to an open body of navigable water). [4] We have adopted a similarly broad interpretation of the language of the CWA. *See Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983)*. Other courts have also adopted expansive interpretations of "navigable waters" under the CWA. *See, e.g., Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), cert. denied, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791*

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[3] *33 U.S.C. § 1251 et seq.*

[4] "Wetlands" as used in *Riverside Bayview Homes* referred to those areas described as "wetlands" in the Army Corps of Engineers regulations, *33 C.F.R. § 323.2 (1985)*. *Riverside Bayview Homes, 106 S. Ct. at 458*. The current Corps regulations, *HN4*[↑] *33 C.F.R. § 328.3(b) (2000)*, contain essentially the same definition, viz:

> "(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

There is no evidence nor any claim that any "wetlands" are involved in this case.

(1986)(holding that non-navigable creeks and arroyos are covered by the CWA where intense rainfall could create surface connections with navigable streams); *United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1329 (6th Cir. 1974)* (holding that the CWA prohibited discharges into a non-navigable tributary three waterways removed from a navigable stream).

[11]** However, more recently, the Supreme Court has limited the scope of the CWA. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001)*, the Court held that an Army Corps of Engineers regulation defining "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce" exceeded the scope of the Corps' regulatory power under the CWA as applied to the petitioner's land under a regulation known as the "Migratory Bird Rule." *See 121 S. Ct. at 678* (quoting *33 C.F.R. § 328.3(a)(3)*). The "Migratory Bird Rule" states that the CWA covers any intrastate water which could be used by migrating birds that cross state lines or which could be used to irrigate crops sold in interstate commerce. *See 51 Fed. Reg. 41217*. The case involved several ponds that had formed in pits that were originally part of a sand and **[**12]** gravel mining operation. *Solid Waste Agency, 121 S. Ct. at 678*. The Court refused to interpret the CWA as extending the EPA's regulatory power to the limits of the *Commerce Clause*, and held that the application of the CWA to the petitioner's land exceeded the authority granted to the Corps under the CWA. *Id.* at 684. The Court distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable: "We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect' and went on **[*269]** to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word a limited meaning and quite another to give it no effect whatever." *Id. at 682-83*. Under *Solid Waste Agency*, it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water. *See id. at 680* ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. **[**13]** But we conclude that the text of the statute will not allow this.")

Nevertheless, under this standard the term "navigable waters" is not limited to oceans and other very large bodies of water. If the OPA and CWA have identical regulatory scope, the district court's conclusion that the OPA cannot apply to *any* inland waters was erroneous. However, the district court's reluctance to apply an Act targeted at disasters like the Exxon Valdez oil spill to Harken's dry land operations in the Texas Panhandle is certainly understandable. Under any definition of "navigable waters" there still must be a discharge of oil into a protected body of water for liability under either statute to attach.

The Rices point to two categories of waters which, they argue, are protected under the OPA. They claim that Harken has discharged oil into Big Creek and other surface waters on the ranch, and also into the groundwater underneath the ranch. The OPA provides the Rices with a remedy only if they can demonstrate that Harken has discharged oil into any waters that are protected by the OPA. We address groundwater and surface water in turn.

Groundwater

The Rices urge this Court to apply the CWA **[**14]** definition of "navigable waters" to the OPA. But, even that definition is not so expansive as to include groundwater within the class of waters protected by the CWA. The law in this Circuit is clear that ***HN5***[⬆] ground waters are not protected

waters under the CWA. [5] *Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977)*. In *Exxon*, we held that the legislative history of the CWA belied any intent to impose direct federal control over any phase of pollution of subsurface waters. *Id.* [6]

[15]** The Rices seek to avoid a similar construction of the OPA by arguing that in enacting the OPA Congress intended to exert its power under the *Commerce Clause* to the fullest possible degree, and that therefore groundwater, if it affects interstate commerce, should be protected under the Act. But, the Rices do not point to any portion of the Act itself or to any part of the legislative history of the Act to justify their claim that Congress intended to depart from its decision not to regulate groundwater under the CWA. The Rices' **[*270]** theory would extend coverage under the OPA to waters that we have explicitly held are not covered by the CWA. *Exxon, 554 F.2d at 1322*. The Rices have presented us with no reason to construe the term "waters of the United States" more expansively in the OPA than in the CWA. We hold that subsurface waters are not "waters of the United States" under the OPA. Accordingly, the Rices have no cause of action under the OPA for discharges of oil that contaminate the groundwater under Big Creek Ranch.

Surface Water

The Rices do not confine their claims to groundwater contamination. They also allege that the Canadian River, Big Creek, and other **[**16]** surface waters on the ranch are directly threatened by Harken's discharges into the groundwater under Big Creek Ranch. There is substantial evidence of a variety of leaks and minor discharges from Harken's equipment onto the soil surrounding its Big Creek Ranch facilities. It appears from our review of the record that Harken's various discharges were all onto dry land. There is no evidence in the record of any discharge of oil directly into any body of surface water. Instead, the Rices appear to claim that Harken's discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water.

There is arguably some evidence in the record that some naturally occurring surface waters on Big Creek Ranch have actually been contaminated with oil. John Drake, the Rices' expert geologist, prepared a preliminary report on water contamination on Big Creek Ranch and was deposed by Harken. Although the report mentions surface waters, Drake's report focuses almost entirely on the impact of Harken's oil production activities on the soil and on the groundwater under Big Creek Ranch. Drake's report does state that several surface water samples were taken **[**17]** in which petroleum hydrocarbons were found. [7] But,

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[5] The Seventh Circuit has reached a similar conclusion. *Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994)*.

[6] We based our rejection of the EPA's claim that the CWA granted it authority over discharges into deep water wells on clear evidence that congressional intent was to the contrary:

> "...the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because 'it is contrary to congressional intentions.'"

Exxon, 554 F.2d at 1322 (quoting *EPA v. State Water Res. Control Bd., 426 U.S. 200, 227, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)*).

[7] Drake's report states:

> "In order to more accurately characterize the site, surface water where present was sampled and analyzed using standard EPA protocol. In all thirteen (13) surface water samples were collected from various surface locations across the site. These samples consisted of four (4) spring, five (5) stock pond, one (1) stormwater, and three (3) stream locations. Several of the surface water samples showed impact by hydrocarbons...."

This statement appears to be consistent with a table, attached to the Rices' motion opposing summary judgment, that summarizes the water samples taken on Big Creek Ranch, although the information provided in that table is somewhat cryptic. It is unclear from the report exactly which samples were taken from naturally occurring surface waters and which were taken from excavated trenches or

the presence of oil does not grant jurisdiction under the Act. Instead, a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water.

[18]** The bodies of water the Rices seek to protect are consistently referred to in the record as intermittent streams which only infrequently contain running water. There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself. It is described several times in various depositions as a "seasonal creek" that often has no running water at all. And, apparently, some of the time that water does flow in it, all the water is underground. There is no detailed information about how often the creek runs, about how much water flows through it **[*271]** when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA. And, as noted, there is no evidence of any oil discharge directly into Big Creek or any other intermittent creek containing above ground water on the ranch; only that there were **[**19]** oil discharges into the ground, some part of which may have, over some undetermined period of time, seeped through the ground into ground water and thence into Big Creek or other intermittent creek (either as an underground or surface body of water).

Although Big Creek and the other intermittent streams located on the ranch do not qualify as "navigable waters," the Rices also allege that the Canadian River is directly threatened by Harken's discharges of oil. The parties agree that the Canadian River is a "navigable water" within the meaning of the OPA. The river is allegedly threatened with contamination by Harken's operations through subsurface flow from the contaminated groundwater under the ranch into the river.

This Court has not yet decided whether discharges into groundwater that migrate into protected surface waters are covered under either the CWA or the OPA. In *Exxon*, we held that the text and legislative history of the CWA "belied an intention to impose direct federal control over any phase of pollution of subsurface waters." *Exxon, 554 F.2d at 1322*. But, in that case the EPA did not argue that the pollutants at issue would migrate from ground water **[**20]** into surface waters and we expressed "no opinion on what the result would be if that were the state of facts." *Id. at 1312 n. 1*. We have therefore not yet addressed whether discharges into groundwater may be actionable under the CWA or OPA if those discharges result in the contamination of some body of protected surface water.

So far as here relevant, the "discharges" for which the OPA imposes liability are those "into or upon the navigable waters." As noted, "navigable waters" do not include groundwater. It would be an unwarranted expansion of the OPA to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a "discharge" "into or upon the navigable waters." [8]

wells. We are also unsure from the record of the level of impact hydrocarbons have had on the surface waters described in the report.

[8] The Seventh Circuit has also concluded that the CWA does not assert authority over ground water simply because those waters may be hydrologically connected to protected surface waters. *Village of Oconomowoc Lake, 24 F.3d at 965*. In *Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985)*, the court held that a CWA claim was not stated by a complaint which alleged "that the pollutants released into the ground at the Air Station not only contaminated the ground water, but are naturally discharging into the Grand Traverse Bay-an undisputed navigable body of water." *Id. at 1106*. In so holding the court relied on our opinion in *Exxon* as well as its own similar reading of the CWA legislative history. Expressly addressing footnote 1 of our *Exxon* opinion the court stated (*618 F. Supp. at 1106-07*):

> "The Fifth Circuit did not concede that discharges into the soil will be subject to the regulatory provisions of CWA if the

[**21] In *Exxon*, we noted that Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA. *Exxon, 554 F.2d at 1325*. [*272] The issue in *Exxon* was whether the EPA, as an incident to its power under the CWA to issue permits authorizing the discharge of pollutants into protected surface waters, [9] had the authority to place conditions in such permits that regulated the disposal of pollutants into deep wells. We concluded that EPA did not have that authority, basing that holding on our reading of the statute as well as a detailed examination of the legislative history of the CWA, which we held "demonstrated conclusively that Congress believed it was not granting the [EPA] any power to control disposals into groundwater." *Id. at 1329*.

In light of Congress's decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe [**22] the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of "navigable waters." We must construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater to the States. Accordingly, we hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA. In this connection, we also note that such a construction is entirely consistent with the occasion which prompted the Act's passage.

The Rices have offered significant evidence that the groundwater under Big Creek Ranch has been contaminated by oil discharges onto the surface of ranch land. But, the only evidence the Rices have produced of the hydrological connection between this groundwater and the Canadian River is a general assertion by their expert that the Canadian River is down gradient from Big Creek Ranch. Drake's report briefly mentions a hydrological connection between the groundwater and the Canadian River, but there is nothing [**23] in the report or in Drake's deposition to indicate the level of threat to, or any actual oil contamination in, the Canadian River. There is no discussion of flow rates into the river, and no estimate of when or to what extent the contaminants in the groundwater will affect the Canadian River. There is also no evidence of any present or past contamination of the Canadian River. The only evidence in the record that any protected body of water is threatened by Harken's activities is Drake's general assertion that eventually the groundwater under the ranch will enter the Canadian river. The ground water under Big Creek Ranch is, as a matter of law, not protected by the OPA. And, the Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA. Summary judgment for Harken was appropriate.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

End of Document

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groundwater contaminated thereby eventually migrates into navigable waters. On the contrary, it specifically 'expressed no opinion on what the result would be [under the CWA] if that were the state of facts.' *Exxon, 554 F.2d at 1312 n.1*. Moreover, the remainder of the *Exxon* opinion and the unmistakably clear legislative history both demonstrate that *HN6*[↑] Congress did not intend the Clean Water Act to extend federal regulatory and enforcement authority over groundwater contamination. Rather, such authority was to be left to the states."

Kelly and *Exxon* are both relied on in this respect by *Village of Oconomuwoc Lake*. *Village of Oconomuwoc Lake, 24 F.3d at 965*.

[9] *See 33 U.S.C. § 1344(a)*.

TAB 12

Defenders of Wildlife v. Browner

United States Court of Appeals for the Ninth Circuit

August 11, 1999, Argued and Submitted, San Francisco, California ; September 15, 1999, Filed

No. 98-71080

Reporter
191 F.3d 1159 *; 1999 U.S. App. LEXIS 22212 **; 99 Cal. Daily Op. Service 7618; 99 Daily Journal DAR 9661; 30 ELR 20116

DEFENDERS OF WILDLIFE and THE SIERRA CLUB, Petitioners, v. CAROL M. BROWNER, in her official capacity as Administrator of the United States Environmental Protection Agency, Respondent. CITY OF TEMPE, ARIZONA; CITY OF TUCSON, ARIZONA; CITY OF MESA, ARIZONA; PIMA COUNTY, ARIZONA; and CITY OF PHOENIX, ARIZONA, Intervenors-Respondents.

Subsequent History: [1]** As Amended December 7, 1999.

Prior History: Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

Disposition: PETITION DENIED.

Core Terms

discharges, municipal, storm water, permits, requirements, pollutants, water quality, provisions, water-quality, industrial, limitations, storm-sewer, regulation, strict compliance, storm-water, management practices, controls, water quality standards, practicable, numeric, internal quotation marks, unambiguously, amendments, determines, exempt, sewers

Case Summary

Procedural Posture
Petitioners appealed decision of the Environmental Appeals Board denying reconsideration of the Environmental Protection Agency's decision issuing five municipalities National Pollution Discharge System permits, without requiring numeric limitations to ensure compliance with state water-quality standards.

Overview

The Environmental Protection Agency (EPA) issued permits to municipalities without requiring limitations on storm-sewer discharges. Petitioners alleged that the Water Quality Act (WQA), *33 U.S.C.S. § 1311(b)(1)(C)*, required municipalities to strictly comply with state water-quality standards. Court concluded that EPA's decision was not arbitrary or capricious. Court determined that WQA unambiguously expressed Congress' intent that municipal storm-sewer discharges did not have to strictly comply with WQA. Congress expressly put in provision for industrial storm-water discharges requiring compliance with WQA, but there was no similar provision in WQA for municipal storm-sewer discharges. The plain language of WQA thus exempted municipal storm-sewer discharges from strict compliance. Court found other provisions in WQA excluded certain discharges from permit altogether. Based on that fact, court concluded exemption of municipal storm-sewer discharges from strict compliance with WQA was not so unusual that the court should not interpret the statute as written.

Outcome
Court denied petition for reconsideration, because

Environmental Protection Agency did not act arbitrarily or capriciously in issuing permits. In examining Water Quality Act, court determined that it was Congress' specific intent to exempt municipal storm-sewer discharges from strict compliance with the statute.

LexisNexis® Headnotes

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN1[↓] **Discharge Permits, Public Participation**

26 U.S.C.S. § 1342(a)(1) authorizes the Environmental Protection Agency to issue National Pollution Discharge Elimination System permits, thereby allowing entities to discharge some pollutants.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

HN2[↓] **Reviewability, Standing**

33 U.S.C.S. § 1369(b)(1)(F) authorizes any interested person to seek review in court of an Environmental Protection Agency decision issuing or denying any permit under *26 U.S.C.S. § 1342(a)(1)*. Any interested person means any person that satisfies the injury-in-fact requirement for U.S. Const. art. III standing.

Environmental Law > Administrative Proceedings & Litigation > Nuisances, Strict Liability, & Trespasses

HN3[↓] **Administrative Proceedings & Litigation, Nuisances, Strict Liability, & Trespasses**

A plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN4[↓] **Standards of Review, Abuse of Discretion**

The Administrative Procedures Act, *5 U.S.C.S. § 701, et seq.*, provides the standard of review for the Environmental Protection Agency's decision to issue a permit. Under the Administrative Procedures Act, the court generally reviews such a decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Interpretation

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

HN5[⬇] **Judicial Review, Standards of Review**
The court has established a two-step process for reviewing an agency's construction of a statute it administers. Under the first step, the court employs traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, instead, Congress has left a gap for the administrative agency to fill, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN6[⬇] **Coverage & Definitions, Discharges**
The Clean Water Act, *33 U.S.C.S. § 1251, et seq.*, generally prohibits the discharge of any pollutant from a point source into the navigable waters of the United States. An entity can, however, obtain a National Pollution Discharge Elimination System permit that allows for the discharge of some pollutants.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN7[⬇] **Clean Water Act, Water Quality Standards**
A National Pollution Discharge Elimination System permit imposes effluent limitations on discharges. First, a permit-holder shall achieve effluent limitations which shall require the application of the best practicable control technology currently available. Second, a permit-holder shall achieve any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any state law or regulations.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Environmental Law > Water Quality > General Overview

HN8[⬇] **Discharge Permits, Storm Water Discharges**
See *33 U.S.C.S. § 1342(p)(3)*.

Governments > Legislation > Interpretation

HN9[⬇] **Legislation, Interpretation**
Questions of congressional intent that can be

answered with traditional tools of statutory construction are still firmly within the province of the courts. Using traditional tools of statutory construction, when interpreting a statute, the court looks first to the words that Congress used. Rather than focusing just on the word or phrase at issue, the court looks to the entire statute to determine congressional intent.

Governments > Legislation > Interpretation

HN10[↓] **Legislation, Interpretation**
Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Legislation > Interpretation

HN11[↓] **Discharge Permits, Storm Water Discharges**
The court generally refuses to interpret a statute in a way that renders a provision superfluous.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Governments > Local Governments > Licenses

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Legislation > Interpretation

HN12[↓] **Discharge Permits, Effluent Limitations**
The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether, and therefore from *33 U.S.C.S. § 1311*. For example, the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture. *33 U.S.C.S. § 1342(l)(1)*. Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. See *33 U.S.C.S. § 1342(l)(2)*.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Environmental Law > Water Quality > General Overview

HN13[↓] **Discharge Permits, Storm Water Discharges**
Congress gave the administrator discretion to determine what controls are necessary. Under that discretionary provision, the Environmental Protection Agency (EPA) has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which uses best management practices (BMPs) in first-round storm water permits to provide for the attainment of water quality standards.

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Division, Denver, Colorado, for the respondent.

Craig Reece, Phoenix City Attorney's Office, Phoenix, Arizona; Stephen J. Burg, Mesa City Attorney's Office, Mesa, Arizona; Timothy Harrison, Tucson City Attorney's Office, Tucson, Arizona; and Harlan C. Agnew, Deputy County Attorney, Tucson, Arizona, for the intervenors-respondents.

David Burchmore, Squire, Sanders & Dempsey, Cleveland, Ohio, for the amici curiae.

Judges: Before: John T. Noonan, David R. Thompson, and Susan P. Graber, Circuit Judges. Opinion by Judge Graber.

Opinion by: SUSAN P. GRABER

Opinion

[*1161] AMENDED OPINION

GRABER, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations **[**2]** to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Title ***HN1***[↑] *26 U.S.C. § 1342(a)(1)* authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner Defenders of Wildlife objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the **[**3]** permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

> The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and **[**4]** requirements set forth in the final municipal permit, will protect the water quality of the

receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

[*1162] On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards. Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

[5]** JURISDICTION

HN2[↑] Title *33 U.S.C. § 1369(b)(1)(F)* authorizes "any interested person" to seek review in this court of an EPA decision "issuing or denying any permit under *section 1342* of this title." "Any interested person" means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)* [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that "members of Defenders and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits," and no other party disputes those facts. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 565-66, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* ***HN3***[↑] ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."); *see also NRDC II, 966 F.2d at 1297* ("NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water **[**6]** contaminants. NRDC's allegations . . . satisfy the broad standing requirement applicable here.").

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners' injury without them. Their real contention appears to be that they are indispensable parties under *Federal Rule of Civil Procedure 19*. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

DISCUSSION

A. *Standard of Review*

HN4[↑] The Administrative Procedures Act (APA), *5 U.S.C. §§ 701-06*, provides our standard of review for the EPA's decision to issue a permit. *See American Mining Congress v. EPA, 965 F.2d 759, 763 (9th Cir. 1992)*. Under the APA, we generally review such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*.

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* **[**7]** *See NRDC II, 966 F.2d at 1297* (so holding). In *Chevron, 467 U.S. at 842-44*, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996)* ("The ***HN5***[↑] Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers.").

Under the first step, we employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. Chevron, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See* id. at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

[8] [*1163]** B. *Background*

HN6[↑] The CWA generally prohibits the "discharge of any pollutant," 33 U.S.C. § 1311(a), from a "point source" into the navigable waters of the United States. *See* 33 U.S.C. § 1362(12)(A). An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See* 33 U.S.C. § 1342(a)(1).

HN7[↑] Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See* 33 U.S.C. § 1342(a)(1) (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder "shall . . . achieve . . . effluent limitations . . . which shall require the application of the best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder "*shall . . . achieve . . . any more stringent limitation*, including those *necessary to meet water quality standards*, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)." 33 U.S.C. § 1311 **[**9]** (b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see* Rybachek v. EPA, 904 F.2d 1276, 1289 (9th Cir. 1990), the EPA also "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," Oklahoma v. EPA, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom.* Arkansas v. Oklahoma, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992). *See also* Ackels v. EPA, 7 F.3d 862, 865-66 (9th Cir. 1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). *See* 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that "the EPA Administrator does not have authority to exempt categories of point sources from **[**10]** the permit requirements of § 402 [33 U.S.C. § 1342]." Natural Resources Defense Council, Inc. v. Costle, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977). "Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts." American Mining Congress, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. *See* NRDC II, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.") (footnotes omitted). Under the Water Quality Act, from 1987 until 1994, [1] most entities discharging storm water did not need to obtain a permit. *See* 33 U.S.C. § 1342(p).

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[1] As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. *See* Pub. L. No. 102-580.

[**11] Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges "with respect to which a permit has been issued under this section before February 4, 1987," 33 U.S.C. § 1342(p)(2)(A); discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B); discharges from a "municipal separate sewer system serving a population of [100,000] or more," 33 U.S.C. § 1342(p)(2)(C) & (D); and "[a] discharge for which the Administrator . . . determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

[*1164] When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

> (A) Industrial discharges
>
> Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and* section 1311 of this title.
>
> (B) Municipal discharge
>
> Permits for discharges from municipal [**12] storm sewers -
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) *shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*

HN8[↑] 33 U.S.C. § 1342(p)(3) (emphasis added).

C. *Application of Chevron*

The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. *See* Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999) ("At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or [**13] manifestly contrary to the statute.") (citation and internal quotation marks omitted), *petition for cert. filed*, No. 99-243 (Aug. 10, 1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. *See, e.g.*, National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998) ("Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of *Chevron*.") (emphasis in original); Sierra Club v. EPA, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*."). We agree with Intervenors and *amici*: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply [**14] strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

"Questions HN9[↑] of congressional intent that can be answered with 'traditional tools of statutory construction' are still firmly within the province of the courts" under Chevron. NRDC II, 966 F.2d at 1297 (citation omitted). "Using our 'traditional

tools of statutory construction,' *Chevron, 467 U.S. at 843 n.9, 104 S. Ct. 2778*, when interpreting a statute, we look first to the words that Congress used." *Zimmerman, 170 F.3d at 1173* (alterations, citations, and internal quotation marks omitted). "Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent." *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of *33 U.S.C. § 1311*. *See 33 U.S.C. § 1342(p)(3)(A)* ("Permits for discharges associated with industrial activity *shall meet all applicable* **[**15]** *provisions of* this section and *section 1311* of this title.") (emphasis added). By incorporation, then, industrial **[*1165]** storm-water discharges "*shall . . . achieve . . . any more stringent limitation*, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title)." *33 U.S.C. § 1311(b)(1)(C)* (emphasis added); *see also* Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565-66 (1993) ("Congress further *singled out* industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [*33 U.S.C. § 1311*]. . . . Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.") (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal **[**16]** storm-sewer discharges. Instead, Congress required municipal storm-sewer discharges "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 . . . determines appropriate for the control of such pollutants." *33 U.S.C. § 1342(p)(3)(B)(iii)*.

The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, "where ***HN10***[↑] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)* (citation and internal quotation marks omitted); *see also United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999)* (stating the same principle), *petition for cert. filed*, No. 98-323 (Aug. 23, 1999). Applying that familiar **[**17]** and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with *33 U.S.C. § 1311*, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that *33 U.S.C. § 1342(p)(3)(B)(iii)* does not require municipal storm-sewer discharges to comply strictly with *33 U.S.C. § 1311(b)(1)(C)*.

Application of that principle is significantly strengthened here, because *33 U.S.C. § 1342(p)(3)(B) is not merely silent* regarding whether municipal discharges must comply with *33 U.S.C. § 1311*. Instead, *§ 1342(p)(3)(B)(iii) replaces* the requirements of *§ 1311* with the requirement that municipal storm-sewer dischargers "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 . . . determines appropriate for the control of such pollutants." *33 U.S.C. § 1342(p)(3)(B)(iii)*. **[**18]** In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with *33 U.S.C. § 1311(b)(1)(C)*.

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. *See* Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 634 (9th Cir. 1999) ("This **HN11**[↑] court generally refuses to interpret a statute in a way that renders a provision superfluous."), *as amended*, 1999 U.S. App. LEXIS 18691, 1999 WL 604218 (9th Cir. Aug. 12, 1999). Section 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, **[*1166]** the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. **HN12**[↑] The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from **[**19]** § 1311). For example, "the Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture." 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II*. There, the petitioner had argued that "the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments." NRDC II, 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

> Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the* **[**20]** *existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

Id. (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), "*Congress did not mandate a minimum standards approach.*" *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards, *see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

D. *Required Compliance with* 33 U.S.C. § 1311(b)(1)(C)

We are left with Intervenors' contention that the EPA may not, under the CWA, require strict compliance with state water-quality **[**21]** standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that "permits for discharges from municipal storm sewers . . . shall require . . . *such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.*" (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, "Congress **HN13**[↑] gave the administrator discretion to determine what controls are necessary. . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language." 966 F.2d

at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide **[**22]** for the attainment of water quality standards." The EPA applied that approach to the permits at issue here. Under *33 U.S.C. § 1342(p)(3)(B)(iii)*, the EPA's choice to include **[*1167]** either management practices or numeric limitations in the permits was within its discretion. *See NRDC II, 966 F.2d at 1308* ("Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements."). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenors.

PETITION DENIED.

End of Document

TAB 13

40 CFR 124.8

§ 124.8 Fact sheet.

(Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).)

(a)A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every Class I sludge management facility, for every 404 and NPDES general permit (§§ 237.37 and 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1)A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4)A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6)A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the final decision.

(7) Name and telephone number of a person to contact for additional information.

(8) For NPDES permits, provisions satisfying the requirements of § 124.56.

(9) Justification for waiver of any application requirements under § 122.21(j) or (q) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251 et seq.; Clean Air Act, 42 U.S.C. 7401 et seq.

History

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 18786, May 2, 1989; 64 FR 42434, 42470, Aug. 4, 1999, as corrected at 64 FR 43426, Aug. 10, 1999; 65 FR 43586, 43661, July 13, 2000, withdrawn at 68 FR 13608, 13614, Mar. 19, 2003; 66 FR 53044, 53048, Oct. 18, 2001]

Annotations

Case Notes

LexisNexis® Notes

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview
Administrative Law : Judicial Review : Administrative Record : General Overview
Contracts Law : Negotiable Instruments : General Overview
Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure
Environmental Law : Water Quality : General Overview
Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Public Participation

Administrative Law : Agency Rulemaking : Rule Application & Interpretation : General Overview

United States v. Metropolitan Dist. Com., 1985 U.S. Dist. LEXIS 16232 (D Mass Sept. 5, 1985).

TAB 14

City of Burbank v. State Water Resources Control Bd.

Supreme Court of California

April 4, 2005, Filed

S119248

Reporter

35 Cal. 4th 613 *; 108 P.3d 862 **; 26 Cal. Rptr. 3d 304 ***; 2005 Cal. LEXIS 3486 ****; 2005 Cal. Daily Op. Service 2861; 2005 Daily Journal DAR 3870; 35 ELR 20071; 60 ERC (BNA) 1470

CITY OF BURBANK, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants. CITY OF LOS ANGELES, Plaintiff and Respondent, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Appellants.

Subsequent History: Time for Granting or Denying Rehearing Extended *Burbank, City of v. State Water Resources Control Board, 2005 Cal. LEXIS 4271 (Cal., Apr. 21, 2005)*

Rehearing denied by, Request denied by *City of Burbank v. State Water Res. Control Bd., 2005 Cal. LEXIS 7185 (Cal., June 29, 2005)*

Prior History: [****1] Superior Court of Los Angeles County, Nos. BS060960, BS060957, Dzintra I. Janavs, Judge. Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 & B152562.

City of Burbank v. State Water Resources Control Bd., 111 Cal. App. 4th 245, 4 Cal. Rptr. 3d 27, 2003 Cal. App. LEXIS 1236 (Cal. App. 2d Dist., 2003)

Disposition: Judgment affirmed in part and remanded in part..

Core Terms

pollutant, regional board, wastewater, clean water, permits, water quality, water quality standards, requirements, federal law, Cities, effluent limitation, restrictions, basin, discharged, regional, limitations, Plant, narrative, stringent, economic factors, numeric, sections, River, issuing, water quality control, federal standard, concentrations, factors, navigable waters, beneficial use

Case Summary

Procedural Posture

Plaintiff cities sought review of a judgment of the Court of Appeal of California, Second Appellate District, Division Three, holding that *Cal. Water Code §§ 13241* and *13263* required a regional water control quality board to take into account economic considerations when it adopted water quality standards in a basin plan but not when the board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

Overview

The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. The court held that whether the regional board should have complied with *Cal. Water Code §§ 13263* and *13241* of California's Porter-Cologne Water Quality Control Act, *Cal. Water Code § 13000 et seq.*, by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the

numeric pollutant restrictions set out in the permits depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, *33 U.S.C.S. § 1251 et seq.* To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by federal law, from taking into account the economic effects of doing so.

Outcome

The court affirmed the judgment of the court of appeal, reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants were necessary to satisfy federal Clean Water Act requirements for treated wastewater. The court remanded for further proceedings to determine whether the pollutant limitations in the permits met or exceeded federal standards.

LexisNexis® Headnotes

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

HN1[↓] **Environmental Law, Water Quality**

Whereas the State Water Resources Control Board establishes statewide policy for water quality control, *Cal. Water Code § 13140*, the regional boards formulate and adopt water quality control plans for all areas within a region. *Cal. Water Code § 13240*. The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. *Cal. Water Code § 13050(j)*. Basin plans must be consistent with state policy for water quality control. *Cal. Water Code § 13240*.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN2[↓] **Discharge Permits, Effluent Limitations**

Under the federal Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act. *33 U.S.C.S. § 1370*.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN3[↓] **Clean Water Act, Water Quality Standards**

The Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, provides for two sets of water quality measures. Effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. *33 U.S.C.S. §§ 1311*, *1314*. Water quality

standards are, in general, promulgated by the states and establish the desired condition of a waterway. 33 U.S.C.S. § 1313. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > Water Quality > General Overview

HN4[↓] **Coverage & Definitions, Point Sources**
See 33 U.S.C.S. § 1362(14).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > Water Quality > General Overview

HN5[↓] **Clean Water Act, Water Quality Standards**
The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, 33 U.S.C.S. § 1251 et seq., requires, inter alia, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the state. 33 U.S.C.S. § 1313(c).

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN6[↓] **Discharge Permits, Effluent Limitations**
Part of the federal Clean Water Act, 33 U.S.C.S. § 1251 et seq., is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. The NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. 33 U.S.C.S. § 1342(a), (b). In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. Cal. Water Code § 13374.

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

HN7[↓] **Environmental Law, Water Quality**
See Cal. Water Code § 13263(a).

Environmental Law > Water Quality > General Overview

Real Property Law > Water Rights > Beneficial Use

HN8[↓] **Environmental Law, Water Quality**
See *Cal. Water Code § 13241*.

Governments > Legislation > Interpretation

HN9[↓] **Legislation, Interpretation**
When construing any statute, the reviewing court's task is to determine the legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN10[↓] **Discharge Permits, Effluent Limitations**
Cal. Water Code § 13263 directs regional boards, when issuing wastewater discharge permits, to take into account various factors including those set out in *Cal. Water Code § 13241*. Listed among the *§ 13241* factors is economic considerations. *Cal. Water Code § 13241(d)*.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN11[↓] **Discharge Permits, Effluent Limitations**
Cal. Water Code § 13377 specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, *§ 13377* forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law, *33 U.S.C.S. § 1311(a)*, and publicly operated wastewater treatment plants must comply with the act's clean water standards, regardless of cost. *33 U.S.C.S. §§ 1311(a)*, *(b)(1)(B)*, *(C)*, *1342(a)(1)*, *(3)*.

Constitutional Law > Supremacy Clause > General Overview

Environmental Law > Water Quality > General Overview

HN12[↓] **Constitutional Law, Supremacy Clause**
Because *Cal. Water Code § 13263* cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of *§ 13263* would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in *Cal. Water Code § 13377* that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's Supremacy Clause, U.S. Const. art. VI, *cl. 2*, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN13[↓] **Discharge Permits, Effluent Limitations**

The federal Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, reserves to the states significant aspects of water quality policy, *33 U.S.C.S. § 1251(b)*, and it specifically grants the states authority to "enforce any effluent limitation" that is not "less stringent" than the federal standard, *33 U.S.C.S. § 1370*. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are more stringent than required by federal law-from taking into account the economic effects of doing so.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that California law required a regional water quality control board to weigh the economic burden on a wastewater treatment facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The cities owned three treatment plants that discharged wastewater under National Pollutant Discharge Elimination System permits issued by the regional board. (Superior Court of Los Angeles County, Nos. BS060960 and BS060957, Dzintra I. Janavs, Judge.) The Court of Appeal, Second Dist., Div. Three, Nos. B150912, B151175 and B152562, concluded that *Wat. Code, §§ 13241* and *13263*, required a regional board to take into account "economic considerations" when it adopted water quality standards in a basin plan but not when the regional board set specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards.

The Supreme Court affirmed the judgment of the Court of Appeal, reinstating the wastewater discharge permits in part and remanding for further proceedings. The court held that whether the regional board should have complied with *Wat. Code, §§ 13263* and *13241*, of California's Porter-Cologne Water Quality Control Act, *Wat. Code, § 13000 et seq.*, by taking into account "economic considerations," such as the costs the permit holder would incur to comply with the numeric pollutant restrictions set out in the permits, depended on whether those restrictions met or exceeded the requirements of the federal Clean Water Act, *33 U.S.C. § 1251 et seq.* To comport with the principles of federal supremacy, California law could not authorize California's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law. The federal Clean Water Act did not prohibit a state, when imposing effluent limitations that were more stringent than required by **[*614]** federal law, from taking into account the economic effects of doing so. (Opinion by Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J. (see p. 629).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)

Pollution and Conservation Laws § 5 > Water > "Basin Plans."

Whereas the State Water Resources Control Board establishes statewide policy for water quality control, *Wat. Code, § 13140*, the regional boards formulate and adopt water quality control plans for

all areas within a region, *Wat. Code, § 13240*. Under *Wat. Code, § 13050, subd. (j)*, the regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. Basin plans must be consistent with state policy for water quality control under *Wat. Code, § 13240*.

CA(2)[⬇] (2)

Pollution and Conservation Laws §
5 > Water > Federal and State Standards.

Under *33 U.S.C. § 1370*, of the federal Clean Water Act, *33 U.S.C. § 1251 et seq.*, each state is free to enforce its own water quality laws so long as its effluent limitations are not less stringent than those set out in the Clean Water Act.

CA(3)[⬇] (3)

Pollution and Conservation Laws §
5 > Water > Federal and State Standards.

The Clean Water Act, *33 U.S.C. § 1251 et seq.*, provides for two sets of water quality measures. Pursuant to *33 U.S.C. §§ 1311* and *1314*, effluent limitations are promulgated by the Environmental Protection Agency and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. Water quality standards are, in general, promulgated by the states and establish the desired condition of a waterway under *33 U.S.C. § 1313*. These standards supplement effluent limitations so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

CA(4)[⬇] (4)

Pollution and Conservation Laws §
5 > Water > Federal and State Standards.

The Environmental Protection Agency (EPA) provides states with substantial guidance in the drafting of water quality standards. Moreover, the Clean Water Act, *33 U.S.C. § 1251 et seq.*, requires, inter alia, that state authorities periodically review water quality **[*615]** standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the state fails to comply with that recommendation, *33 U.S.C. § 1313(c)*, authorizes the EPA to promulgate water quality standards for the state.

CA(5)[⬇] (5)

Pollution and Conservation Laws §
5 > Water > National Pollutant Discharge Elimination System.

Part of the federal Clean Water Act, *33 U.S.C. § 1251 et seq.*, is the National Pollutant Discharge Elimination System (NPDES), the primary means for enforcing effluent limitations and standards under the Clean Water Act. *Title 33 U.S.C. § 1342(a), (b)*, of the NPDES sets out the conditions under which the federal Environmental Protection Agency or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. Under California law, *Wat. Code, § 13374*, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.

CA(6)[⬇] (6)

Statutes § 21 > Construction > Legislative Intent.

When construing any statute, the reviewing court's task is to determine the Legislature's intent when it enacted the statute so that the court may adopt the construction that best effectuates the purpose of the law. In doing this, the court looks to the statutory language, which ordinarily is the most reliable indicator of legislative intent.

CA(7)[⬇] (7)

Pollution and Conservation Laws §

5 > Water > Wastewater Discharge Permits > Economic Considerations.

Wat. Code, § 13263, directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in *Wat. Code, § 13241*. Listed among the *§ 13241* factors is economic considerations, in *§ 13241, subd. (d)*.

CA(8)[↓] (8)

Pollution and Conservation Laws § 5 > Water > Wastewater Discharge Permits > Economic Considerations.

Wat. Code, § 13377, specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, *§ 13377* forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of **[*616]** the United States unless there is compliance with federal law (*33 U.S.C. § 1311(a)*), and publicly operated wastewater treatment plants must comply with the act's clean water standards under *33 U.S.C. §§ 1311(a)*, *(b)(1)(B)* and *(C)*, *1342(a)(1)* and *(3)*, regardless of cost.

CA(9)[↓] (9)

Pollution and Conservation Laws § 5 > Water > Wastewater Discharge Permits > Economic Considerations.

Because *Wat. Code, § 13263*, cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of *§ 13263* would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in *Wat. Code, § 13377*, that all discharged wastewater must satisfy federal standards. Moreover, under the federal Constitution's supremacy clause, U.S. Const., art. VI, a state law that conflicts with federal law is without effect. To comport with the principles of federal supremacy, California law cannot authorize the state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

CA(10)[↓] (10)

Pollution and Conservation Laws § 5 > Water > Federal and State Standards.

The federal Clean Water Act, *33 U.S.C. § 1251 et seq.*, reserves to the states significant aspects of water quality policy under *33 U.S.C. § 1251(b)*, and it specifically grants the states authority to enforce any effluent limitation that is not less stringent than the federal standard under *33 U.S.C. § 1370*. It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state—when imposing effluent limitations that are more stringent than required by federal law—from taking into account the economic effects of doing so. Thus, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are less stringent than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including the wastewater discharger's cost of compliance.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 68, 69.]

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[**3]**

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Judges: Kennard, J., with George, C. J., Baxter, Werdegar, Chin, and Moreno, JJ., concurring. Concurring opinion by Brown, J.

Opinion by: KENNARD **[**864]**

Opinion

KENNARD, J.—Federal law establishes national water quality standards but allows the states to enforce their own water quality laws so long as they comply with federal standards. Operating within this federal-state framework, California's nine Regional Water Quality Control Boards establish water quality policy. They also issue permits for the discharge of treated wastewater; these permits specify the maximum allowable concentration of chemical **[****4]** pollutants in the discharged wastewater.

The question here is this: When a regional board issues a permit to a wastewater treatment facility, must the board take into account the facility's costs

of complying with the board's restrictions on pollutants in the wastewater to be discharged? The trial court ruled that California law required a regional board to weigh the economic burden on the facility against the expected environmental benefits of reducing pollutants in the wastewater discharge. The Court of Appeal disagreed. On petitions by the municipal operators of three wastewater treatment facilities, we granted review.

We reach the following conclusions: Because both California law and federal law require regional boards to comply with federal clean water standards, and because the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require. When, however, a regional board is considering whether to make the pollutant restrictions in [****5] a wastewater discharge permit *more stringent* than federal law requires, California law allows the board to take into account economic [**865] factors, including the wastewater discharger's cost of compliance. We remand this case for further proceedings to determine whether the pollutant limitations in the permits challenged here meet or exceed federal standards.

[*619] I. Statutory Background

The quality of our nation's waters is governed by a "complex statutory and regulatory scheme ... that implicates both federal and state administrative responsibilities." (*PUD No. 1 of Jefferson County v. Washington Department of Ecology (1994) 511 U.S. 700, 704 [128 L. Ed. 2d 716, 114 S. Ct. 1900]*.) We first discuss California law, then federal law.

A. California Law

In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (*Wat. Code, § 13000 et seq.*, added by Stats. 1969, ch. 482, § 18, p. 1051.) [1] Its goal is "to attain the highest water [***307] quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and [****6] detrimental, economic and social, tangible and intangible." (*§ 13000*.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (*§ 13001*.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board). [2]

[****7] ***CA(1)***[↑] (1) ***HN1***[↑] Whereas the State Board establishes statewide policy for water quality control (*§ 13140*), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (*§ 13240*). The regional boards' water quality plans, called "basin plans," must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation. (*§ 13050, subd. (j)*.) Basin plans must be consistent with "state policy for water quality control." (*§ 13240*.)

B. Federal Law

In 1972, Congress enacted amendments (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 816) to the Federal Water Pollution Control Act (*33 U.S.C. § 1251 et seq.*), which, as amended in 1977, is commonly known as the *Clean [*620] Water Act*.

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[1] Further undesignated statutory references are to the Water Code.

[2] The Los Angeles water region "comprises all basins draining into the Pacific Ocean between the southeasterly boundary, located in the westerly part of Ventura County, of the watershed of Rincon Creek and a line which coincides with the southeasterly boundary of Los Angeles County from the ocean to San Antonio Peak and follows thence the divide between San Gabriel River and Lytle Creek drainages to the divide between Sheep Creek and San Gabriel River drainages." (*§ 13200, subd. (d)*.)

The Clean Water Act is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, supra, 511 U.S. at p. 704*, quoting *33 U.S.C. § 1251(a)*.) The act's national goal was to eliminate by the year 1985 **[****8]** "the discharge of pollutants into the navigable waters" of the United States. (*33 U.S.C. § 1251(a)(1)*.) To accomplish this goal, the act established "effluent limitations," which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards. (*33 U.S.C. §§ 1311, 1362(11)*.)

CA(2)[↑] (2) ***HN2***[↑] Under the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act. (*33 U.S.C. § 1370*.) This led the California Legislature in 1972 to amend the state's Porter-Cologne Act "to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act." (*§ 13372*.)

[866]** ***CA(3)***[↑] (3) Roughly a dozen years ago, the United States Supreme Court, in *Arkansas v. Oklahoma (1992) 503 U.S. 91 [117 L. Ed. 2d 239, 112 S. Ct. 1046]*, described the distinct roles of the state and federal agencies **[****9]** in enforcing water quality: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' *33 U.S.C. § 1251(a)*. Toward **[***308]** this end, ***HN3***[↑] [the Clean Water Act] provides for two sets of water quality measures. 'Effluent limitations' are promulgated by the [Environmental Protection Agency (EPA)] and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.[3] See *§§ 1311, 1314*. '[W]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway. See *§ 1313*. These standards supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205, n. 12 [48 L. Ed. 2d 578, 96 S. Ct. 2022, 2025, n. 12] (1976)*.

[**10]** **[*621]** ***CA(4)***[↑] (4) "***HN5***[↑] The EPA provides States with substantial guidance in the drafting of water quality standards. See generally *40 CFR pt. 131 (1991)* (setting forth model water quality standards). Moreover, [the Clean Water Act] requires, *inter alia*, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. *33 U.S.C. § 1313(c)*." (*Arkansas v. Oklahoma, supra, 503 U.S. at p. 101*.)

CA(5)[↑] (5) ***HN6***[↑] Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra, 503 U.S. at p. 101*.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (*33 U.S.C. § 1342(a) & (b)*.) In California, wastewater **[****11]** discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (*§ 13374*.)

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[3] A "***HN4***[↑] point source" is "any discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel ... from which pollutants ... may be discharged." (*33 U.S.C. § 1362 (14)*.)

With this federal and state statutory framework in mind, we now turn to the facts of this case.

II. Factual Background

This case involves three publicly owned treatment plants that discharge wastewater under NPDES permits issued by the Los Angeles Regional Board.

The City of Los Angeles owns and operates the Donald C. Tillman Water Reclamation Plant (Tillman Plant), which serves the San Fernando Valley. The City of Los Angeles also owns and operates the Los Angeles-Glendale Water Reclamation Plant (Los Angeles-Glendale Plant), which processes wastewater from areas within the City of Los Angeles and the independent cities of Glendale and Burbank. Both the Tillman Plant and the Los Angeles-Glendale Plant discharge wastewater directly into the Los Angeles River, now a concrete-lined flood control channel that runs through the City of Los Angeles, ending at the Pacific Ocean. The State Board and the Los Angeles Regional Board consider the Los Angeles River to be a navigable water of the United States for purposes of the federal Clean Water [****12] Act.

The third plant, the Burbank Water Reclamation Plant (Burbank Plant), is owned and operated by the City of Bur [***309] bank, serving residents and businesses within that city. The Burbank Plant discharges wastewater into the Burbank Western Wash, which drains into the Los Angeles River.

[*622] All three plants, which together process hundreds of millions of gallons of sewage [**867] each day, are tertiary treatment facilities; that is, the treated wastewater they release is processed sufficiently to be safe not only for use in watering food crops, parks, and playgrounds, but also for human body contact during recreational water activities such as swimming.

In 1998, the Los Angeles Regional Board issued renewed NPDES permits to the three wastewater treatment facilities under a basin plan it had adopted four years earlier for the Los Angeles River and its estuary. That 1994 basin plan contained general narrative criteria pertaining to the existing and potential future beneficial uses and water quality objectives for the river and estuary. [4] The narrative criteria included municipal and domestic water supply, swimming and other recreational water uses, and fresh water habitat. The plan further provided: [****13] "All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits sought to reduce these narrative criteria to specific numeric requirements setting daily maximum limitations for more than 30 pollutants present in the treated wastewater, measured in milligrams or micrograms per liter of effluent. [5]

[****14] The Cities of Los Angeles and Burbank (Cities) filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when considered in light of the potential benefit to water quality, and that the pollutant restrictions in the NPDES permits were unnecessary to meet the narrative criteria described in the basin plan. The State Board summarily denied the Cities' appeals.

Thereafter, the Cities filed petitions for writs of administrative mandate in the superior court. They alleged, among other things, that the Los Angeles Regional Board failed to comply with *sections 13241* and *13263*, part of California's Porter-Cologne Act, because it did not consider the economic burden on the Cities in having to reduce

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[4] This opinion uses the terms "narrative criteria" or descriptions, and "numeric criteria" or effluent limitations. Narrative criteria are broad statements of desirable water quality goals in a water quality plan. For example, "no toxic pollutants in toxic amounts" would be a narrative description. This contrasts with numeric criteria, which detail specific pollutant concentrations, such as parts per million of a particular substance.

[5] For example, the permits for the Tillman and Los Angeles-Glendale Plants limited the amount of fluoride in the discharged wastewater to 2 milligrams per liter and the amount of mercury to 2.1 micrograms per liter.

substantially the pollutant content of their discharged wastewater. They also alleged that compliance with the pollutant restrictions set out in the NPDES permits issued by the regional [*623] board would greatly increase their costs of treating the wastewater to be discharged into the Los Angeles River. According to the City of Los Angeles, its compliance costs would exceed $ 50 million annually, representing more than 40 percent of its entire budget [****15] for operating its four wastewater treatment plants and its sewer system; the City of Burbank estimated its added costs at over $ 9 million annually, a nearly 100 percent increase above its $ 9.7 million annual budget for wastewater treatment.

[***310] The State Board and the Los Angeles Regional Board responded that *sections 13241* and *13263* do not require consideration of costs of compliance when a regional board issues a NPDES permit that restricts the pollutant content of discharged wastewater.

The trial court stayed the contested pollutant restrictions for each of the three wastewater treatment plants. It then ruled that *sections 13241* and *13263* of California's Porter-Cologne Act required a regional board to consider costs of compliance not only when it adopts a basin or water quality plan but also when, as here, it issues an NPDES permit setting the allowable pollutant content of a treatment plant's discharged wastewater. The court found no evidence that the Los Angeles Regional Board had considered economic factors at either stage. Accordingly, the trial court granted the Cities' petitions for writs of mandate, and it ordered the Los Angeles Regional Board to vacate the contested restrictions [****16] on pollutants in the wastewater discharge permits issued to the three municipal plants here and to conduct hearings [**868] to consider the Cities' costs of compliance before the board's issuance of new permits. The Los Angeles Regional Board and the State Board filed appeals in both the Los Angeles and Burbank cases. [6]

The Court of Appeal, after consolidating the cases, reversed the trial court. It concluded that *sections 13241* and *13263* require a regional board to take into account "economic [****17] considerations" when it adopts water quality standards in a basin plan but not when, as here, the regional board sets specific pollutant restrictions in wastewater discharge permits intended to satisfy those standards. We granted the Cities' petition for review.

[*624] III. Discussion

A. Relevant State Statutes

The California statute governing the issuance of *wastewater permits* by a regional board is *section 13263*, which was enacted in 1969 as part of the Porter-Cologne Act. (See *ante*, at p. 619.) *Section 13263* provides in relevant part: "*HN7*[↑] *The regional board*, after any necessary hearing, *shall prescribe requirements as to the nature of any proposed discharge* [of wastewater]. *The requirements* shall implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and *the provisions of Section 13241*." (*§ 13263, subd. (a)*, italics added.)

Section 13241 states: "*HN8*[↑] Each regional board shall establish such water quality objectives in water quality control [****18] plans as in its judgment will ensure the reasonable protection of

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[6] Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that (1) the Los Angeles Regional Board failed to show how it derived from the narrative criteria in the governing basin plan the specific numeric pollutant limitations included in the permits; (2) the administrative record failed to support the specific effluent limitations; (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages; and (4) the permits improperly specified the manner of compliance.

beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

[*311]** "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) *Economic considerations*.

"(e) The need for developing housing within the region.

"(f) The need to develop and use recycled water." (Italics added.)

The Cities here argue that *section 13263*'s express reference to *section 13241* requires the Los Angeles Regional Board to consider *section 13241*'s listed factors, notably "[e]conomic considerations," before issuing NPDES permits requiring specific pollutant reductions **[****19]** in discharged effluent or treated wastewater.

[*625] Thus, at issue is language in *section 13263* stating that when a regional board "prescribe[s] requirements as to the nature of any proposed discharge" of treated wastewater it must "take into consideration" certain factors including "the provisions of *Section 13241*." According to the Cities, this statutory language requires that a regional board make an independent evaluation of the *section 13241* factors, including "economic considerations," before restricting the pollutant content in an NPDES permit. This was the view expressed in the trial court's ruling. The Court of Appeal rejected that view. It held that a regional board need consider the *section 13241* factors only when it adopts a basin or water quality plan, but not when, as in this case, it issues a wastewater discharge **[**869]** permit that sets specific numeric limitations on the various chemical pollutants in the wastewater to be discharged. As explained below, the Court of Appeal was partly correct.

B. Statutory Construction

CA(6)[↑] (6) *HN9*[↑] When construing any statute, our task is to determine the Legislature's intent when it enacted the statute "so that we may adopt the construction that **[****20]** best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital (2003) 31 Cal.4th 709, 715 [3 Cal. Rptr. 3d 623, 74 P.3d 726]*; *see Esberg v. Union Oil Co. (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069]*.) In doing this, we look to the statutory language, which ordinarily is "the most reliable indicator of legislative intent." (*Hassan, supra, at p. 715*.)

CA(7)[↑] (7) As mentioned earlier, our Legislature's 1969 enactment of the Porter-Cologne Act, which sought to ensure the high quality of water in this state, predated the 1972 enactment by Congress of the precursor to the federal Clean Water Act. Included in California's original Porter-Cologne Act were *sections 13263* and *13241*. *HN10*[↑] *Section 13263* directs regional boards, when issuing wastewater discharge permits, to take into account various factors, including those set out in *section 13241*. Listed among the *section 13241* factors is "[e]conomic considerations." (*§ 13241, subd. (d)*.) The plain language of *sections 13263* and *13241* indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

Our **[****21]** construction of *sections 13263* and *13241* does not end with their plain statutory language, however. We must also analyze them in

the context of the statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal.4th 1029, 1043 [12 [***312] Cal. Rptr. 3d 343, 88 P.3d 71]*.) Like *sections 13263* and *13241*, *section 13377* is part of the Porter-Cologne Act. But unlike the former two statutes, *section 13377* was **[*626]** not enacted until 1972, shortly after Congress, through adoption of the Federal Water Pollution Control Act Amendments, established a comprehensive water quality policy for the nation.

CA(8)[↑] (8) ***HN11***[↑] *Section 13377* specifies that wastewater discharge permits issued by California's regional boards must meet the federal standards set by federal law. In effect, *section 13377* forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (*33 U.S.C. § 1311(a)*), and publicly operated wastewater **[****22]** treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost (see *id.*, *§§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)*). ***HN12***[↑] ***CA(9)***[↑] (9) Because *section 13263* cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. [7] **[****24]** Such a construction of *section 13263* would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's **[**870]** declaration in *section 13377* that all discharged wastewater must satisfy federal standards. [8] This was also the conclusion of the Court of Appeal. Moreover, under the federal Constitution's supremacy clause (art. VI), a state law that conflicts with federal law is " 'without effect.' " (*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516 [120 L. Ed. 2d 407, 112 S. Ct. 2608]*; *see Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 923 [12 Cal. Rptr. 3d 262, 88 P.3d 1]*.) To comport with the principles of federal supremacy, California law cannot authorize this **[*627]** state's regional boards to allow the discharge of pollutants **[****23]** into the navigable waters of the United States in concentrations that would exceed the mandates of federal law.

[*313]** Thus, in this case, whether the Los Angeles Regional Board should have complied with *sections 13263* and *13241* of California's Porter-Cologne Act by taking into account "economic considerations," such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. We therefore remand this matter for the trial court to resolve that issue.

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[7] The concurring opinion misconstrues both state and federal clean water law when it describes the issue here as "whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions *that meet the clean water standards in more cost-effective and economically efficient ways*." (Conc. opn. of Brown, J., *post*, at p. 629, some italics added.) This case has nothing to do with meeting federal standards in more cost effective and economically efficient ways. State law, as we have said, allows a regional board to consider a permit holder's compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. (*§§ 13241* & *13263*.) Federal law, by contrast, as stated above in the text, "prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (*33 U.S.C. § 1311(a)*), and publicly operated wastewater treatment plants such as those before us here must comply with the [federal] act's *clean water standards, regardless of cost* (see *id.*, *§§ 1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3)*)." (Italics added.)

[8] As amended in 1978, *section 13377* provides for the issuance of waste discharge permits that comply with federal clean water law "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." We do not here decide how this provision would affect the cost-consideration requirements of *sections 13241* and *13263* when more stringent effluent standards or limitations in a permit are justified for some reason independent of compliance with federal law.

C. Other Contentions

The Cities [****25] argue that requiring a regional board at the wastewater discharge permit stage to consider the permit holder's cost of complying with the board's restrictions on pollutant content in the water is consistent with federal law. In support, the Cities point to certain provisions of the federal Clean Water Act. They cite *section 1251(a)(2) of title 33 United States Code*, which sets, as a national goal "*wherever attainable,*" an interim goal for water quality that protects fish and wildlife, and *section 1313(c)(2)(A)* of the same title, which requires consideration, among other things, of waters' "*use and value* for navigation" when revising or adopting a "water quality standard." (Italics added.) These two federal statutes, however, pertain not to permits for wastewater discharge, at issue here, but to establishing water quality standards, not at issue here. Nothing in the federal Clean Water Act suggests that a state is free to disregard or to weaken the federal requirements for clean water when an NPDES permit holder alleges that compliance with those requirements will be too costly.

CA(10)[↑] (10) At oral argument, counsel for amicus curiae National Resources Defense Council, which argued on [****26] behalf of California's State Board and regional water boards, asserted that the federal Clean Water Act incorporates state water policy into federal law, and that therefore a regional board's consideration of economic factors to justify greater pollutant concentration in discharged wastewater would conflict with the federal act even if the specified pollutant restrictions were not less stringent than those required under federal law. We are not persuaded. ***HN13***[↑] The federal Clean Water Act reserves to the states significant aspects of water quality policy (*33 U.S.C. § 1251(b)*), and it specifically grants the states authority to "enforce any effluent limitation" that is not "*less stringent*" than the federal standard (*33 U.S.C. § 1370*, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit [*628] a state—when imposing effluent limitations that are *more stringent* than required by federal law—from taking into account the economic effects of doing so.

Also at oral argument, counsel for the Cities asserted that if the three municipal wastewater treatment facilities ceased [****27] releasing their treated wastewater into the concrete channel that makes up the Los Angeles River, it would (other than during the rainy season) contain no water at all, and thus would not be a "navigable water" of the [**871] United States subject to the Clean Water Act. (See *Solid Waste Agency v. United States Army Corps of Engineers (2001) 531 U.S. 159, 172 [148 L. Ed. 2d 576, 121 S. Ct. 675]* ["The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."].) It is unclear when the Cities first raised this issue. The Court of Appeal did not discuss it in its opinion, and the Cities did not seek rehearing on this ground. (See Cal. Rules of Court, rule [***314] 28(c)(2).) Concluding that the issue is outside our grant of review, we do not address it.

Conclusion

Through the federal Clean Water Act, Congress has regulated the release of pollutants into our national waterways. The states are free to manage their own water quality programs so long as they do not compromise the federal clean [****28] water standards. When enacted in 1972, the goal of the Federal Water Pollution Control Act Amendments was to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. In furtherance of that goal, the Los Angeles Regional Board indicated in its 1994 basin plan on water quality the intent, insofar as possible, to remove from the water in the Los Angeles River toxic substances in amounts harmful to humans, plants, and aquatic life. What is not clear from the record

before us is whether, in limiting the chemical pollutant content of wastewater to be discharged by the Tillman, Los Angeles-Glendale, and Burbank wastewater treatment facilities, the Los Angeles Regional Board acted only to implement requirements of the federal Clean Water Act or instead imposed pollutant limitations that exceeded the federal requirements. This is an issue of fact to be resolved by the trial court.

Disposition

We affirm the judgment of the Court of Appeal reinstating the wastewater discharge permits to the extent that the specified numeric limitations on chemical pollutants are necessary to satisfy federal Clean Water Act requirements for treated wastewater. **[****29]** The Court of Appeal is directed to remand this **[*629]** matter to the trial court to decide whether any numeric limitations, as described in the permits, are "more stringent" than required under federal law and thus should have been subject to "economic considerations" by the Los Angeles Regional Board before inclusion in the permits.

George, C. J., Baxter, J., Werdegar, J., Chin, J., and Moreno, J., concurred.

Concur by: BROWN

Concur

BROWN, J., Concurring.—I write separately to express my frustration with the apparent inability of the government officials involved here to answer a simple question: How do the federal clean water standards (which, as near as I can determine, are the state standards) prevent the state from considering economic factors? The majority concludes that because "the supremacy clause of the United States Constitution requires state law to yield to federal law, a regional board, when issuing a wastewater discharge permit, may not consider economic factors to justify imposing pollutant restrictions that are *less stringent* than the applicable federal standards require." (Maj. opn., *ante*, at p. 618.) That seems a pretty self-evident proposition, but not a useful one. **[****30]** The real question, in my view, is whether the Clean Water Act prevents or prohibits the regional water board from considering economic factors to justify pollutant restrictions that *meet* the clean water standards in more cost-effective and economically efficient ways. I can see no reason why a federal law—which purports to be an example of cooperative federalism—would decree such a result. I do not think the majority's reasoning is at fault here. Rather, the agencies involved seemed to have worked hard to make this simple question impenetrably obscure.

A brief review of the statutory framework at issue is necessary to understand my concerns. **[***315]**

[872] I. Federal Law**

"In 1972, Congress enacted the Federal Water Pollution Control Act (*33 U.S.C. § 1251 et seq.*), commonly known as the Clean Water Act (CWA) [Citation.] ... [¶] Generally, the CWA 'prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions. [Citation.]' ... The most important of those exceptions is pollution discharge under a valid NPDES [National Pollution Discharge Elimination System] permit, which can be issued either by the Environmental **[****31]** Protection Agency (EPA), or by an EPA-approved state permit program such as California's. [Citations.] NPDES permits are valid for five years. [Citation.] [¶] Under the CWA's NPDES permit system, the states are required to develop *water quality standards*. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.? [Citation.] A water quality standard for any **[*630]** given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the *water quality criteria* sufficient to protect those uses. [Citations.] [¶] Water quality criteria can be either *narrative* or *numeric*. [Citation.]" (*Communities for a Better*

Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1092–1093 [1 Cal. Rptr. 3d 76].)

With respect to satisfying water quality standards, "a polluter must comply with *effluent limitations*. The CWA defines an effluent limitation as 'any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, **[****32]** the waters of the contiguous zone, or the ocean, including schedules of compliance.' [Citation.] 'Effluent limitations are a means of *achieving* water quality standards.' [Citation.] [¶] NPDES permits establish effluent limitations for the polluter. [Citations.] CWA's NPDES permit system provides for a two-step process for the establishing of effluent limitations. First, the polluter must comply with *technology-based effluent limitations*, which are limitations based on the best available or practical technology for the reduction of water pollution. [Citations.] [¶] Second, the polluter must also comply with more stringent *water quality-based effluent limitations* (WQBEL's) where applicable. In the CWA, Congress 'supplemented the "technology-based" effluent limitations with "water quality-based" limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ' [Citation.] [¶] The CWA makes WQBEL's applicable to a given polluter whenever WQBEL's are 'necessary to meet water quality standards, treatment standards, or schedules of compliance, **[****33]** established pursuant to any State law or regulations ... .' [Citations.] Generally, NPDES permits must conform to state water quality laws insofar as the state laws impose more stringent pollution controls than the CWA. [Citations.] Simply put, WQBEL's implement water quality standards." (*Communities for a Better Environment v. State Water Resources Control Bd., supra, 109 Cal.App.4th at pp. 1093–1094*, fns. omitted.)

This case involves water quality-based effluent limitations. As set forth above, "[u]nder the CWA, states have the primary role in promulgating water quality standards." (*Piney Run Preservation Ass'n v. Commrs. of Carroll Co. (4th Cir. 2001) 268 F.3d 255, 265, fn. 9*.) "Under the CWA, the water quality standards referred to in *section 301* [see *33 U.S.C. § 1311*] are primarily the states' handiwork." **[***316]** (*American Paper Institute, Inc. v. U.S. Envtl. Protection Agency (D.C. Cir. 1993) 302 U.S. App. D.C. 80 [996 F.2d 346, 349]* (*American Paper*).) In fact, upon the 1972 passage of the CWA, "[s]tate water quality standards in effect at the time ... were deemed to be the initial water **[****34]** quality benchmarks for CWA purposes ... . The states were to revisit and, if **[*631]** necessary, revise those initial standards at least once every three years." (*American Paper, at p. 349*.) Therefore, "once a water quality standard has been promulgated, *section 301 of the CWA* requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." (*American Paper, at p. 350*.) Accordingly, it appears that in most instances, **[**873]** state water quality standards are identical to the federal requirements for NPDES permits.

II. State Law

In California, pursuant to the Porter-Cologne Water Quality Control Act (*Wat. Code, § 13000 et seq.*; Stats. 1969, ch. 482, § 18, p. 1051; hereafter Porter-Cologne Act), the regional water quality control boards establish water quality standards—and therefore federal requirements for NPDES permits—through the adoption of water quality control plans (basin plans). The basin plans establish water quality objectives using enumerated factors—including economic factors—set forth in *Water Code section 13241*.

In addition, as one court observed: "The Porter-Cologne **[****35]** Act ... established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (*Wat. Code, §§ 13100, 13140,*

13200, *13201*, *13240*, *13241*, *13243*.) The Porter-Cologne Act identified these permits as 'waste discharge requirements,' and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (*Wat. Code, §§ 13263, subd. (a)*, *13377*, *13374*.) [¶] Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (*Wat. Code, § 13370, subd. (c)*.) As part of these amendments, the Legislature provided that the state and regional water boards 'shall, as required or authorized by the [Clean Water Act], issue **[****36]** waste discharge requirements ... which apply and ensure compliance with all applicable provisions [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.' (*Wat. Code, § 13377*.) *Water Code section 13374* provides that '[t]he term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the [Clean Water Act].' [¶] California subsequently obtained the required approval to issue NPDES permits. [Citation.] Thus, the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (*Wat. Code, § 13374*.)" (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd. (2004) 124 Cal.App.4th 866, 875 [22 Cal. Rptr. 3d 128]*.)

[*632] Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los **[****37]** Angeles Regional Water Quality Control Board (Board)—the body responsible to enforce the statutory framework—failed to comply with its statutory mandate.

[*317]** For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirement set forth in *Water Code section 13241* in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so.

Moreover, the Board acknowledges that it has neglected other statutory provisions that might have provided an additional opportunity to air these concerns. As set forth above, pursuant to the CWA, "[t]he states were to revisit **[****38]** and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they 'protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act. [Citation.] Additionally, the CWA directs **[**874]** states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.' " (*American Paper, supra, 996 F.2d at p. 349*.)

According to the Cities, "[t]he last time that the narrative water quality objective for toxicity contained in the Basin Plan was reviewed and modified was 1994." The Board does not deny this claim. Accordingly, the Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when

making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State **[****39]** and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions.

[*633] Our decision today arguably allows the Board to continue to shirk its statutory duties. The majority holds that when read together, *Water Code sections 13241*, *13263*, and *13377* do not allow the Board to consider economic factors when issuing NPDES permits to satisfy federal CWA requirements. (Maj. opn., *ante*, at pp. 625–627.) The majority then bifurcates the issue when it orders the Court of Appeal "to remand this matter to the trial court to decide whether any numeric limitations, as described in the permits, are 'more stringent' than required under federal law and thus should have been subject to 'economic considerations' by the Los Angeles Regional Board before inclusion in the permits." (*Id.* at pp. 628–629.)

The majority overlooks the feedback loop established by the CWA, under which federal standards are linked to state-established water quality standards, including narrative water quality criteria. (See *33 U.S.C. § 1311* **[****40]** *(b)(1)(C)*; *40 C.F.R. § 122.44(d)(1) (2004)*.) Under the CWA, NPDES permit requirements include the state narrative criteria, which are incorporated into the Board's basin plan under the description "no toxins in toxic amounts." As far as I can determine, NPDES permits **[***318]** designed to achieve this narrative criteria (as well as designated beneficial uses) will usually implement the state's basin plan, while satisfying federal requirements as well.

If federal water quality standards are typically identical to state standards, it will be a rare instance that a state exceeds its own requirements and economic factors are taken into consideration. [1] In light of the Board's initial failure to consider costs of compliance and its repeated failure to conduct required triennial reviews, the result here is an unseemly bureaucratic bait-and-switch that we should not endorse. The likely outcome of the majority's decision is that the Cities will be economically burdened to meet standards imposed on them in a highly questionable manner. [2] In these times of tight fiscal budgets, it is difficult to imagine imposing additional financial burdens on municipalities without at least **[****41]** allowing them to present alternative views.

Based on the facts of this case, our opinion today appears to largely retain the status quo for the Board. If the Board can actually demonstrate that only the precise limitations at issue here, implemented in only one way, will achieve the desired water standards, perhaps its obduracy is justified. That case has yet to be made.

[*634] Accordingly, I cannot conclude that the majority's decision is wrong. The analysis **[**875]** may provide a **[****42]** reasonable accommodation of conflicting provisions. However, since the Board's actions "make me wanna holler and throw up both my hands," [3] I write separately to set forth my concerns and concur in the judgment—*dubitante*. [4]

The petitions of all appellants and respondent for a rehearing were denied June 29, 2005. Brown, J.,

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[1] (But see *In the Matter of the Petition of City and County of San Francisco, San Francisco Baykeeper et al.* (Order No. WQ 95-4, Sept. 21, 1995) 1995 WL 576920.)

[2] Indeed, given the fact that "water quality standards" in this case are composed of broadly worded components (i.e., a narrative criteria and "designated beneficial uses of the water body"), the Board possessed a high degree of discretion in setting NPDES permit requirements. Based on the Board's past performance, a proper exercise of this discretion is uncertain.

[3] Marvin Gaye (1971) "Inner City Blues."

[4] I am indebted to Judge Berzon for this useful term. (See *Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) 400 F.3d 1119 [2005 WL 466202]* (conc. opn. of Berzon, J.).)

did not participate therein.

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TAB 15

County Sanitation Dist. No. 2 v. County of Kern

Court of Appeal of California, Fifth Appellate District

April 1, 2005, Filed

F043095

Reporter

127 Cal. App. 4th 1544 *; 27 Cal. Rptr. 3d 28 **; 2005 Cal. App. LEXIS 516 ***; 2005 Cal. Daily Op. Service 2907; 2005 Daily Journal DAR 3974; 35 ELR 20070

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY et al., Plaintiffs, Cross-defendants and Appellants; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES et al., Plaintiffs and Appellants, v. COUNTY OF KERN, Defendant, Cross-complainant and Appellant; KERN COUNTY BOARD OF SUPERVISORS, Defendant and Appellant; ARVIN-EDISON WATER STORAGE DISTRICT et al., Interveners and Respondents.

Subsequent History: Rehearing denied by *County Sanitation Dist. No. 2 v. County of Kern, 2005 Cal. App. LEXIS 702 (Cal. App. 5th Dist., Apr. 25, 2005)*

Prior History: [***1] Superior Court of Tulare County, No. 189564, Paul A. Vortmann, Judge.

Core Terms

biosolids, sludge, Ordinance, sewage, CEQA, disposal, regulations, County's, Guidelines, preparation, sites, landfills, superior court, cause of action, heightened, administrative record, requirements, negative declaration, fair argument, agencies, moot, EPA, purposes, invalid, soil, tons, contracts, provisions, roads, effects

Case Summary

Procedural Posture

Plaintiff sanitation agencies appealed from adverse rulings of the Superior Court of Tulare County (California), which ruled that a biosolids ordinance, Kern County, Cal., Ordinance G-6638 (Oct. 19, 1999), was not an invalid exercise of police power or a violation of the Commerce Clause, U.S. *Const. art. I, § 8, cl. 3*, and that the biosolids impact fee was constitutional as it had a rational basis and was not an illegal general or special tax.

Overview

The county enacted the ordinance and adopted a negative declaration. The court held that the county was required to prepare an environmental impact report (EIR) under the low threshold imposed by the fair argument standard. The administrative record contained sufficient, credible evidence that the heightened treatment standards for the application of sewage sludge to land in the unincorporated areas of the county could have a significant, adverse effect on California's environment. The possibility that the net overall impact of the ordinance was beneficial did not override the requirement in the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, for the preparation of an EIR addressing the significant, adverse environmental impacts the ordinance could have caused. The sanitation agencies failed to show that the ordinance discriminated against interstate commerce. The ordinance applied to the land application of all sewage sludge, and the burden on the industry was the same, regardless of its

geographical origin. The biosolid impact fee was invalid, however, to the extent that it was a local fee for road use, in violation of *Cal. Veh. Code § 9400.8*.

Outcome

The court reversed the judgments and remanded the matter. The court directed the trial court to issue a writ of mandate ordering the county to void its negative declaration and to prepare an EIR that covered the adoption of the ordinance regulating the land application of treated sewage sludge within its jurisdiction. The trial court was to uphold the biosolids impact fee only to the extent that the funds generated were applied to valid purposes.

LexisNexis® Headnotes

Environmental Law > Solid Wastes > Disposal Standards

HN1[] **Solid Wastes, Disposal Standards**

See *40 C.F.R. § 503.9(w) (2005)*.

Environmental Law > Solid Wastes > Disposal Standards

Real Property Law > Water Rights > Beneficial Use

HN2[] **Solid Wastes, Disposal Standards**

Sewage sludge refers to the mud-like deposit originating from sewage and created by the treatment processes used to decontaminate wastewater before it is released into local waterways. Sewage sludge typically consists of water and 2 to 28 percent solids. *68 Fed. Reg. 61,084*-01, 61,086 (Oct. 24, 2003). Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > Water Quality > General Overview

HN3[] **Enforcement, Discharge Permits**

The Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program. *33 U.S.C.S. § 1345(a)-(c)*. Second, the United States Environmental Protection Agency was directed to develop comprehensive regulations establishing standards for sewage sludge use and disposal. *33 U.S.C.S. § 1345(d)*. Third, states were allowed to establish more stringent standards. *33 U.S.C.S. § 1345(e)*. Fourth, grants were authorized for the conduct of scientific studies, demonstration projects, and public information and education programs concerning the safe and beneficial management of sewage sludge. *33 U.S.C.S. § 1345(g)*.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Solid Wastes > Municipal Landfills

HN4[] **Solid Wastes, Disposal Standards**

Standards for the Use or Disposal of Sewage Sludge, 40 C.F.R. § 503 (2005), specify that sewage sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in *40 C.F.R. pt. 258*.

Environmental Law > Solid Wastes > Disposal

Standards

HN5[⬇] **Solid Wastes, Disposal Standards** Pathogen reduction standards contained in 40 C.F.R. § 503 (2005) are used to differentiate between Class A sewage sludge and Class B sewage sludge. *40 C.F.R. § 503.32 (2005)*. While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed on Class A sewage sludge.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN6[⬇] **Solid Wastes, Disposal Standards** In response to Congress's delegation of authority to the states to issue National Pollutant Discharge Elimination System permits, *33 U.S.C.S. § 1342*, the California legislature amended the Porter-Cologne Water Quality Control Act, *Cal. Water Code § 13000 et seq.*, to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the Clean Water Act. *Cal. Water Code § 13370 et seq.*

Environmental Law > Solid Wastes > Disposal Standards

Governments > Public Improvements > General Overview

HN7[⬇] **Solid Wastes, Disposal Standards** *Cal. Water Code § 13274* requires the State Water Board or the regional boards to prescribe general waste discharge requirements for the discharge of treated sewage sludge used as a soil amendment. *Cal. Water Code § 13274(a)*, *(b)*. *Cal. Water Code § 13274* also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction. *Cal. Water Code § 13274(i)*.

Business & Corporate Compliance > ... > Environmental Law > Solid Wastes > Resource Recovery & Recycling

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Solid Wastes > Flow Control

HN8[⬇] **Solid Wastes, Resource Recovery & Recycling** The California Integrated Waste Management Act of 1989, *Cal. Pub. Res. Code § 40000 et seq.*, requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. *Cal. Pub. Res. Code § 41780*. More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste stream would be recycled, reduced or composted by 1995 and how 50 percent would be achieved by 2000. *Cal. Pub. Res. Code § 41780*.

Environmental Law > Solid Wastes > Disposal Standards

HN9[⬇] **Solid Wastes, Disposal Standards** See *Cal. Pub. Res. Code § 40191(a)*.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of

Review > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Administrative Law > Judicial Review > Reviewability > Factual Determinations

HN10[↓] **Judicial Review, Standards of Review**
It is well established in proceedings brought under the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, that (1) the public agency is the finder of fact, (2) the superior court's findings are not binding on the appellate court, and (3) the scope and standard of review applied by the appellate court to the agency's decision is the same as that applied by the superior court. *Cal. Pub. Res. Code §§ 21168, 21168.5*.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Writs > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Administrative Law > Judicial Review > Remedies > Mandamus

Administrative Law > Judicial Review > Standards of Review > General Overview

HN11[↓] **Standards of Review, Abuse of Discretion**
When a petition brought under the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, challenges action of a public agency that is legislative or quasi-legislative in character, the standard of review contained in *Cal. Pub. Res. Code § 21168.5* and the procedures for traditional mandamus set forth in *Cal. Code Civil Proc. § 1085* are applied.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN12[↓] **Standards of Review, Abuse of Discretion**
See *Cal. Pub. Res. Code § 21168.5*.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Governments > Local Governments > Ordinances & Regulations

HN13[↓] **Standards of Review, Abuse of Discretion**
Amendment or adoption of an ordinance is a legislative act subject to review under *Cal. Pub. Res. Code § 21168.5*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN14[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Pub. Res. Code § 21100(a)*.

Administrative Law > Judicial

Review > Administrative Record > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN15[↓] **Judicial Review, Administrative Record**

A negative declaration-rather than an environmental impact report-is appropriate when the administrative record before the governmental agency does not contain substantial evidence that the project may have a significant effect on the environment. *Cal. Pub. Res. Code § 21080(c)*.

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

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN16[↓] **Standards of Review, De Novo Review**

When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a "fair argument" that the project may have a significant effect on the environment. *Cal. Pub. Res. Code §§ 21080(c)* and *(d)*, *21151*. The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court. Consequently, the appellate court independently reviews the record and determines whether there is substantial evidence in support of a fair argument the proposed project may have a significant environmental impact, while giving the lead agency the benefit of a doubt on any legitimate, disputed issues of credibility.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN17[↓] **Natural Resources & Public Lands, National Environmental Policy Act**

California courts routinely describe the fair argument test as a low threshold requirement for the initial preparation of an environmental impact report that reflects a preference for resolving doubts in favor of environmental review.

Administrative Law > Judicial Review > Administrative Record > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN18[↓] **Judicial Review, Administrative Record**

A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an environmental impact report (EIR). *Cal. Code Regs. tit. 14, § 15064(f)(1)*. The environmental review necessary to complete an EIR prepares the agency to weigh the conflicting, substantial evidence on each side of an issue and make its findings of fact.

Environmental Law > Natural Resources &

Public Lands > National Environmental Policy Act > General Overview

HN19[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15063(b)(1)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN20[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
For projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an environmental impact report is required because the consideration of feasible alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN21[↓] **Standards of Review, Substantial Evidence**
See *Cal. Code Regs. tit. 14, § 15384(a)*.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN22[↓] **Standards of Review, Substantial Evidence**
See *Cal. Pub. Res. Code § 21080(e)*.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN23[↓] **Standards of Review, Substantial Evidence**
The existence of a public controversy is not a substitute for substantial evidence. *Cal. Code Regs. tit. 14, § 15064(f)(4)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN24[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
A project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN25[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Pub. Res. Code § 21060.5*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN26[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15360*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN27[] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Pub. Res. Code § 21068*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN28[] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15064(c)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN29[] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15064(d)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN30[] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15358(a)*.

Administrative Law > Judicial Review > Administrative Record > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN31[] **Judicial Review, Administrative Record**
Under the fair argument test, the inquiry into what is reasonably foreseeable depends on whether the administrative record contains enough evidence to show a reasonable possibility that a particular alternative would be used in the future.

Administrative Law > Judicial Review > Administrative Record > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Real Property Law > Subdivisions > State Regulations

Governments > Local Governments > Ordinances & Regulations

HN32[] **Judicial Review, Administrative Record**
Determining whether alternative methods of compliance with a new ordinance are reasonably foreseeable or speculative depends on the facts in the record rather than a bright line rule of law. A bright line rule-stating that the existence of alternative means of compliance with a new rule or regulation would cause each alternative to be so uncertain that it was not reasonably foreseeable-would contradict the requirements for environmental analysis imposed by *Cal. Pub. Res. Code § 21159(a)*. That subdivision provides that, when specified agencies adopt a rule or regulation concerning pollution control, performance standards or treatment requirements, the agency must perform an environmental analysis of the reasonably foreseeable methods of compliance. Thus, the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, recognizes that the existence of alternative methods of compliance does not, in itself, make the alternatives not reasonably foreseeable. Nothing dictates a different conclusion when the new edict is a county ordinance, even though the express terms of *Cal.*

Pub. Res. Code § 21159 do not cover ordinances. Consequently, regardless of whether the situation concerns a new rule, regulation or ordinance, whether one or more methods of future compliance are reasonably foreseeable depends upon the quality and quantity of evidence in the administrative record.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN33[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
A project will have a significant effect on the environment if it will cause a substantial, or potentially substantial, adverse change in the physical conditions that exist within the area that will be affected by the project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. *Cal. Pub. Res. Code §§ 21060.5*, *21068*; *Cal. Code Regs. tit. 14, §§ 15360*, *15382*.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN34[↓] **Agency Adjudication, Hearings**
Before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN35[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
Under the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, the lead agency bears a burden to investigate potential environmental impacts. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN36[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
When a public agency is preparing an environmental impact report (EIR) and decides to defer environmental review of an action that may be taken in the future, courts analyze the decision to defer environmental review under a specific test. That test provides that the discussion of a future potential action is not required in an EIR for the project if: (1) obtaining more detailed useful information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN37[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
In the context of a negative declaration, the courts have not used the deferral of environmental analysis to determine whether the approval of the negative declaration complies with the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.* Further, use of an inquiry separate from the fair argument test would be inappropriate

if it were used to raise or lower the threshold imposed by that test. Because the concept of deferral of environmental review does not change the threshold imposed by the fair argument test, there is no need for a separate inquiry. In other words, the idea of deferral is subsumed in the fair argument test, which considers whether a potential environmental impact is speculative or reasonably foreseeable; undertaking a separate inquiry would be redundant.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN38[] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15004(b)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN39[] **Natural Resources & Public Lands, National Environmental Policy Act**
Each public agency is required to comply with the California Environmental Quality Act (CEQA), *Cal. Pub. Res. Code § 21000 et seq.*, and meet its responsibilities, including evaluating mitigation measures and project alternatives. *Cal. Code Regs. tit. 14, § 15020*. When agencies-even agencies with antagonistic positions-comply with their responsibilities for environmental review under CEQA, their action should be taken after consideration of the other's position and, as a result, their action may achieve a measure of coordination that would not have existed without that review. *Cal. Pub. Res. Code § 21000(d), (f)*.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN40[] **Judgments, Relief From Judgments**
See *Cal. Pub. Res. Code § 21168.9(b)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN41[] **Natural Resources & Public Lands, National Environmental Policy Act**
After a failure to comply with the California Environmental Quality Act (CEQA), *Cal. Pub. Res. Code § 21000 et seq.*, has been found, the order could mandate that the public entity void all or part of its decision and adopt the heightened treatment standards. *Cal. Pub. Res. Code § 21168.9(a)*. The order also could mandate that the public entity take specific action necessary to bring its decision into compliance with CEQA. *Cal. Pub. Res. Code § 21168.9(a)(3)*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Severability

HN42[] **Natural Resources & Public Lands, National Environmental Policy Act**
The heightened treatment standards of Kern County, Cal., Ordinance No. G-6931 are grammatically, functionally, and volitionally severable from the remainder of the biosolid ordinance. Therefore, violations of the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, relating to the adoption of the heightened treatment standards do not infect the other provisions of the ordinances. *Cal. Pub. Res. Code § 21168.9(b)*.

Environmental Law > Solid Wastes > Disposal Standards

Governments > Public Improvements > General Overview

HN43[] **Solid Wastes, Disposal Standards**
See *Cal. Water Code § 13274*.

Environmental Law > Solid Wastes > Disposal Standards

Governments > Local Governments > Ordinances & Regulations

HN44[] **Solid Wastes, Disposal Standards**
The heightened treatment standards of Kern County, Cal., Ordinance No. G-6931 do not conflict with *Cal. Water Code § 13274* when the term "sewage sludge" is given its usual, ordinary meaning-that is, read literally.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Governments > Native Americans > Authority & Jurisdiction

International Trade Law > Authority to Regulate > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN45[] **Interstate Commerce, Prohibition of Commerce**
See U.S. *Const. art. I, § 8, cl. 3*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN46[] **Commerce Clause, Dormant Commerce Clause**
The explicit grant of power in U.S. *Const. art. I, § 8, cl. 3* has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations and ordinances that burden or interfere with interstate commerce. Known as the "dormant" or "negative" Commerce Clause, this limitation has been characterized as predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has not spoken. Consequently, where Congress has spoken and specifically authorized the state or local government action, the dormant Commerce Clause does not apply.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General

Overview

Environmental Law > Solid Wastes > Disposal Standards

HN47[↓] **Congressional Duties & Powers, Commerce Clause**
The land application of sewage sludge is an article of commerce for purposes of the Commerce Clause, U.S. *Const. art. I, § 8, cl. 3*.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Water Quality > General Overview

HN48[↓] **Solid Wastes, Disposal Standards**
See *33 U.S.C.S. § 1345(e)*.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Federal Versus State Law > Federal Preemption

HN49[↓] **Solid Wastes, Disposal Standards**
See *40 C.F.R. § 503.5(b) (2005)*.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN50[↓] **Interstate Commerce, State Powers**
Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause, U.S. *Const. art. I, § 8, cl. 3*, even if it interferes with interstate commerce. As the United States Supreme Court has noted, however, for a state regulation to be removed from the reach of the dormant Commerce Clause, Congressional intent must be unmistakably clear.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Federal Versus State Law > Federal Preemption

HN51[↓] **Solid Wastes, Disposal Standards**
It is unmistakably clear that Congress intended the manner of disposal or use of sludge to be a local determination so long as minimum federal standards were met. *33 U.S.C.S. § 1345(e)*.

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Water Quality > General Overview

HN52[↓] **Solid Wastes, Disposal Standards**
It is clear that the restriction in Kern County, Cal., Ordinance No. G-6638-that only sewage sludge meeting the heightened treatment standards can be applied to land in Kern County-reflects a local determination of the manner of disposal or use of sewage sludge. Thus, the heightened treatment standards are the type of local regulation expressly authorized by the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

Environmental Law > Solid Wastes > Disposal Standards

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

HN53[↓] **Contractual Relations & Housing, Fair Housing Rights**
The Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, does not explicitly authorize local governmental units to discriminate against sewage sludge that arrives in a state through interstate commerce. *33 U.S.C.S. § 1345(e)*. Nor is there anything in the statutory language that gives rise to a reasonable inference that Congress intended such a result. Consequently, any discriminatory aspect of a local ordinance regulating the land application of sewage sludge is still subject to scrutiny under the limitation imposed on discrimination by the dormant Commerce Clause.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Governments > Local Governments > Ordinances & Regulations

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN54[↓] **Commerce Clause, Dormant Commerce Clause**
Unless Congress has provided otherwise, an ordinance that discriminates against interstate commerce, as opposed to one that regulates evenhandedly, is virtually always invalid under the dormant Commerce Clause. In this context, discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

Governments > Local Governments > Ordinances & Regulations

HN55[↓] **Local Governments, Ordinances & Regulations**
See *Cal. Const. art. XI, § 7*.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Constitutional Limits

Governments > Police Powers

Environmental Law > Land Use & Zoning > Judicial Review

Governments > Local Governments > Police Power

HN56[↓] **Zoning, Constitutional Limits**
The California Supreme Court has identified the standard for determining whether the adoption of a land use restriction is a valid exercise of the police power granted under the California Constitution. An ordinance is valid if it is fairly debatable that the land use restriction in fact bears a reasonable relation to the general welfare. The "general welfare" that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance. If a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.

Governments > Public Improvements > Bridges & Roads

Governments > Public Improvements > Financing

HN57[↓] **Public Improvements, Bridges &**

Roads
See *Cal. Veh. Code § 9400.8*.

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

Governments > Legislation > Interpretation

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

HN58[↓] **Standards of Review, De Novo Review**
An appellate court independently reviews issues of statutory construction and the application of that construction to a set of undisputed facts as questions of law.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Governments > Public Improvements > Bridges & Roads

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Governments > Public Improvements > Financing

Business & Corporate Compliance > ... > Real Property Law > Zoning > Impact Fees

HN59[↓] **Reviewability, Exhaustion of Remedies**
The doctrine of exhaustion of administrative remedies does not apply to the claim that a fee imposed by ordinance is preempted by *Cal. Veh. Code § 9400.8*.

Governments > Public Improvements > Bridges & Roads

Governments > Public Improvements > Financing

HN60[↓] **Public Improvements, Bridges & Roads**
Cal. Veh. Code § 9400.8 expressly states that its prohibition applies notwithstanding any other provision of law. The Mitigation Fee Act, *Cal. Gov't Code § 66000 et seq.*, was in effect at the time *Cal. Veh. Code § 9400.8* became operative and thus was among the other provisions of law covered by the quoted phrase. In short, despite the existence of the Mitigation Fee Act, a local agency may not impose a charge for the privilege of using its streets and highways.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Burdens of Proof > Variances Between Pleadings & Proof

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Conforming Pleadings to Evidence

HN61[↓] **Standards of Review, Abuse of Discretion**
A pleading may be amended at the time of trial unless the adverse party can establish prejudice. Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to establish another cause of action is favored, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party. A variance between pleading and proof does not justify the denial of an amendment to conform pleading to

proof unless the unamended pleading misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

Administrative Law > Judicial Review > Administrative Record > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN62[] **Judicial Review, Administrative Record**

As a general rule, where the evidence to support the cause of action in an amended pleading is already before the court, the opposing party will not experience prejudice if the amendment is allowed.

Governments > Local Governments > Duties & Powers

Governments > Legislation > Types of Statutes

Governments > State & Territorial Governments > Relations With Governments

HN63[] **Local Governments, Duties & Powers**

If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is "contradictory" to general law when it is inimical thereto. Finally, local legislation enters an area that is "fully occupied" by general law when the legislature has expressly manifested its intent to "fully occupy" the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Licenses

Governments > Public Improvements > Bridges & Roads

Governments > Public Improvements > Financing

Business & Corporate Compliance > ... > Real Property Law > Zoning > Impact Fees

HN64[] **Local Governments, Claims By & Against**

By adopting *Cal. Veh. Code § 9400.8*, the legislature has expressly prohibited counties from imposing a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads.

Governments > Public Improvements > Bridges & Roads

HN65[] **Public Improvements, Bridges & Roads**

See *Cal. Veh. Code § 360*.

Governments > Public Improvements > Bridges & Roads

HN66[] **Public Improvements, Bridges & Roads**

See *Cal. Veh. Code § 590*.

Governments > Legislation > Interpretation

HN67[↓] **Legislation, Interpretation**
A reviewing court's fundamental task in determining the meaning of a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. The analysis starts with an examination of the actual words of the statute, giving them their usual, ordinary meaning. A court may refer to the definitions contained in a dictionary to obtain the usual and ordinary meaning of a word.

Governments > Public Improvements > Bridges & Roads

Governments > Public Improvements > Financing

HN68[↓] **Public Improvements, Bridges & Roads**
Cal. Veh. Code § 9400.8 must be construed to prohibit a local agency from imposing fees or charges on legal loads that are hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear to the roads.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Governments > Public Improvements > Financing

HN69[↓] **Judgments, Declaratory Judgments**
The appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are applied to valid purposes and those purposes are otherwise severable from the invalid ones.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN70[↓] **Justiciability, Mootness**
The standard the appellate court applies in determining the mootness of an appeal under the California Environmental Quality Act, *Cal. Pub. Res. Code § 21000 et seq.*, is whether any effective relief can be granted the appellant.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN71[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Pub. Res. Code § 21067*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN72[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
If more than one public agency is involved in a project but only one public agency carries out the project, then that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency. *Cal. Code Regs. tit. 14, § 15051(a)*

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN73[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
Cal. Pub. Res. Code § 21166 sets forth the

conditions where a subsequent or supplemental environmental impact report (EIR) is required to cover a new activity that is regarded as a change in a project already covered by an existing EIR. In particular, a subsequent or supplemental EIR is required where substantial changes are proposed in the project that will require major revisions of the EIR. *Cal. Pub. Res. Code § 21166(a)*; *Cal. Code Regs. tit. 14, §§ 15162*, *15163*, *15164*.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN74[↓] **Natural Resources & Public Lands, National Environmental Policy Act**
See *Cal. Code Regs. tit. 14, § 15168*.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled that a biosolids ordinance, Kern County Ord. No. G-6638, was not an invalid exercise of police power or a violation of the commerce clause, *U.S. Const., art. I, § 8, cl. 3*, and that the biosolids impact fee passed constitutional scrutiny because it had a rational basis and was not an illegal general or special tax. The county had adopted a negative environmental declaration when it enacted the ordinance. (Superior Court of Tulare County, No. 189564, Paul A. Vortmann, Judge.)

The Court of Appeal reversed the judgments and remanded the matter. The court held that the county was required to prepare an environmental impact report (EIR) under the low threshold imposed by the fair argument standard. The administrative record contained sufficient credible evidence that the heightened treatment standards for the application of sewage sludge to land in the unincorporated areas of the county could have a significant adverse effect on California's environment. The possibility that the net overall impact of the ordinance was beneficial did not override the requirement in the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., for the preparation of an EIR addressing the significant adverse environmental impacts the ordinance could have caused. The sanitation agencies failed to show that the ordinance discriminated against interstate commerce. The ordinance applied to the land application of all sewage sludge, and the burden on the industry was the same, regardless of its geographical origin. The biosolid impact fee was invalid, however, to the extent that it was a local fee for road use, in violation of *Veh. Code, § 9400.8*. (Opinion by Dawson, J., with Dibiaso, Acting P. J., and Vartabedian, J., concurring.) **[*1545]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[↓] (1)

Pollution and Conservation Laws § 3.2 > Sewage Sludge.

Sewage sludge refers to the mud-like deposit originating from sewage and created by the treatment processes used to decontaminate wastewater before it is released into local waterways. Sewage sludge typically consists of water and 2 to 28 percent solids. Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties.

CA(2)[↓] (2)

Pollution and Conservation Laws § 5 > Clean Water

Act > Sewage Sludge Disposal.

The *Clean Water Act, 33 U.S.C. § 1251 et seq.*, addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program under *33 U.S.C. § 1345(a)–(c)*. Second, the United States Environmental Protection Agency was directed to develop comprehensive regulations establishing standards for sewage sludge use and disposal under *§ 1345(d)*. Third, *§ 1345(e)* allowed the states to establish more stringent standards. Fourth, *§ 1345(g)* authorized grants for the conduct of scientific studies, demonstration projects, and public information and education programs concerning the safe and beneficial management of sewage sludge.

CA(3)[↓] (3)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge.

Standards for the Use or Disposal of Sewage Sludge, *40 C.F.R. § 503 (2005)*, specify that sewage sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage-sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in *40 C.F.R. § 258*.

CA(4)[↓] (4)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge.

Pathogen reduction standards contained in *40 C.F.R. § 503.20 (2005)* are used to differentiate between Class A sewage sludge and Class B sewage sludge. While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is **[*1546]** treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed on Class A sewage sludge.

CA(5)[↓] (5)

Pollution and Conservation Laws § 5 > Clean Water Act > Discharge Permits.

In response to Congress's delegation of authority to the states to issue National Pollutant Discharge Elimination System permits under *33 U.S.C. § 1342*, the California Legislature has amended the *Porter-Cologne Water Quality Control Act, Wat. Code, § 13000 et seq.*, to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the *Clean Water Act under Wat. Code, § 13370 et seq.*

CA(6)[↓] (6)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge.

Wat. Code, § 13274, subds. (a) and *(b)*, requires the State Water Board or the regional boards to prescribe general waste discharge requirements for the discharge of treated sewage sludge used as a soil amendment. *Wat. Code, § 13274, subd. (i)*, also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction.

CA(7)[↓] (7)

Pollution and Conservation Laws § 3.2 > Integrated Waste Management Plans.

Pub. Resources Code, § 41780, of the *California Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq.)*, requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. More specifically, *Pub. Resources Code, § 41780* required counties to adopt integrated waste management plans that described how 25 percent of the solid waste stream would be recycled, reduced or composted by 1995 and how 50 percent would be achieved by 2000.

CA(8)[↓] (8)

Pollution and Conservation Laws § 2.9 > California Environmental Quality Act > Proceedings > Judicial Review.

Under *Pub. Resources Code, §§ 21168, 21168.5*, it is well established in proceedings brought under the *California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.*, that (1) the public agency is the finder of fact, (2) the superior court's findings are not binding on the appellate court, and (3) the scope and standard of review applied by the appellate court to the agency's decision is the same as that applied by the superior court.

CA(9)[↓] (9)

Pollution and Conservation Laws § 2.9 > California Environmental Quality Act > Proceedings > Judicial Review.

When a petition brought under the *California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.*, challenges action of a public agency that is **[*1547]** legislative or quasi-legislative in character, the standard of review contained in *Pub. Resources Code, § 21168.5*, and the procedures for traditional mandamus set forth in *Code Civil Proc., § 1085*, are applied.

CA(10)[↓] (10)

Counties § 10 > Ordinances > Review.

Amendment or adoption of an ordinance is a legislative act subject to review under *Pub. Resources Code, § 21168.5*.

CA(11)[↓] (11)

Pollution and Conservation Laws § 2.2 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Negative Declaration.

Under *Pub. Resources Code, § 21080, subd. (c)*, a negative declaration, rather than an environmental impact report, is appropriate when the administrative record before the governmental agency does not contain substantial evidence that the project may have a significant effect on the environment.

CA(12)[↓] (12)

Pollution and Conservation Laws § 2.2 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Negative Declaration > Fair Argument Test.

When a court reviews an agency's decision to certify a negative declaration, the court must determine under *Pub. Resources Code, §§ 21080, subds. (c), (d), 21151*, whether substantial evidence supports a "fair argument" that the project may have a significant effect on the environment. The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court. Consequently, the appellate court independently reviews the record and determines whether there is substantial evidence in support of a fair argument the proposed project may have a significant environmental impact, while giving the lead agency the benefit of a doubt on any legitimate, disputed issues of credibility.

CA(13)[↓] (13)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Fair Argument Test.

California courts routinely describe the fair argument test as a low threshold requirement for the initial preparation of an environmental impact report that reflects a preference for resolving doubts in favor of environmental review.

CA(14)[↓] (14)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Fair Argument Test.

A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable **[*1548]** possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an environmental impact report (EIR) under *Cal. Code Regs., tit. 14, § 15064, subd. (f)(1)*. The environmental review necessary to complete an EIR prepares the agency to weigh the conflicting substantial evidence on each side of an issue and make its findings of fact.

CA(15)[⬇] (15)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing.

For projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an environmental impact report is required because the consideration of feasible alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment.

CA(16)[⬇] (16)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing.

The existence of a public controversy is not a substitute for substantial evidence under *Cal. Code Regs., tit. 14, § 15064, subd. (f)(4)*.

CA(17)[⬇] (17)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Possibility of Significant Effect or Impact.

A project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact.

CA(18)[⬇] (18)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Fair Argument Test.

Under the fair argument test, the inquiry into what is reasonably foreseeable depends on whether the administrative record contains enough evidence to show a reasonable possibility that a particular alternative would be used in the future.

CA(19)[⬇] (19)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Alternative Means of Compliance.

Determining whether alternative methods of compliance with a new ordinance are reasonably foreseeable or speculative **[*1549]** depends on the facts in the record rather than a bright line rule of law. A bright-line rule—stating that the existence of alternative means of compliance with a new rule or regulation would cause each alternative to be so uncertain that it was not reasonably foreseeable—would contradict the requirements for environmental analysis imposed by *Pub. Resources Code, § 21159, subd. (a)*. That subdivision provides that, when specified agencies adopt a rule or regulation concerning pollution control, performance standards or treatment requirements, the agency must perform an environmental analysis of the reasonably foreseeable methods of compliance. Thus, the *California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.*, recognizes that the existence of alternative methods of compliance does not, in itself, make the alternatives not reasonably foreseeable. Nothing in logic dictates a different conclusion when the new edict is a county ordinance, even though the express terms of *Pub. Resources Code, § 21159*, do not cover ordinances. Consequently, regardless of whether the situation concerns a new rule, regulation or ordinance, whether one or more

methods of future compliance are reasonably foreseeable depends upon the quality and quantity of evidence in the administrative record.

CA(20)[↓] (20)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Possibility of Significant Effect or Impact.

Under *Pub. Resources Code, §§ 21060.5, 21068*, and *Cal. Code Regs., tit. 14, §§ 15360, 15382*, a project will have a significant effect on the environment if it will cause a substantial, or potentially substantial, adverse change in the physical conditions that exist within the area that will be affected by the project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.

CA(21)[↓] (21)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Fair Argument Test.

A county was required to prepare an environmental impact report because substantial evidence supported a fair argument that Kern County Ord. G-6638 would cause potentially significant adverse environmental impacts. The reasonably foreseeable reactions of sewage sludge generators to the ordinance and the reasonably foreseeable environmental impacts of those reactions, included: (1) increased fuel consumption and vehicle emissions resulting from hauling Class B biosolids greater distances; (2) the consumption of energy for the heating, pumping **[*1550]** and handling involved in treating Class B biosolids to meet more stringent standards, and the emissions generated by the additional treatment; and (3) loss of landfill capacity.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 59A, 62, 63; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 797, 1099; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 314.]

CA(22)[↓] (22)

Administrative Law § 72 > Adjudication > Findings, Decisions, and Orders > Evidentiary Support.

Before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility.

CA(23)[↓] (23)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Fair Argument Test.

Under the *California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.*, the lead agency bears a burden to investigate potential environmental impacts. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

CA(24)[↓] (24)

Pollution and Conservation Laws § 2.3 > California Environmental Quality Act > Impact Reports > Contents and Sufficiency > Deferral of Analysis.

When a public agency is preparing an environmental impact report (EIR) and decides to defer environmental review of an action that may be taken in the future, courts analyze the decision to defer environmental review under a specific test. That test provides that the discussion of a future potential action is not required in an EIR for the project if: (1) obtaining more detailed useful

information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project.

CA(25)[⬇] (25)

Pollution and Conservation Laws § 2.2 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Negative Declaration > Fair Argument Test.

In the context of a negative declaration, the courts have not used the deferral of environmental analysis to determine whether the approval of the negative declaration complies with the *California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.* Further, use of an inquiry separate from the fair **[*1551]** argument test would be inappropriate if it were used to raise or lower the threshold imposed by that test. Because the concept of deferral of environmental review does not change the threshold imposed by the fair argument test, there is no need for a separate inquiry. In other words, the idea of deferral is subsumed in the fair argument test, which considers whether a potential environmental impact is speculative or reasonably foreseeable; undertaking a separate inquiry would be redundant.

CA(26)[⬇] (26)

Pollution and Conservation Laws § 2.3 > California Environmental Quality Act > Impact Reports > Contents and Sufficiency > —Coordination Among Agencies.

Cal. Code Regs., tit. 14, § 15020, requires each public agency to comply with the *California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq.*, and meet its responsibilities, including evaluating mitigation measures and project alternatives. Under *Pub. Resources Code, § 21000, subds. (d)* and *(f)*, when agencies—even agencies with antagonistic positions—comply with their responsibilities for environmental review under CEQA, their action should be taken after consideration of the other's position and, as a result, their action may achieve a measure of coordination that would not have existed without that review.

CA(27)[⬇] (27)

Pollution and Conservation Laws § 2.9 > California Environmental Quality Act > Proceedings > Judicial Review > Remedies for Failure to Comply.

After a failure to comply with the *California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq.*, has been found, the order could mandate that the public entity void all or part of its decision and adopt the heightened treatment standards under *Pub. Resources Code, § 21168.9, subd. (a)*. The order also could mandate that the public entity take specific action necessary to bring its decision into compliance with CEQA under *§ 21168.9, subd. (a)(3)*.

CA(28)[⬇] (28)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge > Local Treatment Standards.

The heightened treatment standards of Kern County Ord. No. G-6931 are grammatically, functionally, and volitionally severable from the remainder of Kern County Ord. No. G-6638 or as currently in effect under Kern County Ord. No. G-6931. Therefore, the violations of *Pub. Resources Code, § 21168.9, subd. (b)*, part of the *California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)*, relating to the adoption of the heightened treatment standards do not infect the other provisions of the ordinances.

CA(29)[⬇] (29)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge > Local Treatment Standards.

The heightened treatment standards of Kern County

Ord. No. G-6931 do not conflict with *Wat. Code, § 13274*, when the term "sewage sludge" is given its usual, ordinary meaning—that is, read literally.

CA(30)[] (30)

Commerce § 3 > State Regulation of Interstate Commerce > Dormant Commerce Clause.

The explicit grant of power in *U.S. Const., art. I, § 8, cl. 3,* has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations and ordinances that burden or interfere with interstate commerce. Known as the "dormant" or "negative" commerce clause, this limitation has been characterized as predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has not spoken. Consequently, where Congress has spoken and specifically authorized the state or local government action, the dormant commerce clause does not apply.

CA(31)[] (31)

Pollution and Conservation Laws § 3.2 > Land Application of Sewage Sludge > Commerce Clause.

The land application of sewage sludge is an article of commerce for purposes of the commerce clause, *U.S. Const., art. I, § 8, cl. 3.*

CA(32)[] (32)

Commerce § 3 > State Regulation of Interstate Commerce > Dormant Commerce Clause > Exception for Actions Authorized by Congress.

Where state or local government action is specifically authorized by Congress, it is not subject to the commerce clause, *U.S. Const., art. I, § 8, cl. 3,* even if it interferes with interstate commerce. As the United States Supreme Court has noted, however, for a state regulation to be removed from the reach of the dormant commerce clause, Congressional intent must be unmistakably clear.

CA(33)[] (33)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge > Local Treatment Standards.

It is unmistakably clear under *33 U.S.C. § 1345(e)*, that Congress intends the manner of disposal or use of sludge to be a local determination so long as minimum federal standards are met.

CA(34)[] (34)

Pollution and Conservation Laws § 3.2 > Use or Disposal of Sewage Sludge > Local Treatment Standards.

It is clear that the restriction in Kern County Ord. No. G-6638—that only sewage sludge meeting the heightened treatment standards can be applied to land in Kern County—reflects a local determination of the manner of disposal or use of sewage **[*1553]** sludge. Thus, the heightened treatment standards are the type of local regulation expressly authorized by the *Clean Water Act, 33 U.S.C. § 1251 et seq.*

CA(35)[] (35)

Pollution and Conservation Laws § 4 > Clean Water Act > Sewage Sludge > Regulation of Interstate Commerce.

The *Clean Water Act, 33 U.S.C. § 1251 et seq.*, does not explicitly authorize local governmental units to discriminate against sewage sludge that arrives in a state through interstate commerce, under *§ 1345(e)*. Nor is there anything in the statutory language that gives rise to a reasonable inference that Congress intended such a result. Consequently, any discriminatory aspect of a local ordinance regulating the land application of sewage sludge is still subject to scrutiny under the limitation imposed on discrimination by the dormant commerce clause.

CA(36)[] (36)

Commerce § 3 > State Regulation of Interstate

Commerce.

Unless Congress has provided otherwise, an ordinance that discriminates against interstate commerce, as opposed to one that regulates evenhandedly, is virtually always invalid under the dormant commerce clause. In this context, discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

CA(37)[] (37)

Municipalities § 26 > Police Power > General Welfare > Land Use Restrictions.

The California Supreme Court has identified the standard for determining whether the adoption of a land use restriction is a valid exercise of the police power granted under the California Constitution. An ordinance is valid if it is fairly debatable that the land use restriction in fact bears a reasonable relation to the general welfare. The "general welfare" that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance. If a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.

CA(38)[] (38)

Statutes § 20 > Construction > Appellate Review.

The appellate court independently reviews issues of statutory construction and the application of that construction to a set of undisputed facts as questions of law.

CA(39)[] (39)

Administrative Law § 89 > Limitations on Availability of Judicial Review or Relief > Exhaustion of Remedies > Exceptions > Preemption of Ordinance by Statute.

The doctrine of exhaustion of administrative remedies does not apply to the claim that a fee imposed by ordinance is preempted by *Veh. Code, § 9400.8*.

CA(40)[] (40)

Highways, Streets, and Bridges § 38 > Use, Regulation, and Control > By Municipalities > Fees for Use.

Veh. Code, § 9400.8, expressly states that its prohibition applies notwithstanding any other provision of law. The Mitigation Fee Act, *Gov. Code, § 66000 et seq.*, was in effect at the time *Veh. Code, § 9400.8*, became operative and thus was among the other provisions of law covered by the quoted phrase. In short, despite the existence of the Mitigation Fee Act, a local agency may not impose a charge for the privilege of using its streets and highways.

CA(41)[] (41)

Pleading § 72 > Time to Amend > At Trial > Prejudice to Opposing Party.

A pleading may be amended at the time of trial unless the adverse party can establish prejudice. Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to establish another cause of action is favored, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party. A variance between pleading and proof does not justify the denial of an amendment to conform pleading to proof unless the unamended pleading misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

CA(42)[] (42)

Pleading § 72 > Time to Amend > At Trial > Prejudice to Opposing Party.

As a general rule, where the evidence to support the cause of action in an amended pleading is already

before the court, the opposing party will not experience prejudice if the amendment is allowed.

CA(43)[⬇] (43)

Municipalities § 56 > Ordinances, Bylaws, and Resolutions > Validity > Conflict with Statutes or Charter > Test for Preemption.

If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is "contradictory" to general law when it is inimical thereto. Finally, local legislation enters an area that is "fully occupied" by general law when the legislature has expressly manifested **[*1555]** its intent to "fully occupy" the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

CA(44)[⬇] (44)

Highways, Streets, and Bridges § 37 > Use, Regulation, and Control > By Counties > Tax, Permit Fee, or Other Charge.

By adopting *Veh. Code, § 9400.8*, the Legislature has expressly prohibited counties from imposing a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads.

CA(45)[⬇] (45)

Statutes § 30 > Construction > Language > Literal Interpretation; Plain Meaning Rule.

A reviewing court's fundamental task in determining the meaning of a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. The analysis starts with an examination of the actual words of the statute, giving them their usual, ordinary meaning. A court may refer to the definitions contained in a dictionary to obtain the usual and ordinary meaning of a word.

CA(46)[⬇] (46)

Highways, Streets, and Bridges § 37 > Use, Regulation, and Control > By Counties > Tax, Permit Fee, or Other Charge.Veh. Code, § 9400.8

, must be construed to prohibit a local agency from imposing fees or charges on legal loads that are hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear to the roads.

CA(47)[⬇] (47)

Highways, Streets, and Bridges § 37 > Use, Regulation, and Control > By Counties > Fees Imposed.

The way a county calculated a biosolids impact fee and the way funds generated could be applied led inescapably to the conclusion that the fee was, at least in part, a fee imposed on road use. This conclusion was reinforced by the provision 8.05.03(H)(1) of Kern County Ord. Code, Ord. No. G-6638 that allowed a waiver of the fee where the permittee could demonstrate that the land application of biosolids did not have an impact on county infrastructure or roads. Because the primary purpose of the biosolids impact fee was to collect funds based on the use of streets or highways located in the county, it violated *Veh. Code, § 9400.8*.

CA(48)[⬇] (48)

Counties § 15 > Fiscal Matters > Fees > Partially Valid Purposes.

The appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are applied to valid purposes and those purposes are otherwise severable from the invalid ones.

CA(49)[⬇] (49)

Pollution and Conservation Laws § 2.9 > California Environmental Quality Act > Proceedings > Judicial Review > Mootness.

The standard the appellate court applies in determining the mootness of an appeal under the California Environmental Quality Act, *Pub. Resources Code, § 21000 et seq.*, is whether any effective relief can be granted the appellant.

CA(50)[⬇] (50)

Pollution and Conservation Laws § 1.6 > California Environmental Quality Act > Agencies and Projects Subject.

If more than one public agency is involved in a project but only one public agency carries out the project, under *Cal. Code Regs., tit. 14, § 15051, subd. (a)*, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.

CA(51)[⬇] (51)

Pollution and Conservation Laws § 2.1 > California Environmental Quality Act > Impact Reports > Necessity of Preparing > Subsequent or Supplemental.

Pub. Resources Code, § 21166, sets forth the conditions where a subsequent or supplemental environmental impact report (EIR) is required to cover a new activity that is regarded as a change in a project already covered by an existing EIR. Under *Pub. Resources Code, § 21166, subd. (a)*, and *Cal. Code Regs., tit. 14, §§ 15162*, *15163*, and *15164*, a subsequent or supplemental EIR is required where substantial changes are proposed in the project that will require major revisions of the EIR.

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McMurtrey, Hartsock & Worth, James A. Worth; and Linda Alvarado for Interveners and Respondents Cawelo Water District and West Kern Water District.

Judges: Dawson, J., with Dibiaso, Acting P. J., and Vartabedian, J., concurring.

Opinion by: DAWSON **[**35]**

Opinion

DAWSON, J.—This appeal concerns the validity of an ordinance that restricts the application of sewage sludge on land located within the jurisdiction of Kern County. [1] Sanitation agencies from Southern California [2] appeal adverse rulings from the trial court. The sanitation agencies contend (1) County was required to prepare an environmental impact report (EIR) under the *California Environmental Quality Act* (CEQA) [3] prior to adopting the ordinance, (2) the ordinance violated the commerce clause as well as other constitutional and statutory provisions, and (3) a biosolids impact fee of $ 3.37 per ton violated the prohibition in *Vehicle Code section 9400.8* against **[*1558]** local fees for **[***3]** the privilege of using roads. County contests all of these allegations. It contends that the ordinance benefited the Kern County environment and that any potential adverse environmental impacts were too remote and speculative to justify preparing an EIR.

[*4]** We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts. CEQA thus sets a low threshold for the required preparation of an EIR. Here, the evidence in the administrative record establishes a reasonable possibility that the ordinance will have both positive and adverse impacts on the environment in Kern County and other areas of California, principally because alternative methods of disposal must be implemented. The positive effects of a project do not absolve the public agency from the responsibility of preparing an EIR to analyze the potentially significant negative environmental effects of the project, because those negative effects might be reduced through the adoption of feasible alternatives or mitigation measures analyzed in the EIR. Therefore, County was required to prepare an EIR.

We hold also that plaintiffs have failed to show that the ordinance discriminates against interstate commerce. We reject plaintiffs' constitutional and statutory attacks on the validity of the ordinance, **[***5]** except that we hold the biosolids impact fee **[**36]** was invalid to the extent it was a local fee for road use.

We will remand with directions to the trial court to issue a writ of mandate directing County to prepare an EIR for the ordinance, and for further proceedings to determine the extent to which the biosolids impact fee was a fee for road use. Otherwise, the rulings of the trial court in favor of County on plaintiffs' complaint will be affirmed.

County cross-appeals from the trial court's denial of its CEQA cross-claims against the sanitation agencies. We address County's contention that CEQA required those agencies to conduct an environmental examination in connection with certain biosolids disposal contracts they entered into or extended near the time the ordinance in question was enacted. We hold that the agencies' contract activities were within the scope of their program EIR's covering their wastewater treatment

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[1] The ordinance was enacted by the Kern County Board of Supervisors, on behalf of the County of Kern (collectively, defendants or County). For purposes of this opinion, "County" refers to the governmental entity and "Kern County" refers to the geographical area.

[2] Plaintiffs, cross-defendants and appellants are County Sanitation District No. 2 of Los Angeles County (CSDLAC), Orange County Sanitation District (OCSD), and the City of Los Angeles (Bureau of Sanitation; CLABS); plaintiffs and appellants are California Association of Sanitation Agencies (CASA), Responsible Biosolids Management, Inc. (RBM), and the Southern California Alliance of Publicly Owned Treatment Works (SCAP).

[3] *Public Resources Code section 21000 et seq.* All further statutory references are to the Public Resources Code unless otherwise indicated.

projects and, therefore, were "[s]ubsequent activities in the program" that should have been subjected to an examination in accordance with *title 14, section 15168 of the California Code of Regulations* [4] to determine if further CEQA review was necessary. We **[*1559]** further hold **[***6]** that, as to expired contracts, this question is moot. Therefore, judgment on County's cross-claims will be reversed and the matter remanded to the trial court with directions to (1) conduct further proceedings to make a complete determination of which contracts have expired, (2) enter an order dismissing as moot County's causes of action that are based on contracts that have expired, and (3) issue writs of mandate under the remaining causes of action directing the appropriate sanitation agency to conduct an examination to determine if additional environmental documents must be prepared in connection with the contracts and extensions.

HISTORICAL BACKGROUND

Sewage sludge is a product of wastewater treatment. The safe and efficient disposal of sludge is a modern and worldwide concern—a by-product of population growth and modernization. [5] Recent decades have witnessed **[***7]** increasing governmental involvement in the effort to safely and efficiently treat sewage and dispose of sewage sludge. In the United States, efforts at regulation have involved the executive, legislative and judicial branches of government at the federal, state and local levels. This historical background briefly describes the process that reduces sewage to sewage sludge and then discusses the disposal and use of that sludge.

HN1[↑] ***CA(1)***[↑] (1) "Sewage sludge" is defined by federal regulations as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (*40 C.F.R. § 503.9(w) (2005)*.) More generally, ***HN2***[↑] sewage sludge refers to the mud-like deposit originating from sewage **[***8]** and created by the treatment processes used to decontaminate wastewater before it is released into local waterways. [6] **[***9]** **[**37]** Sewage sludge typically consists of water and 2 to 28 percent solids. [7] (68 Fed.Reg. 61084, 61086 (Oct. 24, 2003).) To illustrate, the Joint Water Pollution Control Plant located in Carson, California (Carson Plant) produces sewage sludge by detaining wastewater solids in an anaerobic digester for approximately 18 days. After digestion, the remaining solids are dewatered in a centrifuge that produces a residue that is approximately 25 percent solids. The Carson Plant refers to these residues as **[*1560]** "biosolids"—a term that is not defined by federal regulation, and the meaning of which varies with the context in which it is used. (Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Envtl. Aff. L.Rev. at p. 688.) Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. (*Id.*, fn. 6.) To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties. (Goldfarb, *Sewage Sludge*, at p. 688.)

Scope of Sewage Sludge Production

National Production

The United States Environmental Protection Agency (EPA) recently estimated the annual

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[4] In all further citations, *title 14, section 15000 et seq. of the California Code of Regulations* will be referred to as the Guidelines.

[5] European Commission Joint Research Centre, Institute for Environment and Sustainability, Soil and Waste Unit, Organic Contaminants in Sewage Sludge for Agricultural Use (Oct. 18, 2001) <*http://europa.eu.int/comm/environment/waste/sludge/organics_in_sludge.pdf*> (as of Apr. 1, 2005).

[6] Goldfarb et al., *Unsafe Sewage Sludge or Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals* (1999) *26 B.C. Envtl. Aff. L.Rev. 687, 688* (Goldfarb, *Sewage Sludge*).

[7] Because the percentage of solids in sewage sludge varies, there is no constant for converting the wet weight of sewage sludge to its dry weight. Dry weight is defined by federal regulation to mean the mass reached after drying to essentially 100 percent solids content. (*40 C.F.R. § 503.9(h) (2005)*.)

production of sewage sludge from the 16,000 wastewater treatment plants in the United States at both 7 million tons and 8 million dry metric tons. [8] (Compare 68 Fed.Reg. 68813, 68817 (Dec. 10, 2003) with 68 Fed.Reg. 61086 (Oct. 24, 2003).) In 2003, the EPA estimated that approximately 60 percent of sewage sludge was treated and applied to farmland, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. (68 Fed.Reg. 68817 (Dec. 10, 2003).) The land application of sewage sludge occurred **[***10]** on approximately 0.1 percent of the agricultural land in the United States. (68 Fed.Reg. 61086 (Oct. 24, 2003).) Other application sites include forests, strip-mines, reclamation sites, and public spaces like parks, golf courses, and highway median strips. (*Ibid.*)

California

CASA estimated that in 1998 California produced approximately 672,330 dry tons of biosolids and approximately 67.8 percent was applied **[***11]** to land, 10.6 percent was composted, 9.1 percent was buried in landfills, 5.6 percent was incinerated, and 6.9 percent was put in onsite and offsite storage. [9]

[*1561] The EPA estimated that in 2003 California produced 777,480 dry tons of treated sewage sludge. [10] **[***12]** Approximately 50 **[**38]** percentof this sewage sludge was applied to land, 30 percent was put in landfills, 10 percent was transported out of state, 3 percent was incinerated, and the balance was put in long-term storage or treatment or put to other uses. [11]

Conflict between urban and rural interests has caused controversy over the land application of sewage sludge in California. In 1998, approximately 73 percent of land-applied biosolids in California was applied within the geographical jurisdiction of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board), a region that generated only 16.7 percent of California's total production. In contrast, the Los Angeles and San Francisco Regions generated 37.9 percent and 14.4 percent, respectively, and received less than 0.1 percent and 1.8 percent, respectively, of the total land-applied biosolids. [12] The proportion of biosolids applied to land in the Central Valley Region has decreased as a result of restrictive ordinances adopted by counties. [13]

[*13]** *Kern County*

In 1998, approximately one-third of the biosolids applied to land in California was applied in Kern County. [14] In 1999, County estimated that one million wet tons of sewage sludge were applied to approximately 23,594 acres of irrigated agricultural

[8] The EPA has estimated the United States production of human sanitary waste, a precursor of sewage sludge, at approximately 150 million wet tons per year. (68 Fed.Reg. 7176, 7180 (Feb. 12, 2003).) This figure can be restated as about 0.518 wet tons per person per year (*ibid.*) or 2.8 pounds per person per day. By comparison, in 1997, the United States annual production of animal waste from cattle, hogs, chickens and turkeys (which includes more than manure) was estimated at 1,365,661,300 tons, or roughly 5 tons for every person in the United States.

[9] State Water Resources Control Board (State Water Board), Draft EIR, General Waste Discharge Requirements for Biosolids Land Application (June 28, 1999) figure 2-2 (State Water Board's 1999 Draft EIR), which was in the administrative record and is available at <http://www.swrcb.ca.gov/programs/biosolids/deir/chapters/ch2.pdf> (as of Apr. 1, 2005).

[10] State Water Board, Final Statewide Program EIR, General Waste Discharge Requirements for Biosolids Land Application (June 2004) page 3-3 (State Water Board's 2004 Final PEIR for Biosolids), which is available at <http://www.swrcb.ca.gov/hearings/docs/finalbio_chap3.pdf> (as of Apr. 1, 2005).

[11] State Water Board's 2004 Final PEIR for Biosolids, page 3-4.

[12] State Water Board's 1999 Draft EIR, table 2-2 and figure 2-2.

[13] In 1998, the Counties of Kings, Kern, Fresno, and Riverside did not have ordinances that prohibited the land application of Class B biosolids. (See State Water Board's 2004 Final PEIR for Biosolids, p. 3-8.) By early 2004, these counties had adopted ordinances that prohibited the land application of Class B biosolids and were among the 17 of the 58 counties in California that had some type of ordinance related directly to the land application of biosolids. (*Ibid.*)

[14] State Water Board's 1999 Draft EIR, table 2-1 (Kern County received 148,000 dry tons).

land in Kern County. [15] The acreage, which was distributed among 14 noncontiguous sites, represented approximately 3 percent of the harvested cropland in Kern County.

[*1562] *Statutory and Regulatory Framework*

Federal

Congress enacted the *Federal Water Pollution Control Act Amendments of 1972* (Pub.L. No. 92-500 (Oct. 18, 1972) 86 Stat. 896) **[***14]** to restore and maintain the quality of the nation's waters (*33 U.S.C.A. § 1251(a)*) by addressing various sources of pollution, including municipal sewage. In addition to providing extensive federal grants to finance the construction of local sewage treatment facilities, the 1972 amendments increased the role of the federal government by extending water quality standards to intrastate waters, setting technology-based effluent limitations, and implementing the water quality standards through a discharge permit system. [16] **[***15]** *The Clean Water Act* reflected the judgment of Congress **[**39]** that the problem of water pollution caused by the discharge of municipal sewage outweighed problems associated with treating the sewage and disposing of the sewage sludge. [17] The federal legislation stimulated the building of sewage treatment facilities which, in turn, significantly increased the national production of sewage sludge. (See *Leather Industries of America, Inc. v. E.P.A. (D.C. Cir. 1994) 309 U.S. App. D.C. 136 [40 F.3d 392, 394]*.)

CA(2)[↑] (2) ***HN3***[↑] The Clean Water Act addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program (*33 U.S.C.A. § 1345(a)–(c)*). [18] Second, the EPA was directed to develop comprehensive regulations establishing standards for sewage sludge use and disposal (*33 U.S.C.A. § 1345(d)*). [19] Third, states were allowed to establish more stringent standards (*33 U.S.C.A. § 1345(e)*). [20] Fourth, grants were authorized for the conduct of scientific **[*1563]** studies, demonstration projects, and public information and education programs **[***16]** concerning the safe and beneficial management of sewage sludge (*33 U.S.C.A. § 1345(g)*).

[*17]** ***CA(3)***[↑] (3) Eventually, in 1993, [21] the

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[15] The administrative record contains a document dated September 1, 1999, that estimated the volume of Class B biosolids brought into Kern County at 823,350 wet tons per year. The four largest sources were the City of Los Angeles (273,700), Los Angeles County (214,000), Orange County (130,300) and "Fresno" (85,000).

[16] The federal legislation became commonly known as the Clean Water Act (*33 U.S.C.A. § 1251 et seq.*) as a result of amendments adopted in 1977. (Pub.L. No. 95-217, § 2 (Dec. 27, 1977) 91 Stat. 1566.)

[17] "According to Milton Russell and Michael Gruber, 'Risk Assessment in Environmental Policy-Making,' 236 *Science* 286, 289 (April 17, 1989), 'the removal of pollutants from waste water produces sludge that must be either disposed of on land, incinerated, or dumped at sea. None of these procedures are without risk to human health or the environment.'" (Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (1993) p. 97, fn. 111.)

[18] The National Pollutant Discharge Elimination System (NPDES) permitting program set forth in the Clean Water Act regulates point sources of pollution that reach the waters of the United States. (*33 U.S.C.A. § 1342*.) Congress delegated the authority to issue permits to discharge pollutants under the NPDES to states with approved water quality programs.

[19] *The Water Quality Act of 1987* (Pub.L. No. 100-4 (Feb. 4, 1987) 101 Stat. 7) amended the Clean Water Act to require the EPA to identify and set numeric limits for toxic pollutants in sewage sludge and establish management practices for the use and disposal of sewage sludge containing those pollutants. (*33 U.S.C.A. § 1345(d)(2)*.)

[20] Similarly, legislation adopted by the European Union sets minimum standards for the use of sewage sludge in agriculture and also allows member states to impose more stringent measures. (See Council Directive 86/278/EEC of 12 June 1986, Protection of the Environment, and in Particular of the Soil, When Sewage Sludge Is Used in Agriculture, 1986 Official J. Eur. Coms. (L181), pp. 0006–0012 <*http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&nu* mdoc=31986L0278&model=guichett> [as of Apr. 1, 2005].) The Web site maintained by the European Union that summarizes the legislation is <*http://europa.eu.int/scadplus/leg/en/lvb/128088.htm*> (as of Apr. 1, 2005).

[21] The history of the EPA's regulation of sewage sludge prior to the

EPA complied with the directive regarding regulations by promulgating ***HN4***[↑] Standards for the Use or Disposal of Sewage Sludge (*40 C.F.R. § 503 (2005)*) (Part 503), which specify that sewage-sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage-sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in 40 Code of Federal Regulations part 258. (*Part 503, subparts B* [land application], *C* [surface disposal] & *E* [incineration]; *40 C.F.R. § 503.4 (2005)* **[**40]** [disposal in municipal solid waste landfill].) [22]

[*18]** The land application provisions of *subpart B of Part 503* establish concentration ceilings as well as annual and cumulative loading rates for arsenic, cadmium, copper, lead, mercury, nickel, selenium and zinc (*40 C.F.R. § 503.13 (2005)*); establish management practices for the protection of water quality and public health (*40 C.F.R. § 503.14 (2005)*); set the standards for the reduction of pathogens [23] and vector attraction [24] (*40 C.F.R. § 503.15 (2005)*); and include requirements for monitoring (*40 C.F.R. § 503.16 (2005)*), recordkeeping (*40 C.F.R. § 503.17 (2005)*), and reporting (*40 C.F.R. § 503.18 (2005)*).

[*19]** **[*1564]** ***CA(4)***[↑] (4) ***HN5***[↑] Pathogen reduction standards contained in *Part 503* are used to differentiate between Class A sewage sludge and Class B sewage sludge. (See *40 C.F.R. § 503.32 (2005)*.) While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed on Class A sewage sludge.

At the time of their adoption, the EPA stated it was confident the regulations in *Part 503* adequately protected the environment and public health from all reasonably anticipated adverse effects. (58 Fed.Reg. 9248, 9249 (Feb. 19, 1993).) Nevertheless, *Part 503* has been described as "quite controversial." [25] **[***21]** Citizens and environmental organizations have questioned the adequacy of the chemical and pathogen standards contained in *Part 503*. [26] As aresult of **[**41]** these

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final adoption of *Part 503* in 1993 is described in Goldfarb, *Sewage Sludge, supra*, 26 B.C. Envtl.Aff. L.Rev. at pages 697–704. The EPA has described the recent legal history of its regulation of sewage sludge in the Federal Register. (See 68 Fed.Reg. 75533 (Dec. 31, 2003).)

[22] A fifth option, ocean dumping of sewage sludge, was eliminated as a legal disposal option effective December 31, 1991, by the federal Ocean Dumping Ban Act of 1988. (*33 U.S.C.A. §§ 1401–1445*.) (See *City of New York v. United States EPA (S.D.N.Y. 1981) 543 F. Supp. 1084* [prior to statutory ban, City of New York and EPA litigated deleterious impacts of ocean dumping versus other methods of disposal].)

[23] Pathogenic organisms cause disease and "include, but are not limited to, certain bacteria, protozoa, viruses, and viable" eggs of parasitic worms (*40 C.F.R. § 503.31(f) (2005)*), such as tapeworms, whipworms, roundworms, and hookworms.

[24] Vectors are rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents; vector attraction refers to the characteristic of sewage sludge that attracts these carriers. (See *40 C.F.R. § 503.31(k) (2005)*.)

[25] Goldfarb, *Sewage Sludge, supra*, 26 B.C. Envtl. Aff. L.Rev. at page 708; see Comment, *Sewage Sludge and Land Application Practices: Do the Section 503 Standards Guarantee Safe Fertilizer Usage?* (2000) 9 Dick. J. Envtl. L. & P. 147, 169 (asserting EPA failed to account for variability of contaminants in sludge and how combinations of contaminants may affect public health and environment, and failed to foresee problems caused by lackadaisical monitoring and labeling requirements and by the lack of remedies for failure to comply with requirements). Another aspect of the controversy is illustrated by the dispute created when the Agricultural Marketing Service of the United States Department of Agriculture considered allowing the use of sewage sludge in "organic" production. The proposal was based on the view of the federal government that "there is no current scientific evidence that use of sewage sludge in the production of foods presents unacceptable risks to the environment or human health." (65 Fed.Reg. 13514 (Mar. 13, 2000).) Overwhelming public opposition led to the rejection and replacement of the proposal with a regulation that "prohibit[ed sewage sludge] use in the production" of all organic foods. (*Ibid.* ["275,603 commenters ... almost universally opposed the use of [sewage sludge] in organic production systems"]; see *7 C.F.R. §§ 205.105(g)* & 205.301(f)(2) (2005).)

[26] See EPA, Office of Water, Use and Disposal of Biosolids

concerns and the requirement in the Clean Water Act that the sewage sludge regulations be reviewed every two years, the EPA commissioned the National Research Council (NRC) of the National Academy of Sciences to independently **[***20]** review the scientific basis of the regulations governing the land application of sewage sludge. [27]

In July 2002, the NRC published its report—Biosolids Applied to Land: Advancing Standards and Practices—and made the following overarching findings: "There is no documented scientific evidence that the *Part 503* rule has failed to protect public health. However, additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. There have been anecdotal **[*1565]** allegations of disease,[28] and many scientific advances have occurred since the *Part 503* rule was promulgated. To assure the public and to protect public health, there is a critical need to update the scientific basis of the rule to (1) ensure that the chemical and pathogen standards are supported by current scientific **[***22]** data and risk-assessment methods, (2) demonstrate effective enforcement of the *Part 503* rule, and (3) validate the effectiveness of biosolids-management practices." (NRC, Biosolids Applied to Land: Advancing Standards and Practices (July 2002) p. 3 <*http://www.epa.gov/waterscience/biosolids/nas/complete.pdf*> [as of Apr. 1, 2005].)

[*23]** In response to the NRC report, the EPA developed a final action plan that established objectives and identified research and regulatory projects designed to strengthen its sewage sludge use and disposal program. (68 Fed.Reg. 75531, 75533 (Dec. 31, 2003); see EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra.*) As an example of one project, the EPA intends to conduct an incident-tracking workshop to obtain input on developing a program focused on individuals who have received medical attention and suspect that they may have been affected by sewage sludge application practices, and to thereby isolate the causes of any health problems. (68 Fed.Reg. 75535 (Dec. 31, 2003).) As of the date of this opinion, the implementation of the final action plan is an ongoing process, and some of the activities have not been commenced. (See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra.*)

California

CA(5)[↑] (5) ***HN6***[↑] In response to Congress's delegation of authority to the states to issue NPDES permits (see fn. 18, *ante*), the California **[**42]** Legislature amended the Porter-Cologne Water Quality Control Act (*Wat. Code, § 13000 [***24] et seq.*) to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the Clean Water Act. (See *Wat. Code, § 13370 et seq.*) As a result, on May 14, 1973, California became the first **[*1566]** state to be approved by the EPA to administer the NPDES permit program. (See 54 Fed.Reg. 40664 (Oct. 3, 1989); *WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1452 [126 Cal. Rptr. 2d 389].*)

In August 1993, as part of administering the

(Sewage Sludge) (Dec. 2003) <*http://www.epa.gov/ost/biosolids/dec03factsheet.html*> (as of Apr. 1, 2005).

[27] See EPA, Office of Water, Use and Disposal of Biosolids (Sewage Sludge), *supra*; *33 U.S.C.A. § 1345(d)(2)(C)* (two-year review of regulations).

[28] The anecdotal allegations of which the EPA is aware (but unconvinced) include (1) over 350 claims of adverse effects collected by the Cornell Waste Management Institute, (2) the deaths of Shayne Conner, Tony Behun, and Daniel Pennock, and (3) the deaths of 300 dairy cattle on a farm near Augusta, Georgia that resulted in a $ 550,000 jury verdict in a state court action. (G. Tracy Mehan, III, EPA, letter to Joseph Mendelson, III, Center for Food Safety, and Thomas Alan Linzey, Community Environmental Legal Defense Fund, Inc., Dec. 22, 2003, pp. 3, 5–7 [denying petition to stop land application of sewage sludge] <*http://www.centerforfoodsafety.org/pubs/SewageSludgePetitionResponse12-22-03.pdf*> [as of Apr. 1, 2005].) The claims related to the dairy cattle also are described in the administrative record and in *Boyce v. Augusta-Richmond County (S.D.Ga. 2000) 111 F. Supp. 2d 1363*. The medical examiner's autopsy report for Shayne Conner is in the administrative record and it concludes the cause of his death is unknown.

NPDES permit program, the Central Valley Water Board adopted a general order setting the waste discharge requirements (WDR) for the use of sewage sludge as a soil amendment and approved an initial study and negative declaration in connection with that general order. Under the general order, a person wanting to apply biosolids to agricultural land could file with the Central Valley Water Board a notice of intent to comply with the general order, a filing fee, and a preapplication report and, upon receiving an approval letter from the Central Valley Water Board, could begin to apply biosolids subject to the terms and conditions in the **[***25]** general order. Projects using sewage sludge that did not fit the conditions contained in the general order were required to apply for individual WDR's.

On May 26, 1995, the Central Valley Water Board modified its earlier general order by adopting Order No. 95-140 titled "Waste Discharge Requirements General Order For Reuse of Biosolids and Septage on Agricultural, Forest, and Reclamation Sites." The order set minimum standards for the use of biosolids, including Class B sewage sludge, as a soil amendment.

CA(6)[↑] (6) Also in 1995, the California Legislature specifically addressed the land application of sewage sludge by adopting *HN7*[↑] *Water Code section 13274* (Stats. 1995, ch. 613, § 1, p. 4590), which required the State Water Board or the regional boards to prescribe general WDR's for the discharge of treated sewage sludge used as a soil amendment. (*Wat. Code, § 13274, subds. (a) & (b).*) *Water Code section 13274* also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction. (*Id., subd. (i).*)

CA(7)[↑] (7) Other California legislation affecting the **[***26]** disposal and use of sewage sludge is *HN8*[↑] the California Integrated Waste Management Act of 1989 (*Pub. Resources Code, § 40000 et seq.*, also known as Assem. Bill No. 939 (1989–1990 Reg. Sess.); see Stats. 1989, ch. 1095, § 22, p. 3812), which requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. (*§ 41780.*) More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste [29] **[***27]** stream would be recycled, reduced or composted **[*1567]** by 1995 and how 50 percent would be achieved by 2000. (See *§ 41780*; *Kern County Farm Bureau v. County of Kern (1993) 19 Cal.App.4th 1416, 1419, fn. 2 [23 Cal. Rptr. 2d 910].*) This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land. [30] For example, in 1995 the **[**43]** City of Oxnard purchased 1,280 acres in Kern County for $ 1,174,000 as part of a program to apply its sewage sludge to agricultural land and thus reduce its use of landfills.

By 2000, several of the nine regional boards had issued WDR's for the use of biosolids as a soil amendment. To provide a single regulatory framework for the land application of treated sewage sludge in California, in August 2000, the State Water Board issued Water Quality Order No. 2000-10-DWQ, entitled "General Waste Discharge Requirements for the Discharge of Biosolids to Land for Use as a Soil Amendment in Agricultural, Silvicultural, Horticultural, and Land Reclamation Activities" (General Order 2000-10). [31] General Order 2000-10 also was intended to comply with

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[29] The California Integrated Waste Management Act of 1989 defines *HN9*[↑] "solid waste" to include "dewatered, treated, or chemically fixed sewage sludge [that] is not hazardous waste, manure, vegetable or animal solid ... ." (*§ 40191, subd. (a).*)

[30] According to one set of estimates, the portion of California's annual sewage sludge production disposed of in landfills was 60.2 percent in 1988, 43.3 percent in 1991, 9.1 percent in 1998, and 30 percent in 2003. (State Water Board's 1999 Draft EIR, table 2-2 & fig. 2-2; State Water Board's 2004 Final PEIR for Biosolids, p. 3-4.)

[31] General Order 2000-10 is available on the State Water Board's Web site. (See <*http://www.swrcb.ca.gov/resdec/wqorders/2000/wqo2000-10.doc*> [as of Apr. 1, 2005].)

the directive in *Water Code section 13274* and streamline the permitting process. The State Water Board's final program EIR relating to General Order 2000-10 was approved on June 30, 2000, and **[***28]** it is part of the appellate record as a result of the superior court granting a request for judicial notice. General Order 2000-10 allowed Class B biosolids to be applied to agricultural land subject to numerous conditions, including site, crop, and harvesting restrictions.

The State Water Board's approval of General Order 2000-10 and certification of the final program EIR was vacated as a result of a CEQA lawsuit brought by County. (*County of Kern v. State Water Resources Control Board* (Jan. 13, 2003, C039485) [nonpub. opn.].) [32] The Third Appellate District held the EIR was defective because it did not evaluate, as alternatives to General Order 2000-10, either a requirement that sewage sludge be treated to Class A standards before application as a soil amendment or a prohibition on the use of treated sewage sludge where fruits and vegetables **[***29]** are grown.

[*1568] To comply with that decision, the State Water Board's 2004 Final PEIR for Biosolids considered, but rejected, the two alternatives specified by the Third Appellate District. Based on that final EIR, the State Water Board adopted Water Quality Order No. 2004-0012 on July 22, 2004 (General Order 2004-0012). [33] General Order 2004-0012 allows Class B biosolids to be applied to agricultural land subject to numerous conditions, including site and crop restrictions.

[32] County referred to the Third Appellate District's unpublished decision in its reply brief and cited a statement made by the State Water Board in an appellate brief it filed in that case. Our reference to this unpublished opinion as part of a factual narrative of the historical development of California's regulation of sewage sludge is not a citation or reliance upon that opinion as legal authority for purposes of *California Rules of Court, rule 976*.

[33] General Order 2004-0012 is available at <*http://www.swrcb.ca.gov/resdec/wqorders/2004/wqo/wqo2004-0012.pdf*> (as of Apr. 1, 2005).

[*30]** *Kern County*

County first attempted to regulate the application of sewage sludge to agricultural land within its jurisdiction in August 1998, when it adopted Ordinance No. G-6528, an interim urgency ordinance which became operative on September 1, 1998, and was repealed effective December 31, 1999. Ordinance No. G-6528 allowed the application of Class A and Class B sewage sludge in Kern County by any person who **[**44]** obtained a permit from the County Environmental Health Services Department, paid a $ 7,250 application fee, and observed specified management practices, site restrictions and other requirements.

On October 19, 1999, the Kern County Board of Supervisors adopted Ordinance No. G-6638 (Ordinance G-6638) to substitute a new chapter 8.05 into the Kern County Ordinance Code. Ordinance G-6638 provided for two regulatory stages. The first stage, which lasted three years, allowed the application of Class B sewage sludge on sites that had already been approved, but precluded the approval of any new sites. The second stage was scheduled to become effective on January 1, 2003, and allowed only exceptional quality (EQ) sewage sludge [34] to be applied to land in Kern County.

[*31]** Ordinance G-6638 is the subject of this appeal and its pertinent provisions are set forth, *post*, in Facts and Proceedings.

In late 2002, County adopted Ordinance No. 6931, which amended chapter 8.05 of the county code to impose a permitting requirement on the application of EQ biosolids to land within the unincorporated area of Kern County, and found that the project was exempt from CEQA pursuant to *section 15308* of

[34] EQ sewage sludge must meet one of the Class A pathogen reduction alternatives set forth in *40 Code of Federal Regulations part 503.32(a) (2005)*; the more stringent pollutant concentration standards set forth in *40 Code of Federal Regulations part 503.13(b)(3) (2005)*; and a level of vector attraction reduction required by *40 Code of Federal Regulations part 503.33 (2005)*.

the Guidelines, which concerns actions by regulatory agencies to protect the environment. This appeal does not directly involve the 2002 amendment.

[*1569] *Overview of California Cases Involving Land Application of Sewage Sludge*

The application of sewage sludge to land has been the topic of litigation before this and other appellate courts located in California.

This court considered the application of CEQA to Kings County's sewage sludge ordinance in *Magan v. County of Kings (2002) 105 Cal.App.4th 468 [129 Cal. Rptr. 2d 344]*. In that case, the Kings County Board of Supervisors determined that its ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA, and this court upheld that determination. (*105 Cal.App.4th at pp. 476–477*.) **[***32]**

As described earlier, in January 2003, the Third Appellate District considered County's challenge to the adequacy of the EIR the State Water Board prepared in connection with its adoption of General Order 2000-10. (*County of Kern v. State Water Resources Control Board, supra,* C039485 [nonpub. opn.].) That litigation led to the certification of the State Water Board's 2004 Final PEIR for Biosolids and the adoption of General Order 2004-0012.

In *U.S. v. Cooper (9th Cir. 1999) 173 F.3d 1192*, the defendant sludge hauler directly applied sludge to a local farm instead of taking the sludge to a composting site first as required by a NPDES permit issued to the City of San Diego by the regional water quality board. The sludge hauler was convicted under the Clean Water Act of knowingly violating conditions imposed by the permit on the disposal of sewage sludge. The Ninth Circuit Court of Appeals upheld the conviction and ruled, among other things, that *Part 503*—which encouraged the direct land application of sewage sludge, but did not require state and local governments to allow it—did not preempt the conditions in the permit that **[**45]** the sludge hauler violated. (*U.S. v. Cooper, supra, at pp. 1200–1201*.) **[***33]**

In addition to the foregoing appellate cases, the briefing in this appeal mentions other cases before state and federal trial courts concerning County's efforts to regulate the land application of sewage sludge. County contends that Shaen Magan brought two state court actions challenging Ordinance G-6638 and that the judgments entered in County's favor in those actions are now final. In addition, County represents that another state court action brought against it has been stayed by the Tulare County Superior Court pending the resolution of this appeal, and that CASA and others have sued it in a federal action attacking an amended version of the ordinance.

[*1570] FACTS AND PROCEEDINGS

In connection with its consideration and adoption of an ordinance regulating the land application of biosolids within its jurisdiction, County undertook a process that involved the public and produced an administrative record of over 25,000 pages.

In 1997, County established a Biosolids Ordinance Advisory Committee to assist in the preparation of a draft ordinance. The committee included representatives from farming organizations, sludge generators and applicators, environmental groups, County **[***34]** staff and other interested parties. In all, the committee held five public meetings between November 20, 1997, and April 29, 1999. Expert presentations on the scientific issues involving biosolids were received at two public hearings held by County.

In January 1998, County pursued early consultation with public agencies and interested parties to obtain comments on the potential environmental effect of its proposed form of biosolids ordinance. After revisions to the proposed ordinance, County again sought early consultation in May 1999 in connection with determining whether compliance with CEQA would require preparation of an EIR

for the proposed ordinance. After the second consultation period was complete, an initial study was prepared.

On August 10, 1999, an environmental checklist form was completed which found the project—that is, enactment of the ordinance—would not have a significant effect on the environment, and which recommended the preparation of a negative declaration.

County's Planning Department prepared a proposed negative declaration for the biosolids ordinance and published the corresponding notice of availability for public review on August 13, 1999. On October 19, 1999, after [***35] the period for public review of the negative declaration expired, County enacted Ordinance G-6638 and adopted the negative declaration. Section 3 of Ordinance G-6638 amended chapter 8.05 of the Kern County Ordinance Code (Kern Code) effective January 1, 2000, to provide in part:

"**8.05.010 PURPOSE AND INTENT**

"There are numerous unanswered questions about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment if improperly handled. There is a lack of adequate scientific [*1571] understanding concerning the risk land applying of Biosolids may pose to land, air and water and to human and animal health. ... Consequently, in order to promote the general heath, safety and welfare of Kern County and its inhabitants, it is [**46] the intent ofthis chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

"The County recognizes there are existing permitted sites involved in the land [***36] application of Biosolids. Consistent with the protection of private property rights under the United States and California constitutions, this ordinance contains a three year amortization period to permit the orderly discontinuation of the land application of Biosolids by January 1, 2003.

"The County also recognizes that Exceptional Quality Biosolids, as defined in this chapter, are considered by the U.S. Environmental Protection Agency to be a product ... that can be applied as freely as any other fertilizer or soil amendment to any type of land. Therefore, the provisions of this chapter do not apply to Exceptional Quality Biosolids unless specifically stated herein. Further, the provisions of this chapter do not apply to Compost, as defined herein, manufactured from Biosolids at composting facilities that are otherwise regulated by the County through Solid Waste and Conditional Use Permits.

"**8.05.020 DEFINITIONS**

"A. **Agency** means an authorized representative of the Environmental Health Services Department of the County. ... [¶] ... [¶]

"E. **Biosolids** are treated solid, semi-solid or liquid residues generated during the treatment of sewage in a wastewater [***37] treatment facility that meet [certain federal requirements for pathogen reduction, vector attraction reduction and pollutant concentrations]. ... Biosolids as used in this chapter excludes Biosolids products that are in a bag or container packaged for routine retail sales through regular retail outlets which are primarily used for landscaping.

"F. **Biosolids Impact Fee** means the fee per ton of Biosolids charged to Biosolids applicators for mitigating the impacts to the Kern County infrastructure shown to be caused by the transport of Biosolids. Permitees which can establish the lack of impact on County infrastructure shall be exempt from payment of the fee. [¶] ... [¶]

[*1572] "H. **Class A Biosolids** are Biosolids that meet the pathogen reduction requirements in *40*

CFR 503.32[(a) [35]] and contain constituents in concentrations not exceeding the concentrations listed in *40 CFR 503.13*, Table 1 or Table 3.

[*38]** "I. **Class B Biosolids** are Biosolids that meet the pathogen reduction requirements in *40 CFR 503.32(b)*.

"J. **Compost** means the product resulting from the controlled biological decomposition of organic materials which may include Biosolids. Facilities where compost is produced are required to obtain Solid Waste Facilities and Conditional Use Permits as a condition of operation. Compost products are required to meet or exceed product quality criteria as established by the California Integrated Waste Management Board. [¶] ... [¶]

"M. **Exceptional Quality Biosolids** are Class A Biosolids that meet the pollutant concentrations in *40 CFR 503.13*, Table 3 and have achieved a level of vector attraction reduction required by *40 CFR 503.33*. Additionally, Class A Biosolids must meet both the fecal coliform and Salmonella sp. bacteria limits contained in alternatives 1 through 6 of *40 CFR 503.32(a)* to be Exceptional **[**47]** Quality. For the purposes of this chapter, Exceptional Quality Biosolids are in bulk form and shall not include Compost which meets or exceeds Exceptional Quality **[***39]** criteria. [¶] ... [¶]

"P. **Land Application** means the placement of Biosolids on agricultural land at a predetermined agronomic rate to support vegetative growth. For purposes of this chapter, placement includes the spraying or spreading of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil. [¶] ... [¶]

"R. **Permit** means a Land Application Permit issued by the Agency jointly to an Applier and all POTWs or other generators who supply Biosolids to the Applier. Such permit authorizes the Land Application of Biosolids in the County. Permits are not transferable to other parties without the prior approval of the Agency as provided in Section 8.05.040.R. [¶] ... [¶]

"T. **POTW** means publicly or privately owned treatment works that process wastewater and generate Biosolids. ... [¶] ... [¶]

[*1573] "8.05.030 GENERAL REQUIREMENTS

"A. Prior to commencing any Land Application activities under this chapter, the Applier shall obtain a Permit and pay all applicable fees. Only Sites with an Existing Permit shall be eligible for issuance of a Permit under this chapter. [¶] ... [¶]

"H. Biosolids **[***40]** Impact Fee.

"1. There is levied by the County of Kern a fee of $ 3.37 per ton for each ton of Biosolids land applied within the county. The amount of the fee shall be calculated based on the monthly activity report as required by section 8.05.070(I) and is to be remitted to the Agency along with the filing of the monthly activity report. Permitees are subject to enforcement action, including revocation of the Permit, for non-payment. Where the Permitee can demonstrate the land application of Biosolids does not have an impact on County infrastructure or roads, the Agency may waive this fee.

"2. Permitees, either directly or through the wastewater treatment plant generating the Biosolids to be applied on the Permitee's property, which separately contract with the County or are determined to provide a reciprocal benefit, as determined by the Board of Supervisors, shall be exempt from this fee.

"3. Funds generated by this impact fee and other permit fees may be available to fund the following uses: Expenses associated with the inspection of properties within the County which have permits for the land application of Biosolids; development and operation of a GIS tracking system for

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[35] This reference was probably intended to be limited to subsection (a), which states the pathogen reduction requirements for sewage sludge to be classified Class A.

all [***41] Biosolids land applied within the County so that there is an accurate data base containing this information; technical studies and pilot projects which provide additional data on Biosolids land application; correction of any infrastructure deficiencies directly associated with the hauling of Biosolids; and, the cost of public outreach and education programs to ensure that the standards expressed within this ordinance and contained in the federal guidance for the beneficial use of Biosolids are adhered to. The budget for the expenditure of the Biosolids Mitigation Fund on mitigating the impact of Biosolids land application within the County as set forth above, shall be prepared by the Director of the Resource Management Agency for approval by the Board of Supervisors annually. [¶] ... [¶]

"**8.05.040 PERMIT APPLICATION**

[**48] " A. It shall be unlawful for any person to apply Biosolids to land within the unincorporated area of the County without obtaining a Permit from the Agency and being in compliance with the terms and conditions as stated herein.

[*1574] "B. The application for a Permit shall be filed with the Agency on an application form furnished by the Agency, accompanied by an [***42] eight thousand dollar ($ 8,000) fee. ... [¶] ... [¶]

"G. The Agency may deny an application for one (1) or more of the following reasons:

"1. Prior significant non-compliance with local, state or federal regulations or permits related to the land application of biosolids.

"2. Inadequate, incomplete, or inaccurate application information.

"3. The land application proposal would not be in conformance with the applicable requirements of this chapter. [¶] ... [¶]

"M. Fees to review and process Permit applications, appeal an action of the Agency, as specified herein, inspect Sites, engage in enforcement activities and compensate for infrastructure impacts shall be established by the Board of Supervisors. [¶] ... [¶]

"**8.05.050 MANAGEMENT PRACTICES**

"A. Transportation, Storage and Land Application of Biosolids shall not degrade the groundwater or surface water.

"B. Discharge of Biosolids to surface waters or surface water drainage courses is prohibited and all Biosolids shall be confined to within the boundaries of the Site.

"C. All irrigation tailwater on Sites utilized for Biosolids application shall be maintained on the permitted Site and shall not be allowed [***43] to flow on to adjacent properties, either by means of surface or subsurface flows. [¶] ... [¶]

"**8.05.080 INSPECTION AND ENFORCEMENT**

"A. The Agency shall inspect all Sites at least one (1) time per week during the period when Biosolids are being applied and may inspect more frequently or at any time.

"B. The Agency may charge for services not specifically described that are rendered by personnel that are necessary for the enforcement of the provisions of this ordinance. The charge will be calculated on the per-hour fee of [*1575] seventy-five ($ 75.00) dollars as established in Section 8.04.100. Any laboratory analysis will be charged at the Agency's actual costs as charged by a Certified Laboratory retained by Agency for any testing.

"C. Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor.

"D. In addition, any violation of this chapter may be deemed by the Agency to be a public nuisance, and may be abated, or enjoined by the Agency,

irrespective of any other remedy herein provided.

"**8.05.090 EFFECTIVE DATE**

"The provisions of this chapter shall expire on December 31, 2002, unless otherwise extended by the board of **[***44]** supervisors."

Section 4 of Ordinance G-6638 replaced the expired version of chapter 8.05 with a new chapter 8.05 scheduled to become effective on January 1, 2003. Provision 8.05.010 was revised slightly but still stated that the chapter did not apply to EQ biosolids or compost. The definitions of EQ biosolids and compost were not changed. The substantive requirements of that new chapter 8.05 stated:

[49]** " **8.05.040 BIOSOLIDS PROHIBITED**

"A. It shall be unlawful for any person to land apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to ... January 1, 2003 shall discontinue land application of Biosolids upon the effective date of this chapter.[36]

"B. The discharge of Biosolids to surface waters or surface water drainage courses, including wetlands and water ways, is prohibited."

[*45]** Section 5 of Ordinance G-6638 declared that the provisions of Ordinance G-6638 were severable and that the invalidity of any clause or provision would not affect the validity of the other provisions of the ordinance.

[*1576] On November 8, 1999, CSDLAC, OCSD, CLABS, SCAP, CASA, and RBM filed a petition for writ of mandate and complaint for injunction and declaratory relief. The first cause of action in the petition alleged County violated CEQA by approving the negative declaration and making findings that Ordinance G-6638 would not have significant impact on the environment. The second cause of action asserted the adoption of Ordinance G-6638 was an invalid exercise of police power and a violation of the commerce clause. The third cause of action alleged the imposition of the biosolids impact fee violated provisions of the California Constitution concerning taxes, as well as the *equal protection and due process clauses of the United States* and *California Constitutions*, by unfairly discriminating against vehicles carrying biosolids. [37]

[*46]** On March 1, 2000, County filed its cross-action against CSDLAC, OCSD and CLABS challenging changes made in their sewage sludge disposal programs. After amendment on June 19, 2000, County's cross-action contained (1) four causes of action alleging CLABS violated CEQA by entering certain contracts and amendments relating to the disposal of biosolids generated at its facilities without performing any environmental review; (2) one cause of action alleging CSDLAC violated CEQA by failing to undertake any environmental review when it and Yakima Company amended and extended their contract for the transportation of sewage sludge from CSDLAC's facilities to Kern County for application on farm land; and (3) five causes of action alleging OCSD violated CEQA by entering biosolids management agreements or options for the purchase of real estate used in connection with the disposal or use of biosolids generated at its facilities without performing any environmental review.

The superior court granted plaintiffs' request that

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[36] All subsequent references to Kern Code provision 8.05.040(A), Ordinance G-6638, are to this version, which was contained in section 4 of Ordinance G-6638 and was scheduled to become effective on January 1, 2003. The substantive requirements of provision 8.05.040(A) were reenacted by the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638. All subsequent references to the "heightened treatment standards" are to those substantive requirements; this term was chosen because the effect of those requirements was that sewage sludge could not be applied to land in the unincorporated areas of Kern County unless the sludge was treated to the higher standards used to define EQ biosolids.

[37] The theory of discrimination alleged was that vehicles loaded with Class B biosolids should not be singled out, and that all vehicles using the same roads and carrying a load of similar weight caused damage to the roads and thus should be charged the same fee.

their CEQA cause of action be bifurcated, took all of the CEQA claims under submission on August 30, 2000, and by written ruling entered on November 22, [**50] 2000, denied the CEQA [***47] claims of all parties.

Approximately a year and a half later, the superior court heard and denied plaintiffs' motions for summary judgment, and granted County's motion for a protective order regarding depositions and written discovery requested by CSDLAC, OCSD and Shaen Magan relating to the remaining non-CEQA causes of action that challenged the validity of County's legislative act of adopting Ordinance G-6638.

[*1577] On June 3, 2002, the parties agreed to present their cases by trial briefs. After considering the briefs filed by the parties, the superior court entered an order on November 25, 2002, denying the non-CEQA claims alleged in plaintiffs' second and third causes of action. The superior court filed a statement of decision on January 7, 2003, which ruled that (1) Ordinance G-6638 was not an invalid exercise of police power or a violation of the commerce clause and (2) the biosolids impact fee passed constitutional scrutiny because it had a rational basis and was not an illegal general or special tax. On March 10, 2003, judgment was entered in favor of County on all causes of action asserted by plaintiffs and in favor of the cross-defendants on all causes of action asserted by [***48] County in its cross-action.

CSDLAC, OCSD, CLABS, CASA, RBM and SCAP timely filed an appeal. County timely filed a notice of appeal from the judgment that denied its cross-action.

DISCUSSION

Plaintiffs contend County erroneously found that Ordinance G-6638 would not have a significant effect on California's environment and, therefore, County violated CEQA when it approved the negative declaration and adopted Ordinance G-6638. The superior court ruled the approval of the negative declaration was appropriate because there was no "substantial evidence of a fair argument that adoption of this ordinance, which continues to allow application of biosolids but requires [plaintiffs] to upgrade them to protect the environment, would have an adverse impact on the environment."

We hold that the preparation of an EIR was mandatory under the low threshold imposed by the fair argument standard because the administrative record contained sufficient, credible evidence that the heightened treatment standards for the application of sewage sludge to land in the unincorporated areas of Kern County might have a significant adverse effect on California's environment. Furthermore, the possibility [***49] that the net overall impact of the ordinance was beneficial did not override the requirement in CEQA for the preparation of an EIR addressing the significant adverse environmental impacts the ordinance may have caused. (*Guidelines, § 15063, subd. (b)*.)

I. *CEQA Standard of Review*

A. *General Principles*

CA(8)[↑] (8) ***HN10***[↑] It is well established in CEQA proceedings that (1) the public agency is the finder of fact, (2) the superior court's findings are not binding on the appellate court, and (3) the scope and standard of review applied by [*1578] the appellate court to the agency's decision is the same as that applied by the superior court. (See *§§ 21168, 21168.5*; *Fat v. County of Sacramento (2002) 97 Cal.App.4th 1270, 1277 [19 Cal. Rptr. 2d 402]* [county's approval of a negative declaration and conditional use permit reinstated and trial court reversed].)

CA(9)[↑] (9) ***HN11***[↑] When a CEQA petition challenges action of a public agency that is legislative or quasi-legislative in character, the standard of review contained in *section 21168.5* [**51] and the procedures for traditional mandamus set forth in *Code of Civil Procedure*

section 1085 are applied. (See Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 566–567 [8 Cal. Rptr. 2d 139, 888 P.2d 1268].) [***50] Section 21168.5 provides: HN12[↑] "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

CA(10)[↑] (10) HN13[↑] Amendment or adoption of an ordinance is a legislative act subject to review under section 21168.5. (Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal.4th 165, 172, fn. 2 [105 Cal. Rptr. 2d 214, 19 P.3d 567] [§ 21168.5 applied to CEQA challenge to city ordinance that removed certain properties from register of historic landmarks]; No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68 [118 Cal. Rptr. 34, 529 P.2d 66] [city's adoption of ordinances without CEQA compliance was governed by § 21168.5]; Fall River Wild Trout Foundation v. County of Shasta (1999) 70 Cal.App.4th 482, 488 [82 Cal. Rptr. 2d 705] [county's amendment of a zoning ordinance reviewed [***51] under § 21168.5].) Accordingly, the Kern County Board of Supervisors' adoption of Ordinance G-6638 is reviewable under section 21168.5 for a prejudicial abuse of discretion.

B. *Fair Argument Test*

CA(11)[↑] (11) CEQA requires a governmental agency to HN14[↑] "prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." (§ 21100, subd. (a); see Guidelines, § 15064, subd. (a)(1).) Conversely, HN15[↑] a negative declaration—rather than an EIR—is appropriate when the administrative record before the [*1579] governmental agency does not contain substantial evidence that the project may have a significant effect on the environment. (§ 21080, subd. (c).)

CA(12)[↑] (12) HN16[↑] When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a "fair argument" that the project may have a significant effect on the environment. (See §§ 21080, subds. (c) & (d), 21151; Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal.4th 1112, 1123 [26 Cal. Rptr. 2d 231, 864 P.2d 502]; Stanislaus Audubon Society, [***52] Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144, 150–151 [39 Cal. Rptr. 2d 54] [Ct. App., 5th Dist. voided negative declaration and mandated preparation of EIR].) The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court. (Stanislaus Audubon Society, Inc., at p. 151.) Consequently, "we independently 'review the record and determine whether there is substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact, while giving [the lead agency] the benefit of a doubt on any legitimate, disputed issues of credibility.'" (*Ibid.*, quoting Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4th 1597, 1603 [35 Cal. Rptr. 2d 470]; see § 21151.)

CA(13)[↑] (13) HN17[↑] California courts, including the Fifth Appellate District, routinely describe [**52] the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review. (See Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra, 33 Cal.App.4th at p. 151; [***53] Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307, 1316–1317 [8 Cal. Rptr. 2d 473] [Ct. App., 1st Dist., Div. 1]; see also

No Oil, Inc. v. City of Los Angeles, supra, 13 Cal.3d at p. 84.)

In contrast to this description of the fair argument test, County asserts that "[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency's decision." This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration. (See *Marin Mun. Water Dist. v. KG Land California Corp. (1991) 235 Cal. App. 3d 1652, 1660 [1 Cal. Rptr. 2d 767]* [court explicitly stated it was applying the substantial evidence standard to the agency's approval of the EIR].) Where the question is the sufficiency of the evidence to support a fair argument, "deference to the agency's determination is not appropriate ... ." (*Sierra Club v. County of Sonoma, supra, 6 Cal.App.4th at pp. 1317–1318.*) **[*1580]**

CA(14)[↑] (14) ***HN18***[↑] A logical deduction from the formulation of the fair argument test is that, if substantial evidence **[***54]** establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR. (Guidelines, *§ 15064, subd. (f)(1)*; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896, 904–905 [60 Cal. Rptr. 2d 821].*) The environmental review necessary to complete an EIR prepares the agency to weigh the conflicting substantial evidence on each side of an issue and make its findings of fact.

CA(15)[↑] (15) The fair argument test also requires the preparation of an EIR where ***HN19***[↑] "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial ... ." (Guidelines, *§ 15063, subd. (b)(1)*; see *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1996) 42 Cal.App.4th 608, 614–615 [49 Cal.Rptr.2d 494].*) In other words, ***HN20***[↑] for projects that may cause both beneficial and adverse significant impacts on the environment, preparation of an EIR is required because the consideration of feasible **[***55]** alternatives and mitigation measures might result in changes to the project that decrease its adverse impacts on California's environment. Consequently, the argument that an EIR was unnecessary because the net overall effect of Ordinance G-6638 was beneficial to the environment must fail, regardless of potential environmental benefits, if substantial evidence shows a reasonable possibility of one or more significant adverse environmental impacts.

C. *Definitions Relevant to the Fair Argument Test*

The fair argument test contains several terms that are defined further by CEQA, the Guidelines, or case law.

CA(16)[↑] (16) First, the term ***HN21***[↑] "substantial evidence" is defined by the Guidelines to mean "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, *§ 15384, subd. (a)*; see *No Oil, Inc. v. City [**53] of Los Angeles, supra, 13 Cal.3d at p. 75.*) CEQA specifically provides that ***HN22***[↑] "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" (*§ 21080, subd. (e)(1)*) and excludes **[***56]** "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (*Id.*, *subd. (e)(2)*; see Guidelines, *§ 15384, subd. (a).*) Thus, ***HN23***[↑] the existence of a public controversy is not a substitute for substantial evidence. (Guidelines, *§ 15064, subd. (f)(4).*)

[*1581] ***CA(17)***[↑] (17) Second, ***HN24***[↑] a

project "may" have a significant effect on the environment if there is a "reasonable possibility" that it will result in a significant impact. (*No Oil, Inc. v. City of Los Angeles, supra, 13 Cal.3d at p. 83, fn. 16.*)

Third, ***HN25***[↑] "environment" is defined by CEQA as "the physical conditions [that] exist within the area [that] will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (*§ 21060.5.*) *Section 15360* of the Guidelines explains this definition by providing: ***HN26***[↑] "The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The 'environment' includes both **[***57]** natural and man-made conditions."

Fourth, the phrase ***HN27***[↑] "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment." (*§ 21068*; see Guidelines, *§ 15382.*) ***HN28***[↑] "In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by members of the public in all areas affected as expressed in the whole record before the lead agency." (Guidelines, *§ 15064, subd. (c).*)

Fifth, the "significance" of an environmental effect requires the evaluation of ***HN29***[↑] "direct physical changes in the environment [that] may be caused by the project and reasonably foreseeable indirect physical changes in the environment [that] may be caused by the project." (Guidelines, *§ 15064, subd. (d)*; see *§ 21065.*) [38] In this context, "direct" means "caused by and immediately related to the project." (Guidelines, *§ 15064, subd. (d)(1).*) "Indirect" means "not immediately related to the project, but ... caused indirectly by the project" such as a physical change caused by a direct physical change. (*Id., subd. (d)(2).*) The test for the strength of the nexus between the project and an indirect physical **[***58]** change is whether "that change is a reasonably foreseeable impact [that] may be caused by the project." (*Id., subd. (d)(3).*) The "reasonably foreseeable" test excludes physical changes that are speculative or not likely to occur. (*Ibid.*)

Sixth, ***HN30***[↑] "effects" and "impacts" are synonymous and include (1) "[d]irect or primary effects [that] are caused by the project and occur at the same time and place" and (2) "[i]ndirect or secondary effects [that] are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (Guidelines, *§ 15358, subd. (a).*) A common example of an indirect effect is the pollution that results from the growth-inducing effect of a project. (See Guidelines, *§§ 15064, subd. (d)(2), 15382.*) **[*1582]**

[54]** II. *An EIR is Required Under the Low* **[***59]** *Threshold of the Fair Argument Test*

Plaintiffs contend the implementation of Ordinance G-6638 created a reasonable possibility of significant environmental impacts both inside and outside Kern County. Plaintiffs contend these significant impacts included (1) increased vehicle traffic, (2) increased air pollution in the form of vehicle emissions, dust and volatilization of pesticides, (3) degraded water quality from the use of alternative fertilizers, (4) increased burdens on landfills, (5) increased energy and fuel consumption, (6) increased soil erosion, (7) increased use of irrigation water, (8) increased exposure of humans to pathogens, (9) loss of habitat for small animals, and (10) loss of productivity of marginal farmland.

County contends the fair argument test was not met because (1) the relevant environment was approximately 23,594 acres of farmland [39] in Kern County where Class B biosolids were applied and (2) it was not reasonably possible that significant

[38] The Guidelines caution that an ironclad definition of "significant effect" is not possible because the significance of an activity may vary with the setting. (Guidelines, *§ 15064, subd. (b).*)

[39] This farmland represents about 3 percent of the total harvested cropland in Kern County.

adverse environmental impacts would occur on that farmland. To support its first contention, County asserts that any broader sweep of the ordinance would depend on alternative methods of biosolids disposal chosen [***60] by plaintiffs, and that the environmental impacts resulting from those methods were thus too uncertain and speculative for County to evaluate. To support its second contention, County asserts EQ biosolids would serve as an adequate substitute for the Class B biosolids that could no longer be applied by farmers.

CEQA defines the relevant geographical environment as the area where physical conditions will be affected by the proposed project. (§ 21060.5.) Consequently, the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area. (See Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 369 [110 Cal. Rptr. 2d 579].) Moreover, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside [***61] of the boundaries of the project area." (*Ibid.*)

We agree with County that some of the physical changes to the environment resulting from the adoption of Ordinance G-6638 would depend on the reactions of plaintiffs and others to its requirements. Consequently, we will not limit our review to a particular geographical area, but begin by examining (1) the reasonably foreseeable reactions of those affected by the heightened treatment standards, (2) how such reactions might cause physical changes to [*1583] the environment, and (3) the environmental significance of those physical changes. The two main groups directly affected by Ordinance G-6638 were sewage sludge generators and the farmers who used Class B biosolids as a fertilizer. We will analyze each group separately.

A. *Reactions of Sewage Sludge Generators and Related Impacts*

Under the heightened treatment standards of Ordinance G-6638, sludge generators such as CSDLAC, CLABS and OCSD that applied Class B biosolids to agricultural land in Kern County were required to either reduce their production of biosolids or dispose of their biosolids in some other way.

[**55] 1. *Continued production and disposal of sewage sludge* [***62] *was foreseeable*

It was reasonably foreseeable that the City of Los Angeles, and the Counties of Los Angeles and Orange would continue to produce sewage sludge and would need to dispose of it. County does not dispute this point. The administrative record includes documents stating that the generation of biosolids will continue to increase along with the state's population. Therefore, at the time County certified the negative declaration, it was reasonably foreseeable that the heightened treatment standards would compel CSDLAC, CLABS, OCSD and other agencies to find a substitute for applying Class B biosolids on land within the jurisdiction of Kern County.

2. Alternative methods of disposal were reasonably foreseeable

a. *Foreseeability of disposal alternatives*

The following alternatives were foreseeable, because of the applicable rules of law governing the use and disposal of sewage sludge and because of information contained in the administrative record: (1) further treatment to convert Class B biosolids to EQ biosolids followed by land application, (2) land application of Class B biosolids somewhere other than Kern County, (3) incineration, or (4) disposal [***63] in a landfill.

The applicable rules of law set forth in state statute and federal regulations address land application, [40]

[40] Land application may involve sewage sludge that has received various levels of treatment. For example, composting may be an

landfilling, and incineration of sewage sludge. (See *Wat. Code, § 13274, subds. (d), (f) & (g); 40 C.F.R. § 503, subparts B* [land application], *C* [surface disposal, i.e., landfill] & *E* [incineration].) [41] **[*1584]** Also, land application of sewage sludge that has been treated to heightened standards is suggested by Ordinance G-6638 itself.

The administrative record contains a vast amount of information about the alternative methods for **[***64]** disposing of Class B biosolids. Part of that information was presented in comments from persons familiar with the disposal of sewage sludge. For instance, a September 13, 1999, declaration of James F. Stahl, an assistant chief engineer and assistant general manager of CSDLAC, identified the four alternatives and provided historical data showing the disposal options California had used in the past: "[I]n 1998 approximately 1,849 dry tons per day of sludge were generated in California. Of that amount, approximately 67.8% was land applied, while about 7% was in storage, 5.6% was incinerated, 9% was disposed of in landfills, and 10.6% [was] used in compost. In California, the most common use of land-applied biosolids is for agricultural crop production. ... [A]bout one-third of all land-applied biosolids in the State of California in 1998 were applied in Kern County." [42]

[*65]** A letter from the Chief of the Office of Clean Water Act Compliance of Region IX of the EPA indicated the alternatives were (1) treatment to Class A standards, (2) hauling further distances for land application, **[**56]** and (3) adding the organic, nitrogen-rich material to landfills. These methods and incineration were identified in the September 13, 1999, comments jointly submitted by CASA and SCAP and a June 14, 1999, letter signed by attorneys for OCSD, CSDLAC and CLABS. In addition, a letter from the Chair of the Central Valley Water Board mentions landfilling and incineration as alternative methods of disposal.

As a result of the foregoing comments and existing law, the foreseeable alternative methods of disposal of Class B biosolids included (1) land application outside Kern County, (2) further treatment to EQ biosolids standards followed by land application, (3) landfilling and (4) incineration.

b. *Reasonableness limitation on foreseeable alternatives*

CA(18)[↑] (18) Next, we consider which of the foreseeable alternatives were *reasonably* foreseeable under the circumstances of this case. ***HN31***[↑] Under the fair argument test, the inquiry into what is reasonably foreseeable depends on whether **[***66]** the administrative record contains enough evidence to show a reasonable possibility that a particular alternative would be used in the future.

[*1585] OCSD, CSDLAC and CLABS were among the entities affected by Ordinance G-6638 that submitted comments to County predicting how they would respond to the ordinance.

An assistant general manager of OCSD, Blake P. Anderson, stated in a September 9, 1999, declaration that OCSD intended to respond to the ordinance by (1) converting Class B biosolids to EQ biosolids and (2) hauling the portion of the Class B biosolids not converted to more distant locations for land application. At that time, OCSD was "in the process [of] developing a request for proposals in order to obtain bids for the conversion of OCSD's Class B biosolids to exceptional quality biosolids." Earlier, in comments attached to its June 14, 1999, letter, OCSD discussed the limitations on landfills in Southern California and indicated that the landfills most likely to be used to dispose of Class B biosolids were located in Arizona and Utah.

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intermediate step that prepares the sewage sludge to be applied to land as EQ biosolids.

[41] See generally Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Envtl. Aff. L.Rev. at pages 690–697 (discussing the three main ways to dispose of sewage sludge: landfilling, incineration and land application).

[42] Mr. Stahl relied on a survey conducted by CASA that was described in the State Water Board's 1999 Draft EIR, figure 2-2.

The declaration of Mr. Stahl, CSDLAC's assistant general manager, stated adoption of the ordinance would cause CSDLAC to apply its biosolids to [***67] land further away and, if the sites with permits for land application of Class B biosolids did not have sufficient capacity, to treat the biosolids to meet Class A or EQ standards. Mr. Stahl also addressed the potential alternatives of incineration and local landfilling by stating that (1) incineration was not feasible in Southern California because of its adverse impact on air quality and (2) local landfilling lacked viability because of various constraints placed on those landfills, which included the recycling requirements of the *California Integrated Waste Management Act of 1989*. Also, Gregory M. Adams, the head of the air quality engineering section of CSDLAC, opined that the incineration of sewage sludge in Southern California was not feasible because of its adverse impact on air quality.

A September 10, 1999, letter from CLABS stated that "[t]o date, our analysis indicates that the alternative with the highest likelihood of immediate success is the conversion of Class B biosolids to what are known as exceptional quality biosolids under the federal regulations." The letter described the testing undertaken for the conversion of Class B biosolids at its Terminal Island wastewater [***68] treatment plant and its Hyperion treatment plant and stated that it was reasonably foreseeable that within three years CLABS would be converting 100,000 wet tons per year of Class B biosolids to EQ biosolids. The letter also mentioned that the City of Los Angeles [**57] had examined potential alternative sites for land application of Class B biosolids as well as the use of a landfill in Arizona as a backup method for disposal.

[*1586] The foregoing predictions by entities that would have to change their practices when the heightened treatment standards went into effect are not rendered speculative by virtue of being predictions of future methods of compliance. Predicting the physical changes a project will bring about is an inescapable part of CEQA analysis. (*Planning & Conservation League v. Department of Water Resources (2000) 83 Cal.App.4th 892, 919 [100 Cal. Rptr. 2d 173]* [CEQA compels reasonable forecasting]; [43] see *Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 398–399 [253 Cal. Rptr. 426, 764 P.2d 278]*.)

[***69] ***CA(19)***[↑] (19) County contends that, when it adopted Ordinance G-6638, it could only speculate as to which alternative biosolids generators would adopt when the heightened treatment standards went into effect on January 1, 2003. ***HN32***[↑] Determining whether alternative methods of compliance with a new ordinance are reasonably foreseeable or speculative depends on the facts in the record rather than a bright-line rule of law. A bright-line rule—stating that the existence of alternative means of compliance with a new rule or regulation would cause each alternative to be so uncertain that it was not reasonably foreseeable—would contradict the requirements for environmental analysis imposed by *section 21159, subdivision (a)*. That subdivision provides that when specified agencies adopt a rule or regulation concerning pollution control, performance standards, or treatment requirements, the agency must perform "an environmental analysis of the reasonably foreseeable methods of compliance." [44] Thus, CEQA recognizes that the existence of alternative methods of compliance does not, in itself, make the alternatives not reasonably foreseeable. Nothing in logic dictates a different conclusion when the new edict is [***70] a county

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[43] In addressing forecasting, i.e., predicting or estimating what will occur in the future, the Guidelines state that "[d]rafting an EIR or preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Guidelines, *§ 15144*.)

[44] The section in the Guidelines corresponding to *section 21159, subdivision (a)* provides that adoption of a rule or regulation concerning pollution control, performance standards, or treatment requirements by specified state agencies requires an "environmental analysis of the reasonably foreseeable methods by which compliance ... will be achieved." (Guidelines, *§ 15187, subd. (a)*.)

ordinance, even though the express terms of section 21159 do not cover ordinances. Consequently, regardless of whether the situation concerns a new rule, regulation or ordinance, whether one or more methods of future compliance are reasonably foreseeable depends upon the quality and quantity of evidence in the administrative record.

The evidence in this case includes predictions of OCSD, CSDLAC and CLABS that are supported by a reasoned analysis of the options available to them, an investigation into the practicalities of those options, and the plans or **[*1587]** intentions they had formed at that stage of their investigation. Accordingly, **[***71]** the predictions and the information upon which the predictions were based constitute substantial evidence supporting a fair argument that the reasonably foreseeable alternatives for disposing of sewage sludge that otherwise would have been applied to Kern County farmland as Class B biosolids were (1) hauling the Class B biosolids to other locations **[**58]** where land application was allowed, (2) treating the Class B biosolids to meet more stringent standards, and (3) depositing the Class B biosolids in landfills. In other words, based on the record cited on appeal (see Cal. Rules of Court, rule 14(a)(1)(C)), the only alternative method of disposal that was not *reasonably* foreseeable was incineration.

3. *Significance of environmental impacts of disposal alternatives*

CA(20)[↑] (20) The next inquiry under the fair argument test is whether the likelihood of implementation of the reasonably foreseeable disposal alternatives created a reasonable possibility of a significant effect on the environment. ***HN33***[↑] A project will have a significant effect on the environment if it will cause "a substantial, or potentially substantial, adverse change in" (§ 21068) "the physical conditions [that] **[***72]** exist within the area [that] will be affected by [the] project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§§ 21060.5 [defining "environment"], 21068 [defining "significant effect on the environment"]; see Guidelines, §§ 15360, 15382.)

One illustration of the foreseeability of secondary environmental impacts occurred in City of Redlands v. County of San Bernardino (2002) 96 Cal.App.4th 398 [117 Cal. Rptr. 2d 582] where a county approved amendments that modified its general plan relating to land use regulation of unincorporated territory within a city's sphere of influence. The general plan amendment caused the slope development standards to become more lenient in certain areas and created the possibility for development of land previously considered too steep for development. (Id. at pp. 412–413.) The Fourth Appellate District held that an expected secondary effect of the adoption of a general plan amendment was an increase in grading that would destroy the natural contours of hillsides and possibly eliminate the natural habitat for plants and animals. (Id. at p. 413.) Despite the county's **[***73]** argument that the evidence lacked the necessary specificity and the absence of a particular development project, the court concluded the administrative record contained **[*1588]** "substantial evidence of a fair argument that the amendments [to the general plan] may have a significant effect on the environment." (Id. at p. 414.) Thus, the trial court's decision to require the preparation of an EIR was upheld. (*Ibid.*)

a. *Hauling*

Mr. Anderson stated that OCSD anticipated hauling at least five truckloads of Class B biosolids per day to Kings County and two truckloads per day to Yuma, Arizona, which would involve a total of 2,000 vehicle miles per day and 1,200 vehicle miles per day, respectively.

Mr. Stahl stated Ordinance G-6638 would cause CSDLAC to apply Class B biosolids to land "at a currently-permitted location in Kings County for which [CSDLAC has] an existing contract" and at more remote permitted locations because the permitted capacity in Kings County could only accept about two-thirds of the biosolids generated

by CSDLAC, OCSD and CLABS. Mr. Stahl also stated the additional hauling distance to the location in Kings County was approximately 45 miles [***74] one way. Based on this additional mileage and the amount of wet tons of sewage sludge CSDLAC produced, Mr. Adams stated that the additional hauling of CSDLAC alone would result in nitrogen oxide (NOx) emissions of 63 pounds per day. Daily operations-related emissions that exceed 55 pounds per day of NOx are considered significant under the thresholds [**59] established by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD). [45] (See Guidelines, § 15064.7 [public agencies encouraged to develop and publish thresholds of significance]; *Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 110–111 [126 Cal. Rptr. 2d 441]* [adopting quantitative standard as threshold of significance "promotes consistency, efficiency, and predictability in deciding whether to prepare an EIR"].) Accordingly, Mr. Adams concluded that the additional hauling of sewage sludge produced by CSDLAC would have a significant effect on the environment.

[***75] The information in the administrative record supported a reasonable inference that the totality of additional hauling of Class B biosolids beyond sites in Kern County to locations in Kings County and further north would create additional NOx emissions that would have a significant adverse impact on the air quality within the jurisdiction of the SJVUAPCD. This determination is based on the levels of significance established by the SJVUAPCD. (See [*1589] Guidelines, § 15064.7.) Accordingly, under the fair argument test, an EIR should have been prepared to consider the impact of Ordinance G-6638 on air quality.

b. *Treatment to EQ standards*

Mr. Stahl's declaration also stated CSDLAC had not built facilities sufficient to process its biosolids to meet Class A or EQ standards, but the design parameters for a pasteurization facility to accomplish that processing had been calculated by CSDLAC and would require approximately 700 MMBTUH [46] [***76] for heating in a natural gas boiler and 3,200 Hp [47] for pumping and handling.

The declaration of Mr. Adams states that for the 700 MMBTUH design parameter calculated by CSDLAC for a pasteurization facility, a natural gas fired boiler of that capacity "would emit approximately 111 lbs of NOx and 581 lbs of CO per day at their BACT [best available control technology] levels (i.e., 5 ppm NOx and 50 ppm CO)." This estimate of the per day emission of NOx is more than twice the threshold of significance set by the SCAQMD, and the estimate of CO emission also exceeds the threshold of significance of 550 pounds per day. Mr. Adams also stated that the processing activity necessary for another sanitation agency to convert 100,000 tons of Class B biosolids to EQ biosolids per year would also exceed the thresholds of significance for NOx and CO.

In addition, the declaration of Robert A. Gillette, a civil engineer and principal of Carollo Engineers, described the energy consumption associated with the additional treatment processes used to convert Class B biosolids to Class [***77] A biosolids. In his declaration, Mr. Gillette expressed the opinion that the most viable processes for converting Class B biosolids to Class A at a treatment plant were in-vessel composting, heat drying, and lime stabilization. Based on these processes and other data, Mr. Gillette estimated: [**60] "If only one third of the Class B biosolids presently used in Kern County are converted to Class A, the

[45] The SJVUAPCD and the South Coast Air Quality Management District (SCAQMD) have both established thresholds of significance for direct and indirect project emissions, such as NOx, reactive organic gases (ROG), carbon monoxide (CO), sulfur oxide (SOx) and fine particulate matter (PM-10).

[46] Million British thermal units per hour. A British thermal unit is a unit of energy defined as the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit.

[47] Horsepower, which is a unit of power that can be defined as 550 foot pounds per second or 745.7 watts.

electricity usage for these alternatives is equivalent on an annual average basis to the amount used by between 1,500 and 5,000 homes in Southern California, according to data from Southern California Edison. The natural gas usage is equivalent on an annual average basis to the amount used by between 3,000 and 6,000 homes in Southern California according to data from the Southern California Gas Company."

[*1590] Mr. Gillette also stated his opinion that if 200,000 wet tons per year of Class B biosolids were converted to more stringent standards instead of applied to land in Kern County, "the environmental impact from the additional use of energy would be very significant."

While we recognize that OCSD, CSDLAC and CLABS each had choices in deciding what combination of further treatment and **[***78]** hauling to distant sites to implement, we conclude that a fair argument can be made that the aggregate impact of the alternatives adopted by these entities and the publicly and privately owned treatment works (POTW) serving Kern County communities [48] may cause a substantial, or potentially substantial, adverse change in the air quality within the jurisdiction of the SCAQMD and the SJVUAPCD. Furthermore, a fair argument can be made that the increased energy use caused by further treatment processes would cause a significant effect on the environment.

c. *Landfill capacity*

The historical data in the administrative record shows that the biggest changes in the disposal and use of biosolids in California between 1988 and 1998 were the reduction in the use of landfills (60.2 percent to 9.1 percent) and the increase in **[***79]** the use of land application (12.7 percent to 67.8 percent). From this data, it is reasonable to infer that land application has acted as a substitute for disposal in landfills and, as land application becomes more difficult, the use of landfills will be a partial substitute for land application. For instance, page 2-2 of the State Water Board's 1999 Draft EIR links the "huge increase in land application" reflected in the 1998 data with the reduction in the use of landfills.

The California Integrated Waste Management Act of 1989 includes the legislative findings that the "amount of solid waste generated in the state coupled with diminishing landfill space and potential adverse environmental impacts from landfilling constitutes an urgent need for state and local agencies to enact and implement an aggressive new integrated waste management program" (*§ 40000, subd. (d)*), and that the reuse of solid waste would preserve landfill capacity and protect the state's environment (*id.*, *subd. (e)*).

Based in part on (1) the volume of Class B biosolids applied to land in Kern County before the heightened treatment standards became effective, (2) the use of landfills as a substitute for land **[***80]** application of biosolids, and (3) the legislative findings regarding diminishing landfill capacity and the adverse **[*1591]** environmental impact associated with landfilling, we conclude that a fair argument exists that the potential increased use of California's limited landfill space to dispose of an organic, nitrogen-rich material may have a significant adverse effect on the environment. Accordingly, **[**61]** that potential environmental impact should be assessed in an EIR.

d. *Summary*

CA(21)[↑] (21) The reasonably foreseeable reactions of sewage sludge generators to Ordinance G-6638, and the reasonably foreseeable environmental impacts of those reactions, include: (1) increased fuel consumption and vehicle emissions resulting from hauling Class B biosolids greater distances; (2) the consumption of energy for the heating, pumping and handling involved in treating Class B biosolids to meet more stringent standards, and the emissions generated by the

[48] A Central Valley Water Board letter of September 17, 1999, stated the negative declaration "should also address the impacts of the proposed ban on POTWs serving Kern County communities."

additional treatment; and (3) loss of landfill capacity. [49]

[*81]** B. *Farmer Reaction and Related Impacts*

Plaintiffs argue that the reaction of Kern County farmers to the heightened treatment standards for sewage sludge applied to land after December 31, 2002, would result in significant impacts, "including the loss of productivity of marginal farmland (EPA, Garvey, Magan), increased air pollution from volatilization of increased pesticide usage, increased dust, and additional truck traffic (EPA, Regional Board, Garvey, Wilson, Tow, Anderson, Stahl, Adams, Hyde, Nixon, Westhoff) ... increased energy and fuel consumption (Wilson, Gillette, Anderson, Stahl, Nixon), increased erosion and dust (Garvey, Tow), increased water use (Garvey, Dixon, Tow), increased risks to human health (Nixon, Gerba), and loss of habitat for small animals (Garvey)." (Fn. omitted.)

County argues that the evidence referred to by plaintiffs is too general and does not show that "the Ordinance will result in significant environmental impacts on the land to which it applies." County asserts the lack of site-specific evidence occurred because "no physical changes would occur in the unincorporated area during the first three years because the Ordinance allowed the continued **[***82]** use of Class B biosolids; and no significant impacts **[*1592]** would occur after January 1, 2003 because the Ordinance allows the continued land application of EQ biosolids."

1. *Reasonably foreseeable farmer reactions*

Plaintiffs predicted that farmers who could not apply Class B biosolids after December 31, 2002, would react by (1) taking land out of agricultural production, (2) applying animal manure as a substitute for the biosolids, or (3) using chemical fertilizers. County asserts plaintiffs have indulged in assumptions unsupported by facts and have "ignore[d] evidence showing it is far more likely sludge generators will convert their Class B biosolids to EQ, ensuring an adequate substitute for Class B biosolids for anyone who wishes to use them." County supports its prediction by referring to various contracts and related documents of the sanitation agencies that contemplate the use of composting as a disposal option. [50]

[*83]** In effect, County has argued its forecast of how farmers would react when they could no longer apply Class B biosolids was the only forecast supported by substantial **[**62]** evidence. (See Guidelines, *§ 15144* [forecasting].) This position is rejected for three reasons.

First, the documents cited by County in its appellate brief were not considered by County in adopting Ordinance G-6638 as they were not a part of the administrative record. (See *§ 21003, subd. (b)* [document cannot be "meaningful and useful to decisionmakers" if it was not available to them].)

Second, County has cited and this court has located no evidence in the administrative record that supports the factual assertion that EQ biosolids are "an adequate substitute for Class B biosolids." Indeed, the evidence in the administrative record, including a letter from the EPA, indicates that most treatment processes for Class B biosolids reduce the nitrogen levels considerably and therefore reduce its value as fertilizer. County contends this evidence is unreliable because another document that was not in the administrative record shows that one of the primary land application sites used by OCSD in Kern County did not need **[***84]** additional nitrogen for crop growth and would not be available for land application of Class B biosolids for a year or more. This attack on the evidence is faulty because (1) it is based on a

[49] In determining the foreseeability of a significant environmental impact, predicting what combination of alternatives will be used is less important when environmental impacts are associated with each alternative in the limited array of choices available.

[50] Reliance upon these documents could be an after-the-fact justification because the documents were not part of the administrative record before the Kern County Board of Supervisors when it decided to adopt Ordinance G-6638 and to certify the negative declaration.

document that is not in the administrative record; (2) it pertains to only one of the many land application sites in Kern County and provides no basis for inferring that all the other sites have the same characteristic; and (3) the **[*1593]** period the site was unavailable was not shown to extend to the time the heightened treatment standards went into effect. [51]

Third, even if one were to assume EQ biosolids and Class B biosolids were equivalents as fertilizer, the administrative record does not contain evidence which supports County's assumption that EQ biosolids would be available in sufficient quantities **[***85]** to completely replace Class B biosolids at all land application sites in Kern County. Some of the Class B biosolids that would have been applied in Kern County would be hauled to more distant locations or placed in landfills, which supports the inference that the EQ biosolids generated by the conversion of Class B biosolids would not be sufficient to completely replace the use of Class B biosolids.

Consequently, we reject County's position that the only reasonable forecast of the farmers' reaction to the implementation of the heightened treatment standards was that they all would use EQ biosolids as a substitute for Class B biosolids. Instead, substantial evidence in the administrative record shows that it was reasonable to forecast that the farmer reactions also would include taking marginal land out of production and substituting other types of fertilizer to replace the Class B biosolids. (See *League for Protection of Oakland's etc. Historic Resources v. City of Oakland, supra, 52 Cal.App.4th at pp. 904–905* [substantial evidence of one impact is not negated if the record also contains substantial evidence showing a different impact will result].)

The forecast **[***86]** that farmers would take land out of production was reasonable because one farmer told the Kern County Board of Supervisors that the availability of Class B biosolids made it feasible for him to bring 1,200 acres of marginal alkali soil into production, and another stated that the availability of biosolids as a free fertilizer allowed him to break even on a **[**63]** 160-acre parcel. Shaen Magan wrote a letter indicating that if he was unable to continue farming with the use of biosolids, then approximately 4,000 acres of his farmland located in Kern County would revert to open-range land. From these statements, it is reasonable to infer that without the free application of Class B biosolids, the marginal land would be taken out of production.

The forecast that some land would remain in production and substitutes would be used was reasonable because Pat McCarthy stated that he was currently applying Class B biosolids in his family's farming operations and, similar to gypsum, sulfur, animal waste and dairy waste, it was just one tool available to farmers. This statement supports an inference that he would **[*1594]** continue to farm by using one or more other types of fertilizer available to replace the **[***87]** Class B biosolids.

2. *Potential environmental impacts of farmer reactions*

a. *Dust and air quality*

Plaintiffs claim substantial evidence shows that "[a]t marginal sites that are currently used for Class B biosolids application, there will be a significant increase in soil loss of approximately 28,800 tons per year as PM-10 (Dust)" and cite to a letter prepared by Harry A. Tow, a principal engineer with Quad Knopf, Inc. In his letter, Tow states that sites left fallow and unfarmed will experience a significant increase in soil loss through wind erosion. The figure of 28,800 tons per year calculated by Tow equates to approximately 157,808 pounds per day, which is over 1,000 times the 150 pounds per day threshold of significance established for PM-10 by the SJVUAPCD for any

[51] In other words, County failed to show that by January 1, 2003, nitrogen levels at the site would have remained so high that EQ biosolids could have been used as fertilizer without any need for an additional source of nitrogen.

project.

Tow also stated that more dust and odor is likely to be created where animal manure is used as a substitute for Class B biosolids because the transport and application of dry manure is not regulated and it could be applied in wind conditions where the application of biosolids would not be allowed.

[*1595] Plaintiffs also cite a September 10, 1999, letter written on behalf of OCSD by Diane D. **[***88]** Garvey, who has a degree in civil and environmental engineering and a 20-year career in biosolids management. Garvey's company is Garvey Resources, Inc., and it is located in Lansdale, Pennsylvania. In Garvey's opinion, farmers who use chemical fertilizers as a substitute for biosolids will suffer increased soil loss from wind erosion because biosolids reduce soil erosion by increasing the amount of organic matter in the soil, which improves the soil's structure and cohesion. To support her opinion, Garvey quotes from an article titled "Agricultural Tillage Systems: Water Erosion and Sedimentation" published by the Soil and Water Conservation Society.

b. *Increased use of animal manure*

Plaintiffs contend a fair argument exists that increased use of animal manure by farmers affected by Ordinance G-6638 would lead to more surface water pollution, more groundwater pollution and the spread of pathogens such as cryptosporidium, giardia, salmonella and E. coli. This argument is supported by a report by the United States Geological Survey and a report prepared for United States Senator Tom Harkin, both of which are in the administrative record, and show that animal manure has had **[***89]** an adverse impact on the environment at locations across the country and in California.

Plaintiffs also cite the September 10, 1999, letter written by Garvey which asserted that increased use of animal manure **[**64]** would increase (1) nitrate contamination of groundwater and (2) the spread of disease because animal manure is not treated to reduce pathogens like Class B biosolids. Garvey asserts biosolids cause less nitrate contamination because biosolids are closely monitored and more consistent in quality; in contrast, the quality of animal manure can vary greatly in solids and nitrogen content based on the age of the manure, storage method, the feed given to the animals and their weight. The inconsistent quality of manure means that some areas of a field will receive more nitrogen than can be used by the crops and the excess nitrates will contaminate the groundwater.

With respect to the pathogens in animal manure, plaintiffs cite a September 13, 1999, letter from Charles P. Gerba, Ph.D., from the Department of Soil, Water and Environmental Science at the University of Arizona, which described some of the pathogens found in animal manure, asserted outbreaks of some of these pathogens were **[***90]** associated with the use of animal manure as a fertilizer, and observed that animal manure that is land applied is not regulated for pathogen removal, unlike Class B biosolids. [52] The lack of regulatory oversight to the land application of animal manure also is mentioned in the comments submitted to County by the EPA.

c. *Increased use of concentrated chemical fertilizers*

Plaintiffs assert substantial evidence shows that increased use of concentrated chemical fertilizers by affected farmers would lead to a number of adverse environmental impacts including (1) soil erosion, [53] (2) surface water pollution, (3) groundwater pollution, (4) increased use of irrigation water, (5) decreased crop production and (6) increased use of pesticides.

[*91]** We agree that it is reasonable to forecast

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[52] Under *Part 503*, sewage sludge must be treated to significantly reduce pathogens to obtain Class B status. (See *40 C.F.R. § 503.32(b) (2005)* [Class B pathogen requirements and site restrictions].)

[53] The soil loss from wind erosion is discussed in part II.B.2.a., *ante*.

that this farmland will have a lower organic content than it would have had if Class B biosolids had continued to be applied. There is ample evidence in the administrative record showing that the application of biosolids increases the organic content of soil. For example, the September 9, 1999, letter submitted to County by Robert C. Dixon, a certified professional agronomist, indicates that biosolids are an organic soil amendment with a high level of organic matter.

[*1596] Both Garvey and Dixon asserted that the substitution of chemical fertilizers for biosolids could result in adverse impacts to the environment by (1) decreasing the ability of the soil to retain water and thus increasing the amount of water used to irrigate crops, and (2) increasing the amount of nutrients likely to leach below the root zone before they can be utilized by the crops and thereby increasing the amount of nutrients that leach into and pollute the groundwater.

Dixon also asserted that the increase in organic matter from biosolids increases the ability of the soil to hold onto pesticides, fertilizers and the soil itself. Thus, the water runoff from fields using biosolids **[***92]** would pollute surface water less because the runoff would transport fewer nutrients, pesticides and sediment.

Garvey asserted that the decrease in organic matter would decrease beneficial microbial populations in the soil and would increase farmer dependence on pesticides.

[65]** 3. *Significance of potential impacts from farmer reactions*

On our own initiative, we could provide bases on which to attack the significance of the above noted potential impacts to the environment arising from the reasonably foreseeable reactions of affected farmers. [54] County, however, has not provided any detailed analysis of the potential impacts plaintiffs have identified, other than to argue (1) the potential impacts will not arise because farmers will use EQ biosolids as a replacement for Class B biosolids and (2) plaintiffs' claims are based on (a) unsupported assumptions and opinions and (b) biased and unreliable information. (See *§ 21080, subd. (e)*; Guidelines, *§ 15384, subd. (a)*; *Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal. App. 3d 1337, 1349 [272 Cal. Rptr. 372]* [agency entitled to disbelieve biased witness].)

[*93]** Neither of County's arguments is compelling. First, substantial evidence in the record establishes a reasonable possibility that farmers would react to the heightened treatment standards in various ways (see part II.B.1., *ante*) and thus would not limit their reaction to using EQ biosolids as a complete substitute for Class B biosolids. Moreover, County's argument appears to be an after-the-fact rationalization for a decision already made because the **[*1597]** administrative record contains no evidence that County seriously investigated whether EQ biosolids would be a complete substitute for the Class B biosolids that had been used. [55] The after-the-fact nature of the position is illustrated by County's inability to cite any supporting evidence in the administrative record. (See fn. 50, *ante*.)

[*94]** *CA(22)*[↑] (22) Second, County's generalized assertion that the evidence relied upon by plaintiffs was biased and unreliable fails because County (1) did not make any express credibility findings in connection with its approval of the negative declaration and (2) has not shown that there were " 'legitimate, disputed issues of

[54] For example, Tow's analysis of the impact of dust on air quality suffers from a rather glaring deficiency—his failure to compare the potential dispersal of PM-10 after January 1, 2003, to the dispersal of PM-10 from the same land while it was farmed and biosolids were applied to it. The question, of course, is *change* to the environment which might arise from the ordinance. (See *§ 21068*; Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999) p. 162 (Remy, Guide to CEQA).)

[55] For instance, in completing the initial study County did not investigate the basic question of quantity—whether the volume of EQ biosolids available for application to farmland in Kern County would be sufficient to replace the volume of Class B biosolids that had been used.

credibility.' [Citation.]" (*Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra, 33 Cal.App.4th at p. 151.*) Were we to accept County's broad-brush assertion of the incredibility of plaintiffs' evidence, the fair argument test would be effectively eviscerated because much of the evidence submitted in administrative proceedings concerning CEQA projects comes from people and entities who are interested in the outcome of the lead agency's decision. Instead, we hold that ***HN34***[↑] before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity [56] to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility. (E.g., *Leonoff v. Monterey County Bd. of Supervisors, supra, 222 Cal. [**66] App. 3d at pp. 1351–1353* [court **[***95]** upheld county's rejection of project opponents' evidence of purportedly significant traffic impacts].)

We refrain from supplying arguments County has not made, or from requesting further briefing, because to do so would not reflect County's actual analysis but would simply create more after-the-fact justifications. Moreover, it would not change the need to remand this matter with directions to County to prepare an EIR. (See part II.A., *ante*.)

CA(23)[↑] (23) We also agree with plaintiffs that, ***HN35***[↑] under CEQA, the lead agency bears a burden to investigate potential environmental impacts. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of **[***96]** fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 311 [248 Cal. Rptr. 352].*) **[*1598]**

In this case, Tow's calculation regarding the creation of 28,800 tons per year of PM-10 is not a reasonable prediction. Nevertheless, County failed to study the impact of dust on air quality and, as a result, there exists a plausible inference that the heightened treatment standard could cause, in the aggregate, the addition of 150 pounds per day of PM-10 to the air within the jurisdiction of the SJVUAPCD based on (1) Tow's analysis of wind erosion from fallow land, (2) Tow's analysis of the additional dust that will result from the use of animal manure, (3) Garvey's claim that increased use of chemical fertilizers will affect soil structure and lead to more wind erosion, and (4) the PM-10 from the additional truck emissions created by further hauling distances. Accordingly, the heightened treatment standards may have a significant adverse impact on the amount of PM-10 in the air and an EIR should address this potential impact.

In addition, we conclude the impacts from the increased use of animal **[***97]** manure and the increased use of chemical fertilizers may have a significant adverse impact on the environment and should be addressed in an EIR.

C. Magan v. County of Kings *Is Distinguishable*

In *Magan v. County of Kings, supra, 105 Cal.App.4th 468*, the Kings County Board of Supervisors found that an ordinance regulating the application of sewage sludge to land in Kings County was categorically exempt from review under CEQA as an action taken by a regulatory agency for the protection of the environment. (See Guidelines, *§ 15308* [class 8 categorical exemption concerning protection of the environment]; see also *§ 21084*.) In upholding the superior court's denial of a writ of mandate, this court determined that (1) the county met its burden of showing substantial evidence supported the board of supervisors' decision that the ordinance fell within the categorical exemption (*Magan, at p. 476*) and (2) that the petitioner failed to meet his burden of producing substantial evidence showing a reasonable possibility of adverse environmental

[56] Under the facts of this case, we need not decide whether that identification must take place in explicit findings by the agency, elsewhere in the administrative record, or in the briefing submitted by the lead agency to the court.

impact sufficient to remove the ordinance from the categorically exempt class (*ibid.*). In particular, this [***98] court observed that the petitioner "has failed to support his claims with *any* evidence in the record. The claims are based entirely on speculation." (*Id. at p. 477.*)

The present case is distinguished easily from *Magan v. County of Kings* based on [**67] the contents of the administrative record. [57] In this case, the administrative record contains a large quantity of specific information about alternative methods of disposing of the Class B biosolids that otherwise [*1599] would have been applied to Kern County farmland and the environmental significance of the impact of those alternatives on energy consumption, air quality within the jurisdiction of the SJVUAPCD, and landfill capacity. Thus, plaintiffs in this case have done exactly what the petitioner in *Magan v. County of Kings* failed to do—produced substantial evidence to support their argument that the ordinance would indirectly cause "a substantial, or potentially substantial, adverse change in" "the physical conditions [that] exist" inside and outside the county. (*§§ 21060.5, 21068*; Guidelines, *§§ 15360, 15382*; *Heninger v. Board of Supervisors (1986) 186 Cal. App. 3d 601, 609–611 [231 Cal. Rptr. 11]* [***99] ["considerable body of evidence" supported a fair argument that an ordinance amendment authorizing installation of alternative private sewage disposal systems might have a significant effect on the environment; thus, a negative declaration was inappropriate and the preparation of an EIR was required].)

D. *Deferral of Environmental Analysis*

County asserts deferring the preparation of an EIR was appropriate because the uncertainty over how the sanitation agencies would react to Ordinance G-6638 rendered environmental analysis of those reactions premature.

1. *Deferral and the fair argument test*

CA(24)[↑] (24) A threshold issue is how the concept of deferral of environmental analysis interacts with the fair argument [***100] test. *HN36*[↑] When a public agency *is preparing an EIR* and decides to defer environmental review of an action that may be taken in the future, courts analyze the decision to defer environmental review under a specific test. (See *National Parks & Conservation Assn. v. County of Riverside (1996) 42 Cal.App.4th 1505, 1516–1520 [50 Cal. Rptr. 2d 339]* [deferral of environmental analysis in the context of EIR preparation and the test for deferral].) That test provides that the "discussion of a [future potential action] is not required in an EIR for the project ... if: (1) obtaining more detailed useful information is not meaningfully possible at the time when the EIR for the project is prepared, and (2) it is not necessary to have such additional information at an earlier stage in determining whether or not to proceed with the project." (*Id. at p. 1518.*) [58]

[***101] [*1600] *CA(25)*[↑] (25) *HN37*[↑] In the context of a negative declaration, however, the courts have not [**68] used this test to determine whether the approval of the negative declaration complies with CEQA. (See *Pala Band of Mission Indians v. County of San Diego (1998) 68 Cal.App.4th 556, 580 [80 Cal. Rptr. 2d 294]* (*Pala Band*) [applying fair argument test, court held

[57] This court has emphasized the importance of connecting one's arguments to the contents of the administrative record in a CEQA proceeding. (*Protect Our Water v. County of Merced (2003) 110 Cal.App.4th 362 [1 Cal. Rptr. 3d 726]*; see Cal. Rules of Court, rule 14(a)(1)(C).)

[58] A dispute over the application of the test for deferral often is closely related to a dispute concerning the proper scope of the project and whether a line can be drawn between the project covered by the EIR and the future action for which environmental analysis is deferred. (See *National Parks & Conservation Assn. v. County of Riverside, supra, 42 Cal.App.4th at pp. 1514–1515*; see also *No Oil, Inc. v. City of Los Angeles (1987) 196 Cal. App. 3d 223, 236–237 [242 Cal. Rptr. 37]* [discussion of pipelines in an EIR for exploration phase of multistage oil project need not address specific pipeline routes because quantity and quality of oil discovery was uncertain and another EIR would be prepared in connection with the city's approval of a specific pipeline route].)

preparation of EIR would be premature; upheld negative declaration]; *Sundstrom v. County of Mendocino, supra, 202 Cal. App. 3d at pp. 306–307* [deferring environmental assessment related to mitigation measures violated CEQA; negative declaration held invalid].) Further, we believe that use of an inquiry separate from the fair argument test would be inappropriate if it were used to raise or lower the threshold imposed by that test. Because the concept of deferral of environmental review does not change the threshold imposed by the fair argument test, there is no need for a separate inquiry. In other words, the idea of deferral is subsumed in the fair argument test, which considers whether a potential environmental impact is speculative or reasonably foreseeable; undertaking a separate inquiry would be redundant.

2. *Timing and* **[***102]** *Guidelines section 15004*

County contends preparation of an EIR would have been premature because "meaningful information for environmental assessment" (Guidelines, *§ 15004, subd. (b)*) was not available at the time Ordinance G-6638 was adopted.

Section 15004 of the Guidelines addresses the time for preparation of an EIR or negative declaration, and *subdivision (b)* states: ***HN38***[↑] "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." The "Discussion" that follows *section 15004* of the Guidelines states: "This section codifies the requirement that EIRs and Negative Declarations be prepared before an agency makes a decision on the project and early enough to help influence the project's plans or design. For EIRs and Negative Declarations to be effective in serving the purposes of CEQA, the preparation of these documents must be coordinated with the planning, review, and approval processes **[***103]** as described in subsection (c). Early preparation is necessary for the legal validity of the process and for the usefulness of the documents. Early preparation enables agencies to make revisions in projects to reduce or avoid adverse environmental effects before **[*1601]** the agency has become so committed to a particular approach that it can make changes only with difficulty." [59]

County's timing argument is ill-suited to the facts of this case because it (1) confuses deferring environmental analysis of Ordinance G-6638 with avoiding it and (2) treats the reactions of the sanitation agencies as though they were part of the same **[***104]** CEQA project. [60]

[69]** An agency's deferral of environmental assessment was appropriate in *Pala Band, supra, 68 Cal.App.4th 556*, and *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist. (1992) 9 Cal.App.4th 464 [11 Cal. Rptr. 2d 792]* (*Kaufman & Broad*) because the agency had the opportunity to assess all of the physical impacts of its multistage activity in an EIR prepared by the agency at a later stage of the project. Thus, those cases do not use timing considerations to justify an agency's completely avoiding the preparation of an EIR for its project.

In *Pala Band, supra, 68 Cal.App.4th 556*, the County of **[***105]** San Diego adopted a countywide integrated waste management plan, which was a statutory prerequisite to the development of new landfills in the county. The court held the preparation of an EIR would be premature where all 10 proposed landfill sites

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[59] The Discussion is available on the Internet at <*http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art1.html*> (as of Apr. 1, 2005). (See generally *San Franciscans for Reasonable Growth v. City and County of San Francisco (1987) 189 Cal. App. 3d 498, 503, fn. 1 [234 Cal. Rptr. 527]* [judicial notice taken of the "Discussion" that followed a section of the Guidelines].)

[60] The project description contained in County's proposed negative declaration states the project is "the adoption of a Kern County ordinance regulating the land application of Class A and B biosolids ... ." The project description does not include any biosolids management activities that might be undertaken by sanitation agencies in response to the ordinance.

identified in the siting element of the plan were only "tentatively reserved" and the county had made no commitment to develop any of the sites. (*Id. at pp. 574–575, 580.*) Thus, it was not "reasonably foreseeable at the current planning stage that any of the sites will actually be developed" (*id. at p. 575*), and the county could wait and subsequently prepare an EIR to help it decide which sites to actually develop.

Similarly, in *Kaufman & Broad, supra, 9 Cal.App.4th 464*, a school district formed a consolidated facilities district (CFD) but did not prepare an EIR. The formation of the CFD was merely an initial step and many alternative courses of action remained open to the school district. (*Id. at p. 476.*) For instance, formation of the CFD did not commit the school district to build a new facility, buy or lease portable classrooms, or rehabilitate existing facilities. **[***106]** (*Id. at pp. 474–475.*) The formation of the CFD caused no physical changes to the environment and it was not an essential step culminating in **[*1602]** activity that might cause physical changes to the environment. (*Id. at p. 474.*) In other words, physical changes would not occur until the district actually committed to building a new facility or some other course of action. Therefore, the school district itself had the opportunity to prepare an EIR when it committed to a stage of the project that would cause a physical change to the environment. [61] (Cf. Guidelines, *§ 15165* [issues raised by multiple and phased projects where significant environmental impacts arise earlier in the process].)

[*107] [**70]** The present case is distinguishable from *Pala Band* and *Kaufman & Broad* because the adoption of Ordinance G-6638 was a definitive action by County that *completed* its project and, accordingly, County had no opportunity to assess the indirect physical impacts of Ordinance G-6638 before those impacts occurred. Therefore, we reject County's attempts to use cases upholding a public agency's deferral of EIR preparation as support for its avoidance of EIR preparation.

Furthermore, in this case the CEQA "project" was Ordinance G-6638 itself. (See fn. 58, *ante*.) The final form of that project was proposed at the time Ordinance G-6638 was proposed, and County's commitment to the project became final when it adopted that ordinance. By avoiding the preparation of an EIR, County committed to a particular approach and completed its project without the benefit of the environmental analysis and information an EIR would have contained.

3. *Each agency has separate CEQA responsibilities*

Another aspect of County's deferral argument is that (1) the sanitation agencies are responsible for performing an environmental review of the potential environmental impacts resulting **[***108]** from the changes those agencies make in their biosolids management programs, and (2) plaintiffs are trying to **[*1603]** avoid this responsibility by foisting it on County. We reject County's argument because it misses the mark on how CEQA operates. If only the sanitation agencies were required to prepare, supplement, or amend their EIR's, there would be no environmental review of (1) feasible alternatives to the heightened treatment standards adopted in Ordinance G-6638, (2) its cumulative impacts, and (3) mitigation measures available to County but not the sanitation agencies. Under this

[61] The analogy between the adoption of a land use ordinance and the multistage activities involved in *Pala Band* and *Kaufman & Broad* is weak. The stronger analogy is between the adoption of Ordinance G-6638 and the adoption of (1) an amendment to a general plan, (2) revised sphere of influence guidelines, or (3) development plans for an area surrounding an airport. (See *City of Redlands v. County of San Bernardino, supra, 96 Cal.App.4th at pp. 412–413* [adoption of negative declaration set aside and county required to prepare an EIR in connection with general plan amendment]; *City of Livermore v. Local Agency Formation Com. (1986) 184 Cal. App. 3d 531 [230 Cal. Rptr. 867]* [LAFCO's negative declaration vacated and preparation of EIR required for changes in sphere of influence guidelines regarding urban development]; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors, supra, 91 Cal.App.4th at p. 369* [final subsequent EIR certified in connection with approval of updated specific plan for development of area surrounding county airport properly considered "project's effect on growth and housing ... felt outside of the project area"].)

approach, the environmental review contemplated by CEQA would contain a gap, and California's environment would be deprived of the benefits that might result from County's consideration of feasible alternatives, cumulative impacts, and mitigation measures. [62]

[***109] *CA(26)*[↑] (26) Furthermore, the fact that County must prepare an EIR does not absolve the sanitation agencies of their responsibilities to comply with CEQA. (See part VII., *post.*) [63] As noted by the Third Appellate District in *Citizens for Quality Growth v. City of Mt. Shasta (1988) 198 Cal. App. 3d 433 [243 Cal. Rptr. 727]*, ***HN39***[↑] "*Each* public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives. (See Guidelines, *§ 15020.*)" (*Id. at p. 442, fn. 8.*) When agencies—even agencies with antagonistic positions—comply with their responsibilities for environmental review under CEQA, their action should be taken after consideration of the other's position and, [**71] as a result, their action may achieve a measure of coordination that would not have existed without that review. (See *§ 21000, subds. (d) & (f).*)

[***110] E. *Relief Appropriate Under Section 21168.9*

Section 21168.9 sets forth the requirements for the court order entered after a failure to comply with CEQA has been found. (See *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. (2001) 89 Cal.App.4th 1097, 1102–1103 [109 Cal. Rptr. 2d 108].*) An order granting relief for CEQA violations ***HN40***[↑] "shall include only those mandates ... necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA]." (*§ 21168.9, subd. (b).*) In this case, the specific project activity that did not comply with CEQA was the approval of the negative declaration and the adoption of the heightened treatment standards.

[*1604] *CA(27)*[↑] (27) Accordingly, ***HN41***[↑] the order could mandate that County void all or part of its decision to approve the negative declaration and adopt the heightened treatment standards. (*§ 21168.9, subd. (a).*) The order also could mandate that County take specific action necessary to bring its decision into compliance with CEQA. (*§ 21168.9, subd. (a)(3).*)

We requested supplemental briefing concerning how *section 21168.9* should be applied in this case and what directions should be given to the superior [***111] court on remand. (*Gov. Code, § 68081.*) We asked whether the heightened treatment standard should be voided or allowed to remain in effect pending the completion of an EIR, and whether the adoption of Ordinance No. G-6931, which repealed Ordinance G-6638 but reenacted the heightened treatment standards, should affect the relief ordered.

The parties concurred that the heightened treatment standards should remain operative pending County's (1) completion of an EIR in good faith and without unnecessary delay and (2) approval of whatever replacement version of the biosolids ordinance is generated as a result of completing the EIR. [64] This position presumes (1) the severability

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[62] Plaintiffs point to the State Water Board's 1999 Draft EIR contained in the administrative record and argue that if the adoption of General Order 2000-10 at the state level created potential impacts that could be foreseen and required analysis, then the potential impacts from the adoption of Ordinance G-6638 (which represented a greater change from the status quo) also must be foreseeable. In plaintiffs' view, consistent application of CEQA's concept of foreseeability at the state and county level requires rejection of County's position that the potential physical impacts of Ordinance G-6638 were so attenuated as to be unforeseeable.

[63] Justice Stephen Breyer has described the problem of regulatory inconsistency which can arise when agencies ignore their regulatory program's environmental effect on other programs. (See Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation, *supra*, pp. 21–22.)

[64] At the time County begins the EIR process, it will not know the exact terms of the ordinance that it might approve at the end of that process because the terms it initially proposes, i.e., the "project," may be revised after considering feasible alternatives and mitigation measures.

of the heightened treatment standards from the other provisions in Ordinance G-6638 as well as from the additional provisions added by Ordinance No. G-6931, such as the licensing permit required for the land application of EQ biosolids, and (2) that the equities favor it. Because we conclude both of these presumptions are appropriate, we will accept the position adopted by the parties.

[*112]** *CA(28)*[↑] (28) First, we conclude that *HN42*[↑] the heightened treatment standards are grammatically, functionally, and volitionally severable from the remainder of chapter 8.05 as adopted by Ordinance G-6638 or as currently in effect under Ordinance No. G-6931. (See *Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 821–822 [258 Cal. Rptr. 161, 771 P.2d 1247]*.) [65] Therefore, the CEQA violations relating to the adoption of the heightened treatment standards do not infect the other provisions of the ordinances. (See *§ 21168.9, subd. (b)*.)

Second, County and CSDLAC both state they are unaware of any published **[**72]** case in which (1) a negative declaration that related to the adoption of an ordinance, regulation or general order was ruled invalid under CEQA, and (2) the appellate court did not invalidate the ordinance, regulation or general **[*1605]** order itself. (Cf. **[***113]** *Friends of Sierra Madre v. City of Sierra Madre, supra, 25 Cal.4th at p. 196* [appropriate relief for noncompliance with CEQA was invalidation of ordinance; ordinance not allowed to remain in effect pending compliance with CEQA]; *No Oil, Inc. v. City of Los Angeles, supra, 13 Cal.3d at p. 88* [superior court directed to set aside three ordinances].) Nevertheless, a remedy less severe than immediately voiding the heightened treatment standards may be ordered if supported by equitable principles. (See *Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal.3d at pp. 423–425*; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist., supra, 89 Cal.App.4th at p. 1104*.) Because the heightened treatment standards currently contained in Ordinance No. G-6931 have been in effect for over two years, we will follow the more steady course of allowing the status quo to continue pending the completion of an EIR. The alternative of reverting to a situation where the application of Class B biosolids is not subject to any local regulation and then, after an EIR is completed, **[***114]** possibly returning to a situation where Class B biosolids either cannot be land applied or are highly regulated by County would be disruptive to County, the sanitation agencies, and the members of the biosolids industry that are subject to the ordinances.

In light of (1) the position of the parties, (2) the authority given to the courts in *section 21168.9* to fashion the terms of the writ of mandate, and (3) the equitable considerations relevant to this proceeding, we hold that the heightened treatment standards may continue in effect provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA. If County decides to forgo regulating the application of biosolids to land, or does not prepare an EIR in good faith [66] and without unnecessary delay, then the superior court shall enter an order that immediately invalidates the heightened treatment standards. Questions concerning County's good faith or lack of diligence, if raised, shall be decided by the superior court in the first instance.

[*115]** III. *Ordinance G-6638 Is Consistent with Water Code Section 13274*

In the proceedings before the superior court,

[65] This conclusion regarding severability does not mean, however, that the heightened treatment standards are the entire "project" for purposes of determining the scope of the EIR.

[66] One issue that may arise in connection with the good faith of County's attempt to prepare an EIR is whether its definition of the scope of the EIR appropriately considers the "project" to include the "whole of an action" actually implemented by County in regulating the land application of sewage sludge. (Guidelines, *§ 15378, subd. (a)*; see *Association for a Cleaner Environment v. Yosemite Community College Dist. (2004) 116 Cal.App.4th 629, 637–640 [10 Cal. Rptr. 3d 560]*.)

County argued that Ordinance G-6638 was a local determination concerning sewage sludge that was authorized by *Part 503* and by *Water Code section 13274*. ***HN43***[↑] Plaintiffs agree that *Water Code section 13274* allows a county to impose stricter regulations than **[*1606]** those contained in the federal regulations on the land application of Class B biosolids. Plaintiffs contend, however, that County has imposed an outright ban and thus has gone further than *Water Code section 13274* allows when it is read in conjunction with *Part 503*. (See *Blanton v. Amelia County (2001) 261 Va. 55 [540 S.E.2d 869]* **[**73]** [county ordinance banning use of biosolids on farmland held invalid because of conflict with Virginia statute and regulations]; *O'Brien v. Appomattox County (W.D.Va. 2003) 293 F. Supp. 2d 660* [same]; *Franklin County v. Fieldale Farms Corp. (1998) 270 Ga. 272 [507 S.E.2d 460]* [Georgia water quality statute regulating land application of **[***116]** sludge implicitly preempted county ordinance regulating land application of sewage sludge, except in area of monitoring].)

Plaintiffs' contention presents an issue of statutory construction concerning the meaning of *subdivision (i) of section 13274 of the Water Code*, which provides: "Nothing in this section restricts the authority of a local government agency *to regulate* the *application of sewage sludge* and other biological solids to land within the jurisdiction of that agency, ..." (Italics added.)

CA(29)[↑] (29) Under plaintiffs' statutory construction, the word "regulate" does not include the authority to prohibit an activity. Accepting this narrow view of the word "regulate" for purposes of argument, [67] it does not follow that County lacks the authority to prohibit the application of Class B biosolids to land within its jurisdiction. This is because the statute refers to "sewage sludge" and not specifically to Class B biosolids. [68] **[***118]** Ordinance G-6638 did not prohibit "the application of sewage sludge ... to land within the jurisdiction of [County]" (*Wat. Code, § 13274, subd. (i)*) within the usual, ordinary meaning of that **[***117]** language because it would have allowed the application of sewage sludge that has been treated to specified, stringent standards. By allowing the land application of EQ biosolids, Ordinance G-6638 would have regulated how much treatment sewage sludge must receive before it was applied within the unincorporated area of Kern County. Accordingly, ***HN44***[↑] the heightened treatment standards do not conflict with *Water Code section 13274* when the term "sewage sludge" is given its usual, ordinary meaning—that is, read literally. [69]

[*1607] Furthermore, plaintiffs have not demonstrated a legislative purpose that justifies narrowly construing the term "sewage sludge" to mean only Class B biosolids rather than using the broader, literal construction of the term set forth in *40 Code of Federal Regulations part 503.9(w) (2005)*. (See *Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299]* [literal construction should prevail unless contrary to legislative purpose].) **[***119]** Thus, the heightened treatment standards do not conflict with

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[67] But see *Young v. Department of Fish & Game (1981) 124 Cal. App. 3d 257, 279 [177 Cal. Rptr. 247]* ("power to regulate includes the power to prohibit"); *Watkins v. Naifeh (Tenn. 1982) 635 S.W.2d 104, 107* ("extremely broad powers to regulate the sale ... of alcoholic beverages ... extends even to the power to ban such sales"); see also *Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 Cal.App.4th 129, 150 [122 Cal. Rptr. 2d 425]*.

[68] Class B biosolids are one category of "sewage sludge," which *Part 503* defines as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." (*40 C.F.R. § 503.9(w) (2005)*.)

[69] We need not reach the question of statutory construction concerning whether the authority to "regulate" includes or excludes the authority to ban an entire activity. Thus, although we requested supplemental briefing on whether it would be appropriate for this court to take judicial notice of State Water Board's General Order 2004-0012, which states the Water Code does not preempt the authority of local agencies to prohibit the use of biosolids, we need not consider the weight to give the regulatory agency's construction of the statute. (See generally *Yamaha Corp. of America v. State Bd. of Equalization (1999) 19 Cal.4th 1, 6–8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]*.)

*[**74] Water Code section 13274* when that section is read in conjunction with *Part 503*. (See *40 C.F.R. § 503.5(b) (2005)* [state and local government authorized to impose more stringent requirements].)

IV. *Commerce Clause Analysis*

Plaintiffs contend that the heightened treatment standards in Kern Code provision 8.05.040(A), [70] Ordinance G-6638, violate the *commerce clause of the United States Constitution* (*U.S. Const., art. I, § 8, cl. 3*) in that those standards (1) impermissibly discriminate against out-of-county biosolids by allowing municipalities located in Kern County to apply their own Class B biosolids on land in the incorporated areas of Kern County, and (2) were adopted for the protectionist purpose of banning out-of-county biosolids in order to prevent damage to the reputation of agricultural products grown in Kern County.

As factual support for the first of these **[***120]** contentions, plaintiffs point out that the City of Bakersfield maintains an extensive Class B biosolids application program within its incorporated area. At an April 27, 1999, hearing before the Kern County Board of Supervisors, Lauren Fondahl, the biosolids coordinator for the EPA regional office in San Francisco, observed that the proposed ordinance would not prevent Bakersfield and other cities in Kern County from applying Class B biosolids on city lands, and stated that "Bakersfield has been applying for many years now on lands across from East Planz Road[.] Wasco, Taft, Delano and North of Kern in Kern Community Service District have also been applying on city lands for years." [71]

[*121] [*1608]** In contrast to the Bakersfield example, however, the administrative record also shows that not all municipalities located in Kern County were able to apply their Class B biosolids on land within an incorporated area of Kern County. A September 13, 1999, letter from the City of Shafter indicated that the city had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County and stated that the proposed ordinance would "force local, smaller communities, which rely on cost-saving alternatives to promote growth and development, to explore other methods of biosolid use or treatment that require technology and resources that we may not be able to acquire."

A. *Scope of the Dormant Commerce Clause*

CA(30)[↑] (30) The *commerce clause of the federal Constitution* delegates to Congress the power ***HN45***[↑] "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (*U.S. Const., art. I, § 8, cl. 3.*) ***HN46***[↑] This explicit grant of power has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations and ordinances that burden or interfere with interstate **[***122]** commerce. (*West Lynn Creamery, Inc. v. Healy (1994) 512 U.S. 186, 192 [129 L. Ed. 2d 157, 114 S. Ct. 2205]*.) Known as the "dormant" or "negative" commerce clause (*Barclays Bank [**75] PLC v. Franchise Tax Bd. of Cal. (1994) 512 U.S. 298, 311, fn. 9 [129 L. Ed. 2d 244, 114 S. Ct. 2268]*), this limitation has been characterized as "predicated upon the implications of the commerce clause itself, [citations], or upon the presumed intention of Congress, where Congress has not spoken, [citations]." (*Southern Pacific Co. v. Arizona (1945) 325 U.S. 761, 768 [89 L. Ed. 1915, 65 S. Ct. 1515]*.) Consequently, where Congress has spoken and specifically authorized the state or local government action, the dormant commerce clause does not apply. (*White v. Mass. Council of Constr. Employers (1983) 460 U.S. 204, 213 [75 L. Ed. 2d 1, 103 S. Ct. 1042]*

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[70] See footnote 36, *ante*.

[71] According to the Web site maintained by the City of Bakersfield Public Works Department, approximately 3,541 dry tons per year of Class B biosolids produced from two treatment plants are applied to 5,000 acres of farmland owned by the city. (<*http://www.bakersfieldcity.us/cityservices/pubwrks/wastewater*> [as of Apr. 1, 2005].) Assuming an even distribution, each square foot of farmland would receive approximately five ounces of Class B biosolids per year.

(*White*).)

The threshold question is whether Ordinance G-6638 is subject to analysis under the dormant commerce clause. [72] This question will be answered in the **[*1609]** affirmative if (1) an article of commerce is involved and (2) Congress did not specifically authorize the adoption of such an ordinance.

[*123]** B. *Article of Commerce*

CA(31)[↑] (31) The United States Supreme Court has held that the processing and disposal of solid waste in landfills is an article of commerce. (*C & A Carbone, Inc. v. Clarkstown (1994) 511 U.S. 383, 391 [128 L. Ed. 2d 399, 114 S. Ct. 1677]*; see *Philadelphia v. New Jersey (1978) 437 U.S. 617, 628 [57 L. Ed. 2d 475, 98 S. Ct. 2531]*; Nowak & Rotunda, Constitutional Law (5th ed. 1995) § 8.8, pp. 299–300 [out-of-state buyers purchased space in landfill, waste was not purchased]; but see Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey* (1991) 20 Cap. U. L.Rev. 813, 829 [trash is not a commodity but a regulated stream to which the commerce clause should not apply].) Sewage sludge differs from solid waste in that economic benefits are realized by farmers using treated sewage sludge as a fertilizer. This difference creates a stronger case for concluding that an article of commerce is involved in transactions concerning the use of sewage sludge on agricultural land. Accordingly, based on the strength of the analogy to solid waste and the commercial value resulting from the application of treated **[***124]** sewage sludge to land, we conclude that ***HN47***[↑] the land application of sewage sludge is an article of commerce for purposes of the commerce clause.

C. *Congress Authorized Local Sewage Sludge Ordinances*

Congress has not been silent on the issue of local regulation of the land application of sewage sludge. Specifically, the Clean Water Act authorizes some degree of local control over the use and disposal of **[**76]** sewage sludge so long as federal regulatory standards are met:***HN48***[↑] "The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to *subsection (d) of this section*, except in accordance with such regulations." (*33 U.S.C.A. § 1345(e)*.)

The regulations of the EPA reiterate this aspect of local control: ***HN49***[↑] "Nothing in this part precludes a State or political subdivision thereof ... from imposing requirements for the use or disposal of sewage sludge more **[*1610]** stringent than the requirements in this part **[***125]** or from imposing additional requirements for the use or disposal of sewage sludge." (*40 C.F.R. § 503.5(b) (2005)*.)

CA(32)[↑] (32) The foregoing statutory and regulatory language must be examined to determine if Congress affirmatively permitted the adoption of a local ordinance like Ordinance G-6638. (*White, supra, 460 U.S. at p. 213* [applicable federal statute and regulations examined to determine if they authorized City of Boston's requirement that

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[72] The parties did not address this threshold question in their initial briefs, but followed the approach used by others in analyzing the validity of local sewage sludge regulation. For example, the parties in a case involving a ban on biosolids application by a county in Virginia appear to have assumed the dormant commerce clause applied and argued whether the sewage sludge ordinance violated a particular test. (*Welch v. Bd. of Sup'rs of Rappahannock County, Va. (W.D.Va. 1995) 888 F. Supp. 753, 758* (*Welch*); see *Synagro-WWT, Inc. v. Rush Tp., Penn. (M.D.Pa. 2002) 204 F. Supp. 2d 827, 842–843* [allegations sufficient to state a claim under two-tiered analysis applied to violations of dormant commerce clause]; Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Envtl. Aff. L.Rev. at pp. 718–727 [discussion of dormant commerce clause does not address whether enactment of Clean Water Act restricts or eliminates application of dormant commerce clause to local sewage sludge regulations]; Harrison & Eaton, *The Role of Municipalities in Regulating the Land Application of Sewage Sludges and Septage* (2001) 41 Nat. Resources J. 77, 112–115 [overview of commerce clause does not address threshold question].) Accordingly, this court requested supplement briefing on this threshold question. (See *Gov. Code, § 68081*.)

construction contracts it entered must be with firms that hire half or more of their workers from Boston].) ***HN50***[↑] "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 [89 L. Ed. 1915, 65 S. Ct. 1515]* (1945)." (*Ibid.*) As the United States Supreme Court has noted, however, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." (*South-Central Timber Dev. v. Wunnicke (1984) 467 U.S. 82, 91 [81 L. Ed. 2d 71, 104 S. Ct. 2237]*.)

CA(33)[↑] (33) ***HN51***[↑] It is unmistakably clear that Congress **[***126]** intended "the manner of disposal or use of sludge [to be] a local determination" so long as minimum federal standards were met. (*33 U.S.C.A. § 1345(e)*.) ***CA(34)***[↑] (34) ***HN52***[↑] It is equally clear that the restriction in Ordinance G-6638—that only sewage sludge meeting the heightened treatment standards can be applied to land in Kern County—reflects a local determination of the manner of disposal or use of sewage sludge. [73] Thus, the heightened treatment standards are the type of local regulation expressly authorized by the Clean Water Act. (Cf. *Welch, supra, 888 F. Supp. at p. 760* [ordinance banning the land application of sewage sludge permissible under Clean Water Act].) Because Congress authorized a local ban on the land application of sewage sludge (*Welch, supra, at pp. 757–758*), one can strongly infer that Congress also authorized local governments to impose a lesser burden on commerce such as the heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638. (See *Posadas de Puerto Rico Assoc. v. Tourism Co. (1986) 478 U.S. 328, 345–346 [92 L. Ed. 2d 266, 106 S. Ct. 2968]* [the greater power to ban an activity necessarily **[***127]** includes the lesser power to impose conditions on the activity].)

In light of the foregoing, plaintiffs' assertion that Ordinance G-6638 is a step **[**77]** towards the balkanization of the sewage sludge industry misses the **[*1611]** mark; the natural consequence of Congress's authorization of local control is variety and inconsistency in the way localities choose to address the subject. What plaintiffs characterize as balkanization is more appropriately characterized as Congress's choosing to exploit one of the strengths of our federal system—its flexibility—by allowing states **[***128]** and localities to (1) experiment with different approaches (see *New State Ice Co. v. Liebmann (1932) 285 U.S. 262, 311 [76 L. Ed. 747, 52 S. Ct. 371]* (dis. opn. of Brandeis, J.) [describing states as laboratories that can experiment with different laws]), subject to the minimum national standard contained in *Part 503*, and (2) adapt their regulations to local conditions, such as geography, climate, soil types and population density.

D. *Discrimination Against Interstate Commerce*

Plaintiffs contend, however, that although Congress has authorized some local determinations concerning the land application of sewage sludge, it has not expressly authorized ordinances that discriminate against interstate commerce. (Cf. *White, supra, 460 U.S. at p. 213* [federal program authorized local favoritism in hiring construction workers as a means for economic revitalization and providing opportunities for the poor, minorities, and unemployed].) We will address this contention by considering whether the Clean Water Act authorized discriminatory local ordinances and, if not, whether Ordinance G-6638 discriminates against interstate commerce.

1. *The Clean Water* **[***129]** *Act does not authorize discrimination*

CA(35)[↑] (35) ***HN53***[↑] The Clean Water Act

[73] Plaintiffs argue the statutory phrase "local determination" refers only to the decisions made by a wastewater treatment agency and excludes ordinances adopted by land use agencies such as County. We reject this statutory construction because, among other things, it cannot be reconciled with the EPA's regulation concerning local imposition of requirements for the use or disposal of sewage sludge. (See *40 C.F.R. § 503.5(b) (2005)*.)

does not explicitly authorize local governmental units to discriminate against sewage sludge that arrives in a state through interstate commerce. (See 33 U.S.C.A. § 1345(e).) Nor is there anything in the statutory language that gives rise to a reasonable inference that Congress intended such a result. Also, County has cited no legislative history revealing such a Congressional intent. Thus, County has failed to establish that Congress demonstrated an unmistakably clear intent to allow discriminatory state regulation of the land application of sewage sludge. (See South-Central Timber Dev. v. Wunnicke, supra, 467 U.S. at p. 91.) Consequently, any discriminatory aspect of a local ordinance regulating the land application of sewage sludge is still subject to scrutiny under the limitation imposed on discrimination by the dormant commerce clause.

2. *Ordinance G-6638 is not facially discriminatory*

CA(36)[↑] (36) HN54[↑] Unless Congress has provided otherwise, an ordinance that discriminates against interstate commerce, as opposed to one that regulates evenhandedly, is virtually always invalid **[***130]** under the dormant commerce clause. (*Oregon [*1612] Waste Systems v. Dept. of Env. Quality (1994) 511 U.S. 93, 99 [128 L. Ed. 2d 13, 114 S. Ct. 1345]* [landfill disposal fees imposed by Oregon statute were higher for waste generated in other states than for waste generated in Oregon and, thus, were facially discriminatory and invalid].) In this context, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (*Ibid.*)

Ordinance G-6638 does not on its face discriminate against interstate commerce, because its provisions apply to the land application of all sewage sludge regardless of its geographical origin. (See Goldfarb, *Sewage Sludge*, *supra*, 26 B.C. Envtl. Aff. **[**78]** L.Rev. at p. 722 ["local ordinance upheld in *Welch* banned all land application of sewage sludge, not just sewage sludge generated out-of-state"].) Consequently, Ordinance G-6638 is distinguishable from a Michigan statute that violated the dormant commerce clause by creating separate categories for in-county and out-of-county solid waste. (*Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources (1992) 504 U.S. 353 [119 L. Ed. 2d 139, 112 S. Ct. 2019]*; **[***131]** see *Philadelphia v. New Jersey, supra, 437 U.S. at p. 624* [New Jersey's prohibition on the importation of solid waste unconstitutional].)

3. *Ordinance G-6638 is not discriminatory in effect*

In addition to facial discrimination, an ordinance may be discriminatory "in practical effect." (*Hughes v. Oklahoma (1979) 441 U.S. 322, 336 [60 L. Ed. 2d 250, 99 S. Ct. 1727]*.) Plaintiffs' claim of discrimination in practical effect is based on an incorrect comparison of the impacts of different regulations, rather than different impacts caused by the challenged ordinance. Plaintiffs compare (a) the effect of the ordinance within the geographical area that comprises the jurisdiction of County to (b) the effect of other regulations, or the lack of regulations, applicable to the incorporated areas of Kern County. The incorporated areas of Kern County are necessarily outside the jurisdiction and authority of County; County's authority extends only to the unincorporated areas within its borders. (See *Cal. Const., art. XI, § 7* HN55[↑] ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict **[***132]** with general laws"]; *City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 274–275 [17 Cal. Rptr. 2d 845]* [only unincorporated area of a county is "within its limits"].) Therefore, the correct comparison is between the impact of the ordinance on sewage sludge generated outside the jurisdictional authority of County and the impact on sewage sludge generated within that area. (See *Associated Industries of Missouri v. Lohman (1994) 511 U.S. 641, 650 [128 L. Ed. 2d 639, 114 S. Ct. 1815]* ["discrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment"].) In this case, the ordinance's burden on the sewage sludge **[*1613]** industry is the same without regard

to the place of origin of the sewage sludge. Sewage sludge, regardless of whether it originates in Kern County, other counties in California, or out of state must be treated to the same standards before it is allowed to be applied to land in the unincorporated areas of Kern County.

Plaintiffs stated at oral argument that discrimination in practical effect occurred because no in-county producer of sewage sludge needed access to land within the unincorporated area **[***133]** of Kern County to dispose of its sewage sludge. This argument is rejected because it is factually inaccurate. The administrative record contains a letter from the City of Shafter indicating that it had applied biosolids from its treatment plant to neighboring agricultural land that was in the unincorporated area of Kern County.

Consequently, plaintiffs have failed to meet their burden of showing that the ordinance, in practical effect, treats out-of-state economic interests [74] **[***134]** differently than **[**79]** in-state economic interests. (See *Pacific Merchant Shipping Assn. v. Voss (1995) 12 Cal.4th 503, 517 [48 Cal. Rptr. 2d 582, 907 P.2d 430]* [party raising commerce clause challenge has burden of showing discrimination].) In other words, plaintiffs have failed to show that Ordinance G-6638 causes an out-of-county producer of sewage sludge to be at a disadvantage to an in-county producer of sewage sludge in the competition among those producers to acquire the right to place their sewage sludge on agricultural land located in the unincorporated areas of Kern County. [75]

Plaintiffs condemn Ordinance G-6638 as illegitimate economic protectionism prohibited by the commerce clause. But the possibility that the reputation of agricultural produce from Kern County benefited from the enactment of Ordinance G-6638 is not enough to violate the commerce clause. First, Ordinance G-6638 still falls within the scope of what Congress authorized. Second, the possibility that consumers might view Kern County produce more favorably does not render the ordinance discriminatory against interstate commerce from the perspective of (1) in-county farmers who are selling sewage sludge disposal services and applying biosolids to their land in the unincorporated areas of Kern County or (2) the producers of sewage sludge, regardless of their location, that are buying sewage sludge disposal services. RBM focuses on the farmers who applied Class B biosolids and argues **[*1614]** Ordinance G-6638 had the practical effect of discriminating against them for the benefit of farmers who **[***135]** claimed the reputation of their products was harmed by allowing the land application of Class B biosolids in Kern County. This theory of discrimination and protectionism fails because all in-county farmers are subject to the same practical effect of Ordinance G-6638—they can no longer apply Class B biosolids to their land. Furthermore, this result was not achieved at the expense of out-of-state competition. (See *Hunt v. Washington Apple Advertising Comm'n (1977) 432 U.S. 333 [53 L. Ed. 2d 383, 97 S. Ct. 2434]* [out-of-state competition improperly discriminated against by North Carolina statute that prohibited sale of closed apple containers displaying another state's grading classification]; see also *Oregon Waste Systems v. Dept. of Env. Quality, supra, 511 U.S. at pp. 106–107.*)

E. *Burden on Interstate Commerce*

As we have stated, though the Clean Water Act does not authorize discrimination against interstate commerce, it does explicitly authorize local governmental entities to regulate the land application of sewage sludge. Because Congress

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[74] If Ordinance G-6638 were shown to discriminate against out-of-county interests, that discrimination, by definition, would include discrimination against out-of-state interests. (See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, supra, 504 U.S. 353.*) Thus, even though the record does not show any sewage sludge originating outside California was ever shipped to Kern County, we will treat plaintiffs' arguments as implicating interstate commerce.

[75] This lack of discrimination also means the heightened treatment standards do not violate the ***equal protection clause.***

has specifically and unmistakably authorized nondiscriminatory local ordinances like Ordinance G-6638, our analysis **[***136]** of the dormant commerce clause need not consider "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc., 397 U.S. 137, 142 [25 L. Ed. 2d 174, 90 S. Ct. 844]* (1970)." (*C & A Carbone, Inc. v. Clarkstown, supra, 511 U.S. at p. 390.*) Application of the *Pike* test is inappropriate in this case because the enactment of the Clean Water Act reflects a determination by Congress that local regulation is appropriate, which necessarily implies that localities have a legitimate purpose in regulating the use and disposal of **[**80]** sewage sludge within their jurisdictional boundaries and that the local benefits from such a regulation outweigh any nondiscriminatory burdens on interstate commerce that might result.

V. *California Constitutional Limitations on Exercise of Police Power*

Plaintiffs contend that the Kern County Board of Supervisors failed to consider the effect of the ordinance on surrounding areas beyond the borders of Kern County, and that this failure renders the ordinance a defective exercise of the police powers granted to County by the **[***137]** California Constitution. (See *Cal. Const., art. XI, § 7* ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].)

CA(37)[↑] (37) ***HN56***[↑] The California Supreme Court has identified the standard for determining whether the adoption of a land use restriction is a valid exercise of the **[*1615]** police power granted under the California Constitution. An ordinance is valid "if it is fairly debatable that the [land use] restriction in fact bears a reasonable relation to the general welfare." (*Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 601 [135 Cal. Rptr. 41, 557 P.2d 473].*) The "general welfare" that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance. "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." (*Ibid.*)

In ruling against the plaintiffs on this claim, the superior court stated "that OCSD has not **[***138]** presented any evidence of the impact on the entire region as is required pursuant to *Associated Home Builders* ... ." The superior court observed that the administrative record did not contain a study of the ordinance's regional impact and found OCSD was collaterally estopped from raising the issue again because it had already been presented in the CEQA portion of the lawsuit.

We previously held that the imposition of heightened treatment standards in Kern Code provision 8.05.040(A), Ordinance G-6638, was not valid under CEQA. An EIR should have been prepared because plaintiffs presented substantial evidence to support a fair argument that the heightened treatment standards might have a significant effect on the environment, including effects occurring outside Kern County. (See part II.A., *ante*.) Assuming for purposes of argument that County exceeded the limitations imposed by the California Constitution on the exercise of police power when it adopted Ordinance G-6638, the preparation of the EIR required by this decision would have the effect of addressing the alleged failure to consider the general welfare outside Kern County. Therefore, we need not rule separately on this constitutional **[***139]** challenge to the heightened treatment standards.

VI. *The Biosolids Impact Fee Violates Vehicle Code Section 9400.8*

Vehicle Code section 9400.8 provides in pertinent part: ***HN57***[↑] "Notwithstanding any other provision of law, ... no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit

fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989." [76]

[*1616] [81]** In moving for summary adjudication of issues, OCSD asserted that the biosolids impact fee was invalid because it was barred by *Vehicle Code section 9400.8.* **[***140]** The superior court denied summary adjudication and ruled "[t]his issue was not raised by OCSD's pleadings and the pleadings control. Pleadings must give notice of the claim. [Citation.]" OCSD raised the issue again at trial and requested leave to amend its complaint. The superior court denied this request and stated that "[a]mendment at this time would be unduly prejudicial to ... County."

Plaintiffs contend that the complaint raised the preemption issue, although it did not specifically reference *Vehicle Code section 9400.8*, and that the superior court's refusal to consider the issue at the motion for summary adjudication or at trial was a prejudicial abuse of discretion. County argues that plaintiffs' claim is procedurally defective because they did not exhaust their administrative remedies and failed to file a timely motion to amend their complaint. County also asserts that the biosolids impact fee imposed by the ordinance is a bona fide impact fee and not a fee for the privilege of using the streets and highways in Kern County. [77]

[*141]** ***CA(38)***[↑] (38) ***HN58***[↑] We independently review issues of statutory construction and the application of that construction to a set of undisputed facts as questions of law. (*Twedt v. Franklin (2003) 109 Cal.App.4th 413, 417 [134 Cal. Rptr. 2d 740]*.)

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[76] This statutory provision became operative because voters approved Senate Constitutional Amendment No. 1 of the 1989–1990 Regular Session (Prop. 111) at the June 5, 1990, primary election. (See *San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.4th 571, 583, fn. 13 [7 Cal. Rptr. 2d 245, 828 P.2d 147]*.)

[77] The provisions of Ordinance G-6638 relevant to the biosolids impact fee are contained in Kern Code provisions 8.05.020(F) and 8.05.030(H), which expired on December 31, 2002. (See FACTS AND PROCEEDINGS, *ante*.)

A. *Exhaustion Doctrine*

County asserts that plaintiffs did not raise *Vehicle Code section 9400.8* during the administrative proceedings and, as a result, "are barred by the exhaustion doctrine from seeking judicial review of this claim. (*Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1197–1198 [200 Cal. Rptr. 855]*.)"

Coalition for Student Action v. City of Fullerton did not involve a claim that a local ordinance was preempted by a state statute. (See *Coalition for Student Action v. City of Fullerton, supra, 153 Cal. App. 3d 1194*.) In that case, the plaintiffs failed to assert CEQA violations at the administrative level and then sought to set aside approval of construction plans based on alleged violations of CEQA. The superior court denied their petition for a writ of mandate based on the failure to exhaust administrative remedies, and the Court of Appeal affirmed. **[***142]** (*Id. at p. 1198*.) **[*1617]**

Alleged violations of CEQA are distinguishable from alleged violations of *Vehicle Code section 9400.8* because (1) CEQA expressly requires the exhaustion of administrative remedies (*§ 21177*; see Remy, Guide to CEQA, *supra*, pp. 578–588 [exhaustion of administrative remedies] and (2) compliance with CEQA is first determined by a public agency rather than the courts. In contrast, a claim that an ordinance violates *Vehicle Code section 9400.8* is not given to the exclusive jurisdiction of a county's board of supervisors. (See *Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390–391 [6 Cal. Rptr. 2d 487, 826 P.2d 730]* [exhaustion doctrine applies where an agency alone has jurisdiction over a case].) In asserting its **[**82]** theory of exhaustion, County has not shown that there was an available administrative procedure for asserting the ordinance violated the prohibition contained in *Vehicle Code section 9400.8*. (See *People v. Beaumont Inv., Ltd. (2003) 111 Cal.App.4th 102, 125 [3 Cal. Rptr. 3d 429]* [exhaustion doctrine does not apply in the absence of an available

administrative remedy].) [***143] The coincidental existence of a CEQA administrative procedure did not confer exclusive jurisdiction over the preemption challenge on the Kern County Board of Supervisors, or require the preemption challenge to be raised in the CEQA proceeding, before a court could obtain jurisdiction over such a challenge.

CA(39)[↑] (39) Accordingly, we hold that HN59[↑] the doctrine of exhaustion of administrative remedies does not apply to the claim that the biosolids impact fee imposed by the ordinance is preempted by *Vehicle Code section 9400.8*.

B. *Mitigation Fee Act Does Not Apply to the Biosolids Impact Fee*

County asserts that the biosolids impact fee was adopted by County pursuant to the Mitigation Fee Act, *Government Code section 66000 et seq.* and therefore the prohibition in *Vehicle Code section 9400.8* does not apply.

CA(40)[↑] (40) We do not address the issues of statutory construction raised in connection with the Mitigation Fee Act in detail because the prohibition on certain fees contained in *Vehicle Code section 9400.8* is not overridden by the Mitigation Fee Act. HN60[↑] *Vehicle Code section 9400.8* [***144] expressly states that its prohibition applies "[n]otwithstanding any other provision of law." The Mitigation Fee Act was in effect at the time *Vehicle Code section 9400.8* became operative and thus was among the other provisions of law covered by the quoted phrase. In short, despite the existence of the Mitigation Fee Act, a local agency may not impose a charge for the privilege of using its streets and highways.

C. *Prejudice and Leave to Amend to Reference Specific Code Section*

CA(41)[↑] (41) The superior court found that allowing plaintiffs to amend their pleadings to assert a violation of *Vehicle Code section 9400.8* would prejudice County. This finding is not supported by any evidence. Indeed, County [*1618] did not even assert it experienced prejudice in its trial brief, reply trial brief, or appellate brief. HN61[↑] "A pleading may be amended at the time of trial unless the adverse party can establish prejudice. [Citation.] Where a party is allowed to prove facts to establish one cause of action, an amendment which would allow the same facts to establish another cause of action is favored, and a trial court abuses its discretion by prohibiting [***145] such an amendment when it would not prejudice another party. [Citations.] A variance between pleading and proof does not justify the denial of an amendment to conform pleading to proof unless the unamended pleading 'misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' [Citations.]" (*Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1303 [242 Cal. Rptr. 324]*, overruled on another ground in *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1248–1251 [32 Cal. Rptr. 2d 223, 876 P.2d 1022]*.)

CA(42)[↑] (42) HN62[↑] As a general rule, where the evidence to support the cause of action in the amendment is already before the court, the opposing party will not experience prejudice if the amendment is allowed. (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 12:394, p. 12-79 (rev. # 1, 2004).) In this case, the general rule applies because the evidence relied upon by [**83] plaintiffs was contained in the administrative record and was discussed before the superior court in connection with the constitutional challenges raised against the biosolids impact fee. In addition, County has not shown that the lack of a specific reference [***146] to *Vehicle Code section 9400.8* in the complaint misled it in the presentation of its defense, either in terms of the evidence it would have produced or in a manner not related to evidence. Thus, County has not shown that this situation falls within an exception to the general rule. Accordingly, we conclude that plaintiffs should have been allowed to assert that the biosolids impact fee was prohibited by *Vehicle Code section 9400.8*.

D. *Vehicle Code Section 9400.8 Preempts the Biosolids Impact Fee*

HN63[↑] The general principles governing state law preemption of a local ordinance were set forth by the California Supreme Court in *Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893 [16 Cal. Rptr. 2d 215, 844 P.2d 534]* as follows:

CA(43)[↑] (43) "'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.] [¶] Local legislation is 'duplicative' of general law when it is coextensive **[***147]** therewith. [Citation.]

[*1619] "Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]

"Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality. [Citations.]" (*Sherwin-Williams Co. v. City of Los Angeles, supra, 4 Cal.4th at pp. 897–898*.)

CA(44)[↑] (44) ***HN64***[↑] By adopting *Vehicle Code section 9400.8*, the Legislature expressly **[***148]** prohibited a county from "impos[ing] a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads ... ." (*Ibid.*) This language raises two questions of statutory construction. First, was the biosolids impact fee a "tax, permit fee, or other charge"? Second, do fees "for the privilege of using its streets or highways" [78] include fees designed to cover damage resulting from the use of a county's roads?

County does not argue that the biosolids impact fee was not a "permit fee or other charge" for purposes of *Vehicle Code section 9400.8*. The parties' dispute focuses on the second issue. County specifically **[**84]** argues the fee was not for road use, but was a bona fide impact fee: "The **[***149]** fee is imposed only on permittees to recover the costs for repairing damage or upgrading county roads due to the incremental increase in truck traffic transporting biosolids to be land applied in Kern County."

In describing the underlying basis for the fee, County states in its appellate brief that it "commissioned an engineering firm to determine the condition of local roads used for biosolids transport, the volume of traffic attributable to trucks hauling biosolids on ... those roads, and the estimated cost of maintaining the roads in their current condition. [Citation.] The study specifically identified the roads affected, the length of the road segments, the required thickness of paving overlay needed to maintain them, and the price **[*1620]** of the required materials. [Citation.] Based on this information, ... County determined the amount of the fee needed to pay the estimated cost of the required maintenance. [Citation.]"

County explicitly argues that a fee for the privilege of using its roads is distinguishable from a fee "for mitigating the impacts to the ... County infrastructure shown to be caused by the transport

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[78] ***HN65***[↑] "Highway" and ***HN66***[↑] "street" are both defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." (*Veh. Code, §§ 360, 590.*)

of Biosolids." (Ordinance G-6638, Kern Code provision 8.05.020(F) [definition [***150] of biosolids impact fee].) Whether such a distinction should be recognized is a matter of statutory construction.

CA(45)[↑] (45) HN67[↑] A reviewing court's fundamental task in determining the meaning of a statute "is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.]" (*Day v. City of Fontana (2001) 25 Cal.4th 268, 272 [105 Cal. Rptr. 2d 457, 19 P.3d 1196]*.) The analysis starts with an examination of the actual words of the statute, giving them their usual, ordinary meaning. (*Garcia v. McCutchen (1997) 16 Cal.4th 469, 476 [66 Cal. Rptr. 2d 319, 940 P.2d 906]*.) A court may refer to the definitions contained in a dictionary to obtain the usual and ordinary meaning of a word. (*Martinez v. Enterprise Rent-A-Car Co. (2004) 119 Cal.App.4th 46, 54, fn. 3 [13 Cal. Rptr. 3d 857]*.)

Webster's Third New International Dictionary (1986), page 2524, states the verb "use" "is general and indicates any putting to service of a thing, usu. for an intended or fit purpose ... ." This definition is quite broad because it covers "*any* putting to service" (italics added). If the Legislature employed the literal meaning of this definition, then the "privilege of using" a road would cover the privilege of putting that road [***151] to service. Because trucks hauling loads within the legal weight limit are putting to service the roads over which they travel and they have the privilege of traveling over those roads as a result of being properly licensed and registered, it follows that a literal reading of the phrase the "the privilege of using [a county's] streets or highways" includes driving a truck on a road even if it causes incremental damage to the road. In other words, a road maintenance or impact fee is simply one type of fee for the privilege of using a road.

Before adopting the literal meaning of the word "using," we must check the resulting statutory construction to determine if it comports with, or frustrates, the purpose of the statutory scheme. (See *Torres v. Automobile Club of So. California (1997) 15 Cal.4th 771, 777 [63 Cal. Rptr. 2d 859, 937 P.2d 290]* [statutory language must be construed in context by referring to the nature and purpose of the statutory scheme as a whole]; *Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 645 [335 P.2d 672]* [legislative purpose will not be sacrificed to a literal construction].) [*1621]

[**85] First, neither *Vehicle Code section 9400.8* [***152] nor the remainder of article 3 of chapter 6 of division 3 of the Vehicle Code—which addresses weight fees assessed at vehicle registration—contains an express exception for local fees or charges that attempt to recover damage to streets or highways caused by vehicle use.

Second, such an exception cannot be implied. *Vehicle Code section 9400.8* expressly creates an exception for "extra legal loads" and authorizes local agencies to collect a permit fee for those types of loads. Because the exception for extra legal loads shows the Legislature was capable of expressing its intent to except certain uses, it creates the inference that the Legislature did not intend any exceptions that were not expressly stated. (See *Code Civ. Proc., § 1858* [judge may not insert what Legislature has omitted]; see *Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1230 [32 Cal. Rptr. 2d 19, 876 P.2d 505]* [express statutory exemptions generally preclude implied exemptions].)

Third, *Vehicle Code section 9400.8* is part of article 3 of chapter 6 of division 3 of the Vehicle Code. Division 3 concerns the registration of vehicles and [***153] certificates of title. Chapter 6 addresses registration and weight fees. Article 3, which includes *Vehicle Code sections 9400 through 9410*, concerns weight fees. For example, *subdivision (b) of Vehicle Code section 9400* sets forth registration fees based on unladen weight for commercial motor vehicles with not more than two axles, and *subdivision (c)* does the same for

commercial motor vehicles with three or more axles and certain trailers and dollies. [79] Thus, it appears that *Vehicle Code section 9400.8* is part of a statutory scheme that regulates fees based on vehicle weight. [80] This statutory scheme as set forth in article 3 of chapter 6 of division 3 of the Vehicle Code, and the Legislature's statement in the legislation that added *section 9400.8* to the Vehicle Code that "[n]othing in this act shall be construed to allow local governments to impose fees not otherwise authorized by statute" (Stats. 1989, ch. 1337, § 4, p. 5498), support the conclusion that the Legislature intended to fully occupy the field of fees related to the weight of vehicles carrying legal **[***154]** loads.

[*1622] In opposition to the foregoing reasoning, County has cited no case law, legislative history, published legal opinion of the **[***155]** Attorney General, treatise, article or other authority that adopts or endorses the distinction between fees for the privilege of using roads and fees that recover damages caused by a specific type of road use. Nor has County offered an explanation as to how such a distinction would further the purpose of the statutory scheme. In other words, County has not shown the Legislature intended to allow local agencies to charge fees for road use that causes incremental damage to the roads.

CA(46)[↑] (46) Accordingly, ***HN68***[↑] *Vehicle Code section 9400.8* must be construed to prohibit a local agency from imposing fees or charges on legal **[**86]** loads that are hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear to the roads.

The final step of our analysis is to determine if the biosolids impact fee was in fact the type of fee prohibited by *Vehicle Code section 9400.8*. This is necessary because, on its face, the biosolids impact fee was not assessed on miles driven on roads. Instead, the biosolids impact fee was assessed primarily on tons of Class B biosolids applied to land in the unincorporated areas of Kern County. Although this **[***156]** basis of assessment is attenuated from actual road use, that attenuation is insufficient to save the entire biosolids impact fee. The undisputed facts in the administrative record establish that the per-ton amount of the biosolids impact fee was derived from (1) the miles of Kern County roads used in the hauling of biosolids, [81] (2) the quality of those roads, [82] (3) an estimate of the total weight of Class B biosolids that would be hauled before the January 1, 2003, deadline, (4) the load and volume of nonbiosolid traffic experienced by the road segments, and (5) the amount of load and volume of traffic added to each road segment by the transport of biosolids. The funds generated by the biosolids impact fee were to be used to maintain and repair roads and correct any other "infrastructure deficiencies directly associated with the hauling of Biosolids" (Ordinance G-6638, Kern Code provision 8.05.030(H)(3)), but also were available for other purposes not related to roads and other infrastructure.

[*157]** ***CA(47)***[↑] (47) The way County calculated the biosolids impact fee and the way funds generated could be applied leads inescapably to the conclusion that the fee was, at least in part, a

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[79] *Vehicle Code section 9400.1* became effective on September 29, 2000, and sets forth a range of fees based on gross vehicle weight for commercial motor vehicles with declared gross vehicle weight of 10,001 pounds or more. (Stats. 2000, ch. 861, § 50.)

[80] The commercial weight fees collected under this statutory scheme are deposited with the State Treasurer, who, on order of the Controller, shall deposit the money in the State Highway Account in the State Transportation Fund. (*Veh. Code, § 42205, subd. (a)*.) Funds from the commercial weight fee not used to cover the administration costs related to the fee may be appropriated by the Legislature to various uses including the maintenance and construction of public streets and highways. (*Veh. Code, § 42205, subd. (b)*; see *Cal. Const., art. XIX, §§ 1, 2*.)

[81] An inventory of those roads established their total length at 153.5 miles.

[82] The roads were classified into three categories. According to the biosolids staff report dated October 5, 1999, issued by the County Resource Management Agency, category 3 roads were designed for heavy truck traffic and, as a result, "[t]he increased truck traffic due to the biosolids transport [would] not have any noticeable effect on the structural integrity of these roads."

fee imposed on road use. This conclusion is reinforced by the exception in Kern Code provision 8.05.03(H)(1), Ordinance G-6638, **[*1623]** that allows a waiver of the fee "[w]here the Permitee can demonstrate the land application of Biosolids does not have an impact on County infrastructure or roads." Because the primary purpose of the biosolids impact fee was to collect funds based on the use of streets or highways located in Kern County, it violated *Vehicle Code section 9400.8*.

E. *Remedy*

Although the primary purpose of the biosolids impact fee was to pay for road repair and maintenance, that was not its exclusive purpose. Kern Code provision 8.05.030(H)(3), Ordinance G-6638, was in effect from January 1, 2000, through December 31, 2002, and stated that the money generated by the biosolids impact fee and other permit fees would be available to fund a number of different uses, some of which were not related to the impact of hauling biosolids over County roads.

Because of these multiple purposes, we asked **[***158]** OCSD and County to submit supplemental letter briefs on the issue of what relief is appropriate when an ordinance imposes a fee for more than one purpose and one of the purposes conflicts with a statute and other purposes do not. We asked OCSD and County whether the superior court should be directed to (1) uphold the entire biosolids impact fee, (2) invalidate the entire fee, or (3) determine what portion of the fee, if any, was or will **[**87]** be used for purposes not contrary to *Vehicle Code section 9400.8* and allow that portion to stand.

The first alternative—upholding the entire fee based on the existence of some potentially valid uses of the funds generated by that fee—is not appropriate because such a remedy would allow public agencies to adopt fees with illegal purposes and save those fees from invalidation by appending one valid purpose for which the fees could be used. Thus, when a fee has both valid and invalid purposes, the entire fee cannot be upheld as valid. Conversely, it would be unduly harsh to completely invalidate a fee when part of the funds would be used for proper purposes and the formula by which the fee is calculated—in this case, tons of **[***159]** biosolids applied to the unincorporated areas of Kern County—does not itself run afoul of a statutory prohibition. [83]

CA(48)[↑] (48) Accordingly, we hold ***HN69***[↑] the appropriate relief when a fee is imposed for both valid and invalid purposes is to uphold the fee to the extent that the funds generated are applied to valid purposes and those purposes are otherwise severable from the invalid ones. (See *Williams Communications v. City [*1624] of Riverside (2003) 114 Cal.App.4th 642, 656–660 [8 Cal. Rptr. 3d 96]* [unlawful portion of school facilities fee imposed on developer ordered refunded under *Gov. Code, § 66020, subd. (e)*].) [84]

[*160]** In this case, Ordinance G-6638 expressly stated that (1) the invalidity of any of its provisions would not affect the validity of its other provisions and (2) its provisions were severable. (See *City and County of San Francisco v. Flying Dutchman Park, Inc. (2004) 122 Cal.App.4th 74, 79 [18 Cal. Rptr. 3d 532]* [illegal allocation did not require invalidation of entire parking tax ordinance or reduction of parking tax arrearages because offending clause was severable under ordinance's savings clause].) Furthermore, the rate used to determine the biosolids impact fee as well as the funds generated by the fee are inherently divisible, at least down to the penny. We conclude that the appropriate relief is to invalidate the biosolids impact fee to the extent it was or will be used for purposes that violated *Vehicle Code section 9400.8*.

OCSD contends this court should direct the

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[83] A stronger argument for invalidating the entire fee might exist if the formula by which the fee is applied to the public were itself contrary to a statute.

[84] *Government Code section 66020* is not applicable to the biosolids impact fee, but it provides a useful analogy for determining the appropriate relief in this case.

superior court to invalidate the entire biosolids impact fee and order a refund of that fee with interest. Recognizing that Kern Code provision 8.05.030(H)(3), Ordinance G-6638, created the possibility of valid purposes mixed with invalid purposes, OCSD asserts: "To the extent that ... 8.05.030(H)(3) **[***161]** could be read as authorizing the use of biosolids impact fees for property inspections or the GIS tracking system, then the annual permit fee would have to be reduced and the overpayment would have to be refunded—the County cannot recover the same cost twice."

OCSD's assertion is based on the factual premise that the annual permit fees collected were sufficient to pay for all of the valid uses and, therefore, the funds generated by the biosolids impact fee were not needed, and will not be budgeted, for valid uses. We are unable to confirm this factual premise based on the current appellate record.

Relief in the form of apportionment or allocation between valid and invalid purposes cannot be granted without further **[**88]** findings of fact. Therefore, this matter will be remanded to the superior court for further proceedings to consider how the funds generated by the biosolids impact fee were spent or will be spent and how to separate the valid applications of funds, if any, from the invalid applications. [85]

[*162]** **[*1625]** Because of the relief that will be granted on remand, we need not address the claims that the biosolids impact fee violated the *equal protection clause of the United States Constitution* and constituted an illegal general or special tax. (See fn. 37, *ante*; see also *Waters-Pierce Oil Co. v. City of Hot Springs (1908) 85 Ark. 509 [109 S.W. 293]* [taxing vehicles differently based on contents—petroleum products, ice or other—instead of capacity and size unconstitutional].) On one hand, if all or a portion of the biosolids impact fee is invalidated under *Vehicle Code section 9400.8*, then addressing other grounds of invalidity would be redundant. On the other hand, if all or a portion of the biosolids impact fee was or will be allocated to expenditures specifically related to County's biosolids regulatory program, then a rational basis exists for imposing a per ton fee on Class B biosolids and not imposing a per ton fee on other materials carried by truck. The existence of a rational basis for distinguishing between biosolids and other materials means the distinction does not violate equal protection. (See *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal.App.4th 597, 605 [6 Cal. Rptr. 3d 574]* **[***163]** [equal protection claims are based on the lack of a rational basis for treating similarly situated persons differently].) Similarly, funds allocated to valid uses do not constitute illegal general or special taxes. (See *City of Dublin v. County of Alameda, supra, 14 Cal.App.4th 264* [county landfill $ 6 per ton surcharge valid as a reasonably necessary charge for cost of the program].)

VII. *County's Cross-action*

County's cross-action alleged that a number of contracts and contract extensions entered by CSDLAC, CLABS, and OCSD relating to the transport and disposal of biosolids were projects for purposes of CEQA, and that some level of CEQA review should have been performed before they were entered. Environmental assessment was required, according to County, because the new contracts and extensions were either separate projects or modifications of prior projects that may have triggered the need for a subsequent EIR, supplemental EIR or subsequent negative declaration.

[85] Deciding these broad questions may involve the consideration of a wide variety of specific factual and legal issues. For example, if the terms of section 3 of Ordinance G-6638, Kern Code provision 8.05.040(M) are construed to allow the biosolids impact fee to be used to pay costs and expenses incurred in "enforcement activities," then funds from the biosolids impact fee might appropriately be allocated to cover various amounts expended in connection with *Kern County Environmental Health Services v. Arciero Ranches* (Aug. 9, 2001, F035181) (nonpub. opn.). These issues and others are best addressed in the first instance by the superior court.

The superior court ruled against County on all of the causes of action in its cross-action and concluded that (1) some of the actions by the sanitation agencies were covered by program [***164] EIR's that did not require additional CEQA documentation, (2) the Central Valley Water Board rather than the sanitation agency was the lead agency for some of the projects, and (3) CEQA review of an option to purchase real estate was premature under the [*1626] provisions of Guidelines section 15004 [**89] . County appealsfrom the rulings related to nine contracts. [86]

A. *Mootness of Expired Contracts and Extensions*

CA(49)[↑] (49) The termination dates for some of the contracts and extensions have passed since the ruling by the superior court. Consequently, we directed the parties to submit supplemental letter briefs on the question whether County's CEQA challenges to those contracts or extensions are moot. HN70[↑] The standard this court applies in determining the mootness of a CEQA appeal is whether any effective relief can be granted the appellant. (*Association for a Cleaner Environment v. Yosemite Community College Dist., supra, 116 Cal.App.4th 629* [***165] [question whether initial study should have been prepared was not moot]; *Woodward Park Homeowners Assn. v. Garreks, Inc. (2000) 77 Cal.App.4th 880, 888–889 [92 Cal. Rptr. 2d 268]* [completing and opening car wash project for operations while appeal was pending did not render preparation of EIR moot because modification or removal of project remained possible].)

1. *Extension of CSDLAC-Yakima Agreement*

On November 9, 1994, CSDLAC and Yakima Company (Yakima) entered into an agreement for the removal, transportation and reuse of biosolids (Yakima Agreement) pursuant to which biosolids produced at the Carson Plant would be transported to Kern County and applied to a specific site owned and cultivated by the Buttonwillow Land and Cattle Company. The Yakima Agreement required Yakima to (1) obtain all the necessary licenses, permits and other approvals needed to perform the agreement, (2) keep complete records, (3) conduct testing of soil, groundwater and plant tissue, (4) provide CSDLAC access to the site and records for inspection purposes, (5) provide CSDLAC with copies of all regulatory reports, and (6) maintain insurance. Yakima agreed to remove up to 1,000 wet tons of [***166] biosolids per week from CSDLAC's treatment plant and was paid $ 25 per wet ton.

The Yakima Agreement began on November 9, 1994, remained effective for a period of three years, and provided for two 3-year renewal periods upon agreement of Yakima and CSDLAC's chief engineer. Yakima was granted the right to terminate the Yakima Agreement by giving 24 hours' notice if it could no longer legally perform the required services.

In October 1997, CSDLAC and Yakima agreed to the first extension of the Yakima Agreement. Almost two years later, in a letter dated September 16, [*1627] 1999, CSDLAC stated: "The first three-year extension was granted and will expire on November 8, 2000. Due to the current uncertain situation involving proposed ordinances in the County of Kern, which may place restrictions on the land application of biosolids, [CSDLAC's] preference is to extend the contract through the second allowable three-year period. It is our understanding that Yakima is interested and will participate in this arrangement at the original biosolids management fee of $ 25.00 per wet ton."

Yakima agreed to the second extension by countersigning the letter and, as a result, the termination [***167] date of the extended contract became November 8, 2003.

[**90] a. *Previous CEQA review and documentation*

[86] The first, second, fourth, seventh, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action of County's cross-action each address one of the nine contracts.

CSDLAC's final program EIR for the "Joint Outfall System 2010 Master Facilities Plan, June 1995" (1995 final Program EIR), discussed the Yakima Agreement: "Since circulation of the draft EIR, some changes in the reuse sites have occurred. ... Ag Tech has opened an additional land application site near Delano, California, that now receives some of the Districts' biosolids. The Districts also have initiated new land application contracts with the Yakima Company near Buttonwillow, California; McCarthy Family Farms near Corcoran, California; and one short-term contract with Bio Gro Systems near Blythe, California." The 1995 final Program EIR also stated that in January 1995, approximately 1,699 wet tons per week were delivered to McCarthy Family Farms and 580 wet tons per week were delivered to Yakima Company.

CSDLAC's draft Program EIR recognized that NOx emissions generated by trucks transporting biosolids from the Carson Plant to disposal or use sites would be considered a significant impact under the thresholds adopted by the South Coast Air Basin and the Southeast **[***168]** Desert Air Basin. To mitigate this impact, CSDLAC stated it would perform maintenance on its trucks at least as frequently as recommended by the manufacturer.

The 1995 final Program EIR also references the mitigated negative declarations from the Central Valley Water Board obtained by McCarthy Family Farms and Yakima Company in connection with the permits that authorize them to land apply biosolids. More specifically, the Central Valley Water Board adopted resolution No. 95-011 approving the initial study and adopting a mitigated negative declaration for the issuance of a WDR relating to Yakima Company's application of biosolids to 1,372 acres of farmland in Kern County.

Based on the 1995 final Program EIR and the mitigated negative declaration of the Central Valley Water Board, CSDLAC contends that both the **[*1628]** hauling and the land application aspects of the extension of the Yakima Agreement were covered by CEQA documents and that further CEQA review was unnecessary. In contrast, County argues that CSDLAC violated CEQA by (1) approving the extension of the Yakima Agreement without performing the review required by Guidelines *section 15168* and (2) failing to prepare a subsequent or supplemental **[***169]** EIR that analyzed the extension.

b. *Mootness*

In responding to our inquiry, both parties have agreed that the November 8, 2003, termination date rendered County's CEQA challenge to the extension of the Yakima Agreement moot. (See *Giles v. Horn (2002) 100 Cal.App.4th 206 [123 Cal. Rptr. 2d 735]* [challenges to county contracts moot because contracts had been fully performed and had expired].) County, however, asserts that we should exercise our discretion to address the controversy because of its importance and the likelihood similar controversies will recur. We also conclude the challenge to the Yakima Agreement is moot. Furthermore, we decline County's invitation to render an advisory opinion because the future disputes between County and CSDLAC regarding CSDLAC's disposal activities are likely to be factually distinct. Thus, any ruling made now would do little to prevent future disputes from arising.

2. *CLABS Contract No. C-87685*

In January 1994, CLABS entered contract No. C-87685 (Contract C-87685) with **[**91]** Gardner-Arciero for the loading, transporting and beneficial use of biosolids produced by CLABS. Gardner-Arciero applied the biosolids to farms near Cantil, **[***170]** California. On February 11, 2000, the Los Angeles City Council approved amendment No. 3 to Contract C-87685, which included an extension of the contract through February 14, 2003. The second cause of action in County's cross-action alleged CLABS violated CEQA by failing to perform any environmental review before approving the amendment of Contract C-87685. The superior court rejected the second cause of

action and ruled (1) the Central Valley Water Board, not CLABS, was the lead agency for the project, (2) the contract had been reviewed under a program EIR prepared by CLABS, and (3) the amendment did not expand the project in a way that required additional review under CEQA.

The date for the expiration of the amendment to Contract C-87685 has passed, but County asserts its CEQA claim regarding the amendment of Contract C-87685 is not moot unless that contract cannot be renewed or extended.

As with the CSDLAC-Yakima Agreement, we conclude that County's CEQA challenges to CLABS's February 11, 2000, approval of amendment **[*1629]** No. 3 to Contract C-87685 is moot because the contract is no longer in effect. (See *Giles v. Horn, supra, 100 Cal.App.4th 206*.) Moreover, the mere **[***171]** prospect that Contract C-87685 or a similar contract might become operative because of future actions taken by CSDLAC and Gardner-Arciero does not create an actual, present controversy.

3. *CLABS Contract No. C-94375*

In October 1996, CLABS entered contract No. C-94375 (Contract C-94375) with RBM and Valley Communities, Inc. (collectively, RBM-Valley) for the loading, transporting and beneficial use of biosolids produced at the Terminal Island and Hyperion treatment plants. RBM-Valley agreed to load CLABS's biosolids onto its trucks, transport the biosolids to RBM-Valley's sites, unload the biosolids at designated sites, and beneficially use the biosolids in accordance with applicable laws and regulations. The term of Contract C-94375 was to run for three years from the date of the first load.

On October 26, 1999, the Los Angeles City Council approved an amendment of Contract C-94375 to provide CLABS the option of renewing it for two additional three-year terms, the first of which would be from October 31, 1999, through October 30, 2002. The first cause of action in County's cross-action alleged the extension of Contract C-94375 was a project for purposes of CEQA, and CLABS violated CEQA **[***172]** by failing to perform any environmental review before approving the extension. The superior court rejected this claim, ruling the extension already had been reviewed under a program EIR adopted by CLABS and further review was not required.

In its supplemental letter brief, CLABS represented that Contract C-94375 was amended again in 2000 and that the contract, as then amended, remains in effect. RBM [87] and CLABS assert that performing CEQA review at this point, such as preparing an EIR or the checklist referenced in *Guidelines section 15168, subdivision (c)(4)*, would be pointless because the particular amendment to Contract C-94375 challenged in the cross-action is no **[**92]** longer in effect. In contrast, County contends that its CEQA claim regarding Contract C-94375 is not moot because the contract has remained in effect as a result of the subsequent amendment in 2000.

We conclude that County's cause of **[***173]** action based on Contract C-94375 is not moot. First, a court order addressing Contract C-94375 may still be able to provide effective relief. For example, if an environmental assessment actually is performed by CLABS, such assessment could lead to mitigation **[*1630]** measures, either as part of a supplemental EIR or a subsequent mitigated negative declaration, that affect the performance of Contract C-94375. (See *Association for a Cleaner Environment v. Yosemite Community College Dist., supra, 116 Cal.App.4th at p. 641* [CEQA claim not moot because performing initial study could lead to adoption of mitigation measures].) Second, Contract C-94375 itself is still in effect and the case law regarding the mootness of contract-based claims involves the expiration of the entire contract, not just the expiration of a single amendment. (See *Giles v. Horn, supra, 100 Cal.App.4th at pp. 228–229*.)

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[87] RBM also submitted a supplemental letter brief and requested that we consider it. That request is granted.

4. *OCSD's contract with Yakima*

OCSD and Yakima entered into a contract titled "Agreement for the Management of Biosolids and Construction and Operation of Storage/Composting Facility," effective January 10, 2000 (OCSD-Yakima Agreement). Under section 1 of **[***174]** the OCSD-Yakima Agreement, Yakima charged $ 25 per wet ton "to accept delivery of up to 100 wet tons per day of Class B Biosolids" from OCSD's plants and apply the biosolids to land at specified sites in Kern County. Yakima represented that it had valid permits from the Central Valley Water Board and Kern County Environmental Health Services Department that authorized it to land apply biosolids at the sites.

The OCSD-Yakima Agreement also contained a number of provisions regarding the construction and operation of a storage and composting facility. In July 2000, however, OCSD and Yakima amended the OCSD-Yakima Agreement to remove any reference to the construction or operation of a storage and composting facility. The trial court ruled County's CEQA challenge to the storage and composting facility was moot. We concur in that ruling.

The remaining part of the OCSD-Yakima Agreement, which concerns the land application of Class B biosolids to sites located in Kern County, was not formally terminated and technically remains in effect. Section 21.1 of the OCSD-Yakima Agreement stated that the term of the agreement would end in January 2012, unless terminated earlier. Section 23.1 of the OCSD-Yakima **[***175]** Agreement stated Yakima could terminate the agreement on 24 hours' notice if it could no longer legally perform the required services. OCSD contends the adoption of the heightened treatment standards had the effect of terminating the agreement by making the land application of Class B biosolids illegal. **[*1631]** County asserts the CEQA claim in its thirteenth cause of action is not moot because OCSD and Yakima could resume activities under the OCSD-Yakima Agreement if the heightened treatment standards were invalidated or modified. [88] **[**93]** Even assumingthe claim presently is moot, we will exercise our inherent discretion and consider County's CEQA claim regarding the OCSD-Yakima Agreement because of the potential it will be reinstituted if the heightened treatment standards are modified. (See *In re William M. (1970) 3 Cal.3d 16, 23 [89 Cal.Rptr. 33, 473 P.2d 737]* [court has discretion to consider issue likely to recur].)

[*176]** 5. *OCSD's contract with Magan*

OCSD and Shaen Magan entered a contract titled "Agreement for the Management of Biosolids," effective January 10, 2000 (OCSD-Magan Biosolids Agreement). Under the agreement, OCSD agreed to pay Magan a base fee of $ 22.40 per wet ton for biosolids that Magan accepted, transported, and used on land located in Kings and Kern Counties. The agreement was not expressly limited to Class B biosolids. The OCSD-Magan Biosolids Agreement was scheduled to terminate January 2003 and provided for early termination in the event that Magan could no longer legally perform the services required.

In its supplemental letter brief, OCSD has represented that OCSD and Magan agreed to extend the OCSD-Magan Biosolids Agreement through December 31, 2004, and it was likely that OCSD would exercise an option to extend the agreement an additional year. Because the agreement may have been extended through 2005, we will address the merits of County's challenge to OCSD's failure to perform any environmental assessment concerning the OCSD-Magan Biosolids Agreement and leave it to the superior court to

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[88] For example, in conducting its environmental review, County might consider alternatives to the current heightened treatment standards that would allow the application of Class B biosolids to land only used to grow fiber crops, such as cotton, or land not used for food crops and grazing. If an alternative is adopted that allows some lands to receive Class B biosolids, then deliveries might resume under the OCSD-Yakima Agreement.

determine the question of mootness on remand.

6. *OCSD's option* **[***177]** *contracts*

On January 10, 2000, OCSD entered three contracts involving the option to purchase real estate. One option contract was entered with Shaen Magan involving 1,360 acres and another option contract was entered with Shaen Magan, Inc., involving 2,666 acres. Also, OCSD entered an option and right of first refusal with Yakima, which had a 12-year total term and involved 320 acres.

[*1632] The appellate record does not show whether OCSD's option agreements with Shaen Magan and Shaen Magan, Inc., which were to expire after three years, have been exercised, extended or allowed to expire. Similarly, the appellate record does not show the current status of OCSD's option and right of first refusal with Yakima. The option was to expire after three years and the right of first refusal was to remain in effect for nine years thereafter, but OCSD and Yakima may have rescinded it like the portion of the OCSD-Yakima Agreement. We will consider the merits of County's CEQA claims concerning these contracts and, on remand, the superior court can determine whether those claims are moot.

B. *Program EIR and Subsequent Environmental Assessment*

Both CLABS and OCSD have adopted program EIR's **[***178]** that cover the management of biosolids generated at the treatment plants they operate.

1. *EIR's of CLABS*

In connection with CLABS's wastewater treatment operations, the City of Los Angeles prepared a CEQA document titled "Offsite Sludge Transportation and Disposal Program Final EIR" dated March 1989 (CLABS 1989 FEIR). Section 3 of the CLABS 1989 FEIR is titled "Setting, Impacts, and Mitigation Measures" and excerpts are part of the appellate record.

The CLABS 1989 FEIR states that (1) the hauling and disposal of sewage sludge **[**94]** from the treatment plants is not one specific action, but consists of potential combinations of actions involving different disposal technologies and transportation modes; (2) a detailed discussion of current or proposed projects is not provided because site-specific issues will be dealt with on a case-by-case basis; (3) future or ongoing specific projects may require additional CEQA documentation; and (4) such additional CEQA documentation would tier off the CLABS 1989 FEIR.

More recently, the City of Los Angeles also prepared a CEQA document titled "Biosolids Management Program Final [EIR]" dated July 1996 (CLABS 1996 FEIR). The first page **[***179]** of its executive summary is part of the appellate record. The CLABS 1996 FEIR was designed to "serve as the basis for examining subsequent implementation actions to determine if additional environmental documentation is required." The CLABS 1996 FEIR stated that (1) under the concept of tiering, the site-specific environmental documents would incorporate by reference the analysis of environmental effects contained in the CLABS 1996 FEIR and (2) if additional effects are created or further mitigation measures are required, supplemental environmental documents would be required.

[*1633] 2. *OCSD's program EIR*

OCSD adopted a 1999 Strategic Plan that covered all aspects of its operations and assessed its wastewater systems needs and options to the year 2020. Volume 8 of OCSD's 1999 Strategic Plan addressed biosolids management. OCSD acted as the lead agency for purposes of preparing and considering the environmental documents that CEQA required for the adoption of the 1999 Strategic Plan. As a result, OCSD caused a draft program EIR, dated June 1999, to be prepared covering the 1999 Strategic Plan (OCSD 1999 DEIR). Chapter 8.0 of the OCSD 1999 DEIR was titled "Residual Solids/Biosolids **[***180]**

Management Setting, Impacts, and Mitigations." In October 1999, after receipt of comments, the "Orange County Sanitation District 1999 Strategic Plan Final Program [EIR]" was prepared. Both the draft and final EIR are part of the administrative record.

OCSD used a program EIR to allow for more streamlined and focused environmental reviews in the future, including the use of tiering. In addition, the OCSD 1999 DEIR states that "[s]hould the design or project description as identified in this document change substantially for any of the near-term projects, subsequent project-level impact evaluation will be necessary."

3. *Lead agencies under the program EIR's*

CA(50)[↑] (50) CEQA defines ***HN71***[↑] "lead agency" as "the public agency [that] has the principal responsibility for carrying out or approving a project [that] may have a significant effect upon the environment." (*§ 21067.*) ***HN72***[↑] If more than one public agency is involved in a project but only one public agency carries out the project, then "that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency." (Guidelines, *§ 15051, subd. (a)*; see *§ 21165.*)

CLABS and OCSD are the **[***181]** agencies that actually carry out the construction and operation of wastewater treatment facilities. Thus, under the ordinary meaning of the language contained in the statutory definition of "lead agency," both CLABS and OCSD are lead agencies. This conclusion is not controversial in that CLABS and OCSD have recognized in their program EIR's that they are each the lead agency for purposes of their wastewater treatment operations.

[95]** Because the operation of a wastewater treatment facility includes managing the biosolids that the facility produces, CLABS and OCSD are also each the lead agency for their activities concerning the management of biosolids. Again, this conclusion is based on (1) a straightforward application of the statutory definition of "lead agency" and the criteria contained in the Guidelines (see **[*1634]** *§ 21067*; Guidelines, *§§ 15050, 15051*), and (2) the program EIR's of CLABS and OCSD, both of which cover the activity of biosolids management. Thus, the program EIR's effectively acknowledge that biosolids management is the responsibility of CLABS and OCSD, even though they carry out that responsibility by contracting with other entities to handle the physical aspects of hauling and disposing **[***182]** of the biosolids generated. (See *§ 21065, subd. (b)* [definition of "project" includes activity undertaken in whole or in part through a contract with a public agency].)

4. *Assessment of later actions related to the program*

Having determined that CLABS and OCSD are lead agencies with program EIR's that address biosolids management, the question becomes what procedural steps those lead agencies should have performed to comply with CEQA when entering contracts or extensions concerning the use or disposal of biosolids generated at their facilities.

The program EIR's of CLABS and OCSD expressly state that activity undertaken after the adoption of the program EIR's might result in the use of a tiered EIR to achieve future CEQA compliance. Therefore, one possible answer to the question is that the lead agencies must follow the steps of performing a preliminary review, completing an initial study, and preparing a tiered EIR. (See *§ 21094.*)

CA(51)[↑] (51) Alternatively, ***HN73***[↑] *section 21166* sets forth the conditions where a subsequent or supplemental EIR is required to cover a new activity that is regarded as a change in a project already covered by an existing EIR. In particular, a subsequent **[***183]** or supplemental EIR is required where "[s]ubstantial changes are proposed in the project [that] will require major revisions of the [EIR]." (*§ 21166, subd. (a)*; see Guidelines, *§§ 15162* [subsequent EIR], *15163* [supplement to

EIR] & *15164* [addendum to EIR].)

To identify the initial procedural steps that CLABS and OCSD should have taken, we turn to the provisions in the Guidelines that explicitly address how subsequent activity that is related to the program covered by a program EIR must be handled to comply with the documentation requirements of CEQA. *Section 15168 of the Guidelines* provides:

HN74[↑] "(c) Use With Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

"(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.

[*1635] "(2) If the agency finds that pursuant to Section 15162 [regarding subsequent EIR's], no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as **[***184]** being within the scope of the project covered by the program EIR, and no new environmental document would be required.

"(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

[96]** "(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR."

The Discussion that follows *section 15168* of the Guidelines states: "Use of the program EIR also enables the Lead Agency to characterize the overall program as the project being approved at that time. Following this approach when individual activities within the program are proposed, the agency would be required to examine the individual activities to determine whether their effects were fully analyzed in the program EIR. If the activities would have no effects beyond those analyzed in the program EIR, the agency could assert that the activities are merely part of the program which had been approved earlier, and no further CEQA **[***185]** compliance would be required. This approach offers many possibilities for agencies to reduce their costs of CEQA compliance and still achieve high levels of environmental protection." [89]

Based on the requirements of *subdivision (c) of section 15168 of the Guidelines*, County argues that if CLABS's and OCSD's sludge disposal contracts are viewed as "subsequent activities" in their wastewater collection, treatment and disposal program, then CLABS and OCSD are required to conduct an examination to determine if additional environmental documents must be prepared and, with respect to site-specific activities, prepare a written checklist or similar device to determine whether the environmental effects of the contracts were covered by the program EIR.

There is little doubt that the contracts and extensions entered by CLABS and OCSD concern the management of biosolids and that CLABS and OCSD **[***186]** have characterized the management of biosolids as part of the overall program covered by their program EIR's. Therefore, the contracts and extensions are "[s]ubsequent activities in the program" for purposes of Guidelines *section 15168, subdivision (c)*. Consequently, CLABS and OCSD **[*1636]** were required to conduct the examination and make the determinations required by that subdivision. [90]

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[89] The Discussion is available at <*http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art11.html*> (as of Apr. 1, 2005).

[90] We do not address what impact, if any, the provisions of *section 15004* of the Guidelines might have on the steps taken to comply with CEQA after the examination and determinations required by *subdivision (c) of section 15168* of the Guidelines have been made.

The required examination and determinations were not made. Neither CLABS nor OCSD has cited to any evidence in the administrative record showing it completed these requirements. With respect to some of OCSD's contracts, the administrative record affirmatively shows such an examination was overlooked. One staff report sent to the board of directors of the OCSD on November 17, 1999, concerning **[***187]** the OCSD's consideration of the OCSD-Yakima Agreement and the OCSD-Magan Biosolids Agreement, contained no entries under the heading "CEQA FINDINGS." Similarly, another staff report that recommended authorizing the staff to negotiate with Magan for the purchase of a site for the long-term management of OCSD's biosolids contained only the notation "N/A" under the heading "CEQA FINDINGS."

[97]** As a result of their failure to conduct an examination and document the determinations required to be made after the examination, CLABS and OCSD violated *section 15168, subdivision (c)* of the Guidelines. Accordingly, they have "not proceeded in a manner required by law" and have abused their discretion for purposes of *section 21168.5*. [91]

C. *Remand and Remedy*

To remedy the foregoing violations of CEQA and appropriately dispose of the moot causes of action **[***188]** in County's cross-action, the judgment on the cross-action will be reversed and the superior court directed to dismiss the moot causes of action (see *Giles v. Horn, supra, 100 Cal.App.4th at p. 229* [when an appeal is moot, the preferable procedure is to reverse the judgment and direct the trial court to dismiss the action for having become moot prior to its final determination on appeal]), and issue a writ of mandate under the remaining causes of action.

We have determined that dismissals of the second cause of action concerning Contract C-87685 between CLABS and Gardner-Arciero, and the seventh cause of action concerning the CSDLAC-Yakima Agreement are appropriate because of mootness. Additional causes of action in the cross-action may be moot at the time the superior court issues a writ of mandate. For instance, if Yakima and OCSD formally terminate the OCSD-Yakima Agreement, then the thirteenth cause of action would be moot and should be dismissed rather **[*1637]** than included in the writ. Similarly, if any option agreement has expired unexercised or has been formally terminated, then the related cause of action would be moot. Consequently, immediately prior to issuing **[***189]** a writ of mandate, the superior court should determine which causes of action are moot and exclude them from the writ or writs issued.

If all of the remaining causes of action are justiciable, the superior court should issue a writ of mandate under the first and fourth causes of action of the cross-action [92] directing CLABS to undertake the examination required by *section 15168, subdivision (c)* of the Guidelines as well as the other steps necessary to comply with that provision and any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under *section 15168, subdivision (c)* of the Guidelines. A similar writ of mandate should be issued under the remaining causes of action that concern OCSD [93] and are

[91] We will not go so far as to rule what determinations should have been made, but remand to allow CLABS and OCSD to make those determinations in the first instance.

[92] The first cause of action concerns Contract C-94375 and the fourth cause of action concerns the "Contract to Purchase Real Property" that the City of Los Angeles entered with Valley Communities, Inc., and Buena Vista Lake Properties regarding 4,688 acres of land located in Kern County at a purchase price of approximately $ 9.6 million. The contract to purchase real property was not discussed in part VII.A., *ante*, because it was performed and did not expire. Accordingly, the CEQA cause of action relating to that contract is not moot.

[93] These causes of action are the tenth (OCSD-Magan Biosolids Agreement), eleventh (option agreement to purchase real estate from Magan), twelfth (option agreement to purchase real estate from Shaen Magan, Inc.), thirteenth (OCSD-Yakima Agreement) and fourteenth (option agreement to purchase real estate from Yakima) contained in County's cross-action.

justiciable. The superior court also shall require a return be filed to notify it of (1) the determinations made under Guidelines *section 15168, subdivision (c)*, and (2) the other actions taken by the **[**98]** sanitation agency in response to the writ of mandate. (See *§ 21168.9, subd. (b)* [trial court shall retain jurisdiction by way of a return]; Cal. Civil Writ Practice (Cont.Ed.Bar 3d ed. 2004) § 11.1 & appen. A-15, pp. 473–474, 581–582.) **[***190]**

The question of whether any acts taken in performance of the contracts should be enjoined should, if raised by the parties **[***191]** on remand, be determined by the superior court in accordance with *section 21168.9* and any other applicable provisions of law.

VIII. *Evidentiary Objections*

In connection with the non-CEQA causes of action, plaintiffs contend the superior court erred in failing to permit them to conduct discovery or submit extra-record evidence at the time of trial. Because plaintiffs' cause of action concerning the biosolids impact fee will be remanded for further proceedings, the assertions of reversible error based on the evidentiary rulings related to that cause of action need not be addressed.

[*1638] To the extent that the evidentiary issues relate to plaintiffs' allegations that counsel for County advised the Kern County Board of Supervisors that it only had to consider the proposed ordinance's impacts within Kern County and had no duty to consider the impacts to the surrounding communities, those evidentiary issues are no longer relevant because of the broader environmental review that will be conducted in connection with the preparation of an EIR. For the same reason that we did not address the issues concerning the claim based on California's constitutional limits on exercises of the police **[***192]** power (see part V., *ante*), we need not address the related evidentiary issues.

Insofar as the evidentiary issues might relate to the other alleged constitutional violations, such as the claims based on the commerce clause and equal protection, or the affirmative defenses of laches, unclean hands and estoppel, we conclude the evidentiary rulings of the superior court did not affect the outcome on those claims and defenses, and thus were not reversible error.

DISPOSITION

Appeal

The judgment entered on plaintiffs' petition and complaint is reversed and the matter is remanded to the superior court. The orders underlying the judgment are reversed in part and affirmed in part as set forth *post*.

As to plaintiffs' first cause of action, the superior court is directed to vacate its November 22, 2000, order denying that cause of action under CEQA. The superior court is further directed to issue a writ of mandate ordering County to void its negative declaration relating to Ordinance G-6638 and to prepare an EIR that covers the adoption of an ordinance regulating the land application of treated sewage sludge within its jurisdiction. The heightened treatment standards **[***193]** once reflected in Kern County Ordinance Code provision 8.05.040(A), Ordinance G-6638, and now set forth in Ordinance No. G-6931, may remain operative, provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA.

As to plaintiffs' second cause of action, the November 25, 2002, order denying relief is affirmed.

As to plaintiffs' third cause of action regarding the validity of the biosolids impact fee, the superior court is directed to vacate its November 25, 2002, order denying relief under that cause of action. On remand, the superior court is directed to uphold the biosolids impact fee to the extent that the funds generated are, or will **[**99]** be, applied to valid purposes and those purposes are **[*1639]** otherwise severable from the invalid ones. The superior court

also is directed to hold such further proceedings as it deems appropriate for the purpose of determining how the funds generated by the biosolids impact fee were spent, or will be spent, and how to separate the valid applications of funds, if any, from the invalid applications.

Cross-action

The judgment on County's cross-action is reversed and the matter remanded to the superior court with directions to (1) **[***194]** enter an order dismissing the second and seventh causes of action as moot; (2) determine which of the remaining causes of action in the cross-action (first, fourth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action) have become moot and dismiss those causes of action; (3) issue a writ of mandate under the causes of action that are not moot directing CLABS or OCSD to undertake (a) the examination and make the determinations necessary to comply with *section 15168, subdivision (c)* of the Guidelines and (b) the steps necessary to comply with any other provisions of CEQA or the Guidelines that become applicable as a result of the determinations made under Guidelines *section 15168*; and (4) require the party subject to the writ of mandate to file a return.

The parties shall bear their own costs on the appeals.

Dibiaso, Acting P. J., and Vartabedian, J., concurred.

A petition for a rehearing was denied April 25, 2005.

End of Document

TAB 16

Building Industry Assn. of San Diego County v. State Water Resources Control Bd.

Court of Appeal of California, Fourth Appellate District, Division One

December 7, 2004, Filed

D042385

Reporter

124 Cal. App. 4th 866 *; 22 Cal. Rptr. 3d 128 **; 2004 Cal. App. LEXIS 2073 ***; 2004 Cal. Daily Op. Service 10694; 2004 Daily Journal DAR 14492; 34 ELR 20149

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY et al., Plaintiffs and Appellants, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; SAN DIEGO BAYKEEPER et al., Interveners and Respondents.

Notice: As modified Jan. 4, 2005.

[***1] CERTIFIED FOR PARTIAL PUBLICATION [1]

Subsequent History: Modified by, Rehearing denied by *Building Industry Assn. v. State Water Resources Control Bd., 2005 Cal. App. LEXIS 7 (Cal. App. 4th Dist., Jan. 4, 2005)*

Time for Granting or Denying Review Extended *Building Industry Assn. of San Diego v. Calif Regional Water Qlty Bd., 2005 Cal. LEXIS 2502 (Cal., Feb. 24, 2005)*

Review denied by, Request denied by *Building Industry Association of San Diego County v. California Regional Water Quality Control Board, 2005 Cal. LEXIS 3489 (Cal., Mar. 30, 2005)*

Prior History: Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.

Disposition: Affirmed.

[1] Pursuant to *California Rules of Court, rule 976.1*, this opinion is certified for publication with the exception of Discussion parts III, IV, V, VI and VII.

Core Terms

municipal, water quality standards, pollutants, storm sewer, practicable, provisions, maximum extent, discharges, water board, Industry's, Regional, state water, controls, federal law, permits, regulation, water quality, challenging, runoff, state law, requirements, management practices, effluent limitation, permit requirement, stringent, amendments, stormwater, iterative, entities, quality standards

Case Summary

Procedural Posture

Plaintiff building industry association filed an administrative appeal with defendant California Water Resources Control Board (State Water Board) regarding the Board's issuance of a comprehensive municipal storm sewer permit. The Board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. The Superior Court of San Diego County, California, found the association failed to prove its claims.

Overview

The association argued that the permit violated federal law because it allowed the State Water Board and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as

"maximum extent practicable" set forth in 33 U.S.C.S. § 1342(p)(3)(B)(iii). The instant court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and/or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN1[] **Discharge Permits, Effluent Limitations**
The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. It is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. 33 U.S.C.S. § 1311(a). An NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. 33 U.S.C.S. § 1342(a), (b). Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10. NPDES permits are valid for five years. 33 U.S.C.S. § 1342(b)(1)(B).

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > Water Quality > General Overview

HN2[] **Coverage & Definitions, Point Sources**
The Clean Water Act defines a "point source" to be any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Real Property Law > Water Rights > Beneficial Use

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN3[] **Clean Water Act, Water Quality**

Standards

Under the Clean Water Act, the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. As enacted in 1972, the Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. *33 U.S.C.S. §§ 1311*, *1362(11)*.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Local Governments > Licenses

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Governments > Federal Government > US Congress

HN4[⬇] **Clean Water Act, Water Quality Standards**

In 1987, Congress amended the Clean Water Act to add provisions that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. *33 U.S.C.S. § 1342(p)*. In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. With respect to municipal storm water discharges, Congress clarified that the Environmental Protection Agency had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose controls to reduce the discharge of pollutants to the maximum extent practicable. *33 U.S.C.S. § 1342(p)(3)(B)(iii)*.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Environmental Law > Water Quality > General Overview

HN5[⬇] **Discharge Permits, Storm Water Discharges**

See *33 U.S.C.S. § 1342(p)(3)(B)(iii)*.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Environmental Law > Water Quality > General Overview

HN6[⬇] **Discharge Permits, Effluent Limitations**

See *Cal. Water Code § 13377*.

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Real Property Law > Water Rights > Beneficial Use

Environmental Law > Water Quality > General Overview

HN7[↓] **Discharge Permits, Effluent Limitations**
See *Cal. Water Code § 13374*.

Environmental Law > ... > Enforcement > Discharge Permits > Public Participation

Governments > Local Governments > Licenses

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN8[↓] **Discharge Permits, Public Participation**
The waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law. *Cal. Water Code § 13374*.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Environmental Law > Water Quality > General Overview

HN9[↓] **Reviewability, Standing**
See *Cal. Water Code § 13330(b)*.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Civil Procedure > Remedies > Writs > General Overview

Environmental Law > Water Quality > General Overview

HN10[↓] **Reviewability, Standing**
Where a party has been aggrieved by a final decision of a regional water board for which the California Water Resources Control Board denies review, *Cal. Code Civ. Proc. § 1094.5* governs the writ of mandate proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. *Cal. Water Code § 13330(d)*. In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

Administrative Law > Judicial Review > Administrative Record > General Overview

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

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN11[↓] **Judicial Review, Administrative Record**
In reviewing the trial court's factual determinations

on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

Environmental Law > Water Quality > General Overview

HN12[↓] **Environmental Law, Water Quality**
It is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law, *33 U.S.C.S. § 1370*, and California law specifically allows the imposition of controls more stringent than federal law, *Cal. Water Code § 13377*.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Environmental Law > Water Quality > General Overview

HN13[↓] **Discharge Permits, Storm Water Discharges**
The language of *33 U.S.C.S. § 1342(p)(3)(B)(iii)* does communicate the basic principle that the Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

HN14[↓] **Legislation, Interpretation**
While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the legislature. If the statutory language is susceptible to more than one reasonable interpretation, a court must also look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

Governments > Public Improvements > General Overview

Environmental Law > Water Quality > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

HN15[↓] **Clean Water Act, Water Quality Standards**
With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the Water Quality Act of 1987, and *33 U.S.C.S. § 1342(p)* in particular, supports that Congress intended to provide the Environmental Protection Agency (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where that compliance will be

achieved primarily through an iterative process.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN16[↓] **Standards of Review, Deference to Agency Statutory Interpretation**
A court is required to give substantial deference to an administrative interpretation of a statute.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN17[↓] **Standards of Review, Reversible Errors**
All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error.

Civil Procedure > Appeals > Appellate Briefs

HN18[↓] **Appeals, Appellate Briefs**
A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) all of the material evidence, not just the evidence favorable to his or her appellate positions.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN19[↓] **Standards of Review, Abuse of Discretion**
The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Environmental Law > Water Quality > General Overview

HN20[↓] **Discharge Permits, Storm Water Discharges**
BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A building industry association filed an administrative appeal with the State Water Resources Control Board regarding the board's issuance of a comprehensive municipal storm sewer permit. The board denied the appeal. The association then petitioned for a writ of mandate, asserting numerous claims. Three environmental groups intervened as defendants. The trial court found the association failed to prove its claims. The association argued that the permit violated federal law because it allowed the state water board and a regional water board to impose municipal storm

sewer control measures more stringent than a federal standard known as "maximum extent practicable" under 33 U.S.C. § 1342(p)(3)(B)(iii). (Superior Court of San Diego County, No. GIC 780263, Wayne L. Peterson, Judge.)

The Court of Appeal affirmed. The court held the language of § 1342(p)(3)(B)(iii) communicates the basic principle that the Environmental Protection Agency, and or a state approved to issue a National Pollution Discharge Elimination System (NPDES) permit, retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable." The NPDES permit did not violate federal law. The water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards. (Opinion by Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.) **[*867]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[⬇] (1)

Pollution and Conservation Laws **§ 5** > Water Pollution > Clean Water Act > Regulatory Permit > Municipal Storm Sewer Control Measures.

A regulatory permit issued by the State Water Resources Control Board allowing it and a regional water board to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable," set forth in 33 U.S.C. § 1342(p)(3)(B)(iii), did not violate federal law.

[4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 69.]

CA(2)[⬇] (2)

Pollution and Conservation Laws **§ 5** > Water Pollution > Clean Water Act > NPDES Permits.

The Clean Water Act (33 U.S.C. 1251 et seq.) employs the basic strategy of prohibiting pollutant emissions from "point sources" unless the party discharging the pollutants obtains a National Pollution Discharge Elimination System (NPDES) permit. Pursuant to 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. Pursuant to 33 U.S.C. § 1342(a) and (b) an NPDES permit is issued by the Environmental Protection Agency or by a state that has a federally-approved water quality program. Pursuant to 40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10, before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. Pursuant to 33 U.S.C. § 1342(b)(1)(B), NPDES permits are valid for five years.

CA(3)[⬇] (3)

Pollution and Conservation Laws **§ 5** > Water Pollution > Clean Water Act > NPDES Permits.

Under the Clean Water Act (33 U.S.C. § 1251 et seq.), the proper scope of the controls in a National Pollution Discharge Elimination System (NPDES) permit depends on the applicable state water quality standards for the affected water bodies. Each state is required to develop water quality standards that establish the desired condition of a waterway. A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. As enacted in 1972, 33 U.S.C. §§ 1311, 1362(11) of the Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source.

CA(4)[⬇] (4)

Pollution and Conservation Laws § 5 > Water Pollution > Clean Water Act > NPDES Permits.

In 1987, Congress amended the *Clean Water Act (33 U.S.C. 1251 et seq.)*, to add provisions, specifically, *33 U.S.C. § 1342(p)*, that specifically concerned National Pollution Discharge Elimination System (NPDES) permit requirements for storm sewer discharges. In these amendments, enacted as part of the *Water Quality Act of 1987 (33 U.S.C. § 251 et seq.)*, Congress distinguished between industrial and municipal storm water discharges. With respect to municipal storm water discharges, Congress clarified in *33 U.S.C. § 1342(p)(3)(B)(iii)* that the Environmental Protection Agency had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose controls to reduce the discharge of pollutants to the maximum extent practicable.

CA(5)[↓] (5)

Pollution and Conservation Laws § 5 > Water Pollution > Waste Discharge Requirements.

Pursuant to *Wat. Code, § 13374*, the waste discharge requirements issued by the regional water boards ordinarily also serve as National Pollution Discharge Elimination System permits under federal law.

CA(6)[↓] (6)

Pollution and Conservation Laws § 5 > Water Pollution > Writ of Mandate > Exercise of Independent Judgment.

Where a party has been aggrieved by a final decision of a regional water board for which the State Water Resources Control Board denies review, *Code Civ. Proc., § 1094.5*, governs the writ of mandate proceedings, and the superior court must, pursuant to *Wat. Code, § 13330, subd. (d)*, exercise its independent judgment in examining the evidence and resolving factual disputes. In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.

CA(7)[↓] (7)

Appellate Review § 144 > Scope of Review > Questions of Law and Fact > Factual Determinations > Substantial Evidence Standard > De Novo Review.

In reviewing the trial court's factual determinations on the administrative record, an appellate court applies a substantial evidence standard. However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. Thus, the appellate court is not bound by the legal determinations made by the state or regional agencies or by the trial court, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute.

CA(8)[↓] (8)

Pollution and Conservation Laws § 5 > Water Pollution > Clean Water Act > More Stringent State Controls.

It is well settled that the *Clean Water Act (33 U.S.C. § 1251 et seq.)* authorizes states to impose water quality controls that are more stringent than are required under federal law, *33 U.S.C. § 1370*, and California law specifically allows the imposition of controls more stringent than federal law, *Wat. Code, § 13377*.

CA(9)[↓] (9)

Pollution and Conservation Laws § 5 > Water Pollution > Clean Water Act > NPDES Permits.

The language of *33 U.S.C. § 1342(p)(3)(B)(iii)* does communicate the basic principle that the

Environmental Protection Agency (and/or a state approved to issue a National Pollution Discharge Elimination System permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of "maximum extent practicable."

CA(10)[] (10)

Statutes § **21** > Construction > Legislative Intent.

While punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature. If the statutory language is susceptible to more than one reasonable interpretation, a court must also look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

CA(11)[] (11)

Pollution and Conservation Laws § **5** > Water Pollution > Clean Water Act > NPDES Permits.

With respect to National Pollution Discharge Elimination System (NPDES) permits, the legislative purpose underlying the *Water Quality Act of 1987 (33 U.S.C. § 251 et seq.)*, and *33 U.S.C. § 1342(p)* in particular, supports that Congress intended to provide the Environmental Protection Agency (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where that compliance will be achieved primarily through an iterative process.

CA(12)[] (12)

Statutes § **44** > Construction > Administrative > Judicial Deference.

A court is required to give substantial deference to an administrative interpretation of a statute.

CA(13)[] (13)

Appellate Review § **135** > Scope of Review > Presumptions.

All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error.

CA(14)[] (14)

Appellate Review § **108** > Briefs > Requisites > Reference to Record > Party Challenging Sufficiency of Evidence > Summarization of All Material Evidence Required.

A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) all of the material evidence, not just the evidence favorable to his or her appellate positions.

CA(15)[] (15)

Administrative Law § **116** > Judicial Review and Relief > Scope of Review > Abuse of Discretion > Administrative Permit.

The party challenging the scope of an administrative permit has the burden of showing the agency abused its discretion or its findings were unsupported by the facts.

CA(16)[] (16)

Pollution and Conservation Laws § **5** > Water Pollution > Industrial Storm Water Dischargers > Best Available Technology Economically Achievable.

BAT is an acronym for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices.

Counsel: Latham & Watkins, David L. Mulliken, Eric M. Katz, Paul N. Singarella, Kelly E. Richardson and Daniel P. Brunton for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Mary Hackenbracht, Assistant Attorney General, Carol A. Squire, David Robinson and Deborah Fletcher, Deputy Attorneys General, for Defendants and Respondents.

David S. Beckman, Heather L. Hoecherl, Anjali I. Jaiswal and Dan L. Gildor for Interveners and Respondents.

Marco Gonzalez for Intervener and Respondent San Diego BayKeeper.

Law Offices of Rory Wicks and Rory R. Wicks for Surfrider Foundation, Waterkeeper Alliance, The Ocean Conservancy, Heal the Bay, Environmental Defense Center, Santa Monica BayKeeper, Orange County CoastKeeper, Ventura CoastKeeper, Environmental Health Coalition, CalBeach Advocates, San Diego Audubon Society, Endangered Habitats League and Sierra Club as Amici Curiae on behalf [***2] of Defendants and Respondents and Interveners and Respondents.

Judges: Haller, J., with Benke, Acting P. J., and Aaron, J., concurring.

Opinion by: HALLER [*871]

Opinion

[**130] **HALLER, J.**—This case concerns the environmental regulation of municipal storm sewers that carry excess water runoff to lakes, lagoons, rivers, bays, and the ocean. The waters flowing through these sewer systems have accumulated numerous harmful pollutants that are then discharged into the water body without receiving any treatment. To protect against the resulting water quality impairment, federal and state laws impose regulatory controls on storm sewer discharges. In particular, municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems.

In this case, the California Regional Water Control Board, San Diego Region, (Regional Water Board) conducted numerous public hearings and then issued a comprehensive municipal storm sewer permit governing 19 local public entities. Although these entities did not bring an administrative challenge to the permit, one business organization, the Building Industry [***3] Association of San Diego County (Building Industry), filed an administrative appeal with the State Water Resources Control Board (State Water Board). After making some modifications to the permit, the State Water Board denied the appeal. Building Industry then petitioned for a writ of mandate in the superior court, asserting numerous claims, including that the permit violates state and federal law because the permit provisions are too stringent and impossible to satisfy. Three environmental groups intervened as defendants in the action. After a hearing, the trial court found Building Industry failed to prove its claims and entered judgment in favor of the administrative agencies (the Water Boards) and the intervener environmental groups.

CA(1)[↑] (1) On appeal, Building Industry's main contention is that the regulatory permit violates federal law because it allows the Water Boards to impose municipal storm sewer control measures more stringent than a federal standard known as "maximum extent practicable." (*33 U.S.C. § 1342(p)(3)(B)(iii)*.) [2] [**131] In the published portion of this opinion, we reject this contention, and conclude the Water Boards had the authority to include [***4] a permit provision requiring compliance with state water quality standards. In the unpublished portion of the opinion, we find Building Industry's additional contentions to be without merit. We affirm the judgment.

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[2] Further statutory references are to *title 33 of the United States Code*, unless otherwise specified.

[*872] RELEVANT BACKGROUND INFORMATION

I. *Summary of Relevant Clean Water Act Provisions*

Before setting forth the factual background of this particular case, it is helpful to summarize the federal and state statutory schemes for regulating municipal storm sewer discharges. [3]

[***5] A. *Federal Statutory Scheme*

When the United States Congress first enacted the *Federal Water Pollution Control Act in 1948*, the Congress relied primarily on state and local enforcement efforts to remedy water pollution problems. (*Middlesex Cty. Sewerage Auth. v. Sea Clammers (1981) 453 U.S. 1, 11 [69 L. Ed. 2d 435, 101 S. Ct. 2615]*; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd. (1989) 210 Cal. App. 3d 1421, 1433 [259 Cal. Rptr. 132]*.) However, by the early 1970's, it became apparent that this reliance on local enforcement was ineffective and had resulted in the "accelerating environmental degradation of rivers, lakes, and streams ... ." (*Natural Resources Defense Council, Inc. v. Costle (D.C. Cir. 1977) 568 F.2d 1369, 1371* (*Costle*); see *EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 203 [48 L. Ed. 2d 578, 96 S. Ct. 2022]*.) In response, in 1972 Congress substantially amended this law by mandating compliance with various minimum technological effluent standards established by the federal government and creating a comprehensive regulatory scheme to implement these laws. (See *EPA v. State Water Resources Control Board, supra, 426 U.S. at pp. 204–205*.) [***6] The objective of this law, now commonly known as the Clean Water Act, was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (*§ 1251(a)*.)

HN1[↑] *CA(2)*[↑] (2) The Clean Water Act employs the basic strategy of prohibiting pollutant emissions from "point sources" [4] unless the party discharging the pollutants obtains a permit, known as an NPDES [5] permit. (See *EPA v. State Water Resources Control Board, supra, 426 U.S. at p. 205*.) It is "unlawful [*873] for any person to discharge a pollutant without obtaining a permit and complying with its terms." (*Ibid.*; see *§ 1311(a)*; *Costle, supra, 568 [**132] F.2d at p. 1375*.) An NPDES permit is issued by the United States Environmental Protection Agency (EPA) or by a state that has a federally approved water quality program. (*§ 1342(a), (b)*; *EPA v. State Water Resources Control Board, supra, 426 U.S. at p. 209*.) Before an NPDES is issued, the federal or state regulatory agency must follow an extensive administrative hearing procedure. (See *40 C.F.R. §§ 124.3, 124.6, 124.8, 124.10*; see generally Wardzinski et al., *National Pollutant Discharge Elimination System* [***7] *Permit Application and Issuance Procedures,* in The Clean Water Act Handbook (Evans edit., 1994) pp. 72–74 (Clean Water Act Handbook).) NPDES permits are valid for five years. (*§ 1342(b)(1)(B)*.)

HN3[↑] *CA(3)*[↑] (3) Under the Clean Water Act, the proper scope of the controls in an NPDES permit depends on the applicable state water quality standards for the affected water bodies. (See *Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1092 [1 Cal. Rptr. 3d 76]*.) Each state is required to develop water quality standards

[3] The systems that carry untreated urban water runoff to receiving water bodies are known as "[m]unicipal separate storm sewer" systems (*40 C.F.R. § 122.26(b)(8)*), and are often referred to as "MS4s" (*40 C.F.R. § 122.30*). For readability, we will identify these systems as municipal storm sewers. To avoid confusion in this case, we will generally use descriptive names, rather than initials or acronyms, when referring to parties and concepts.

[4] *HN2*[↑] The Clean Water Act defines a "point source" to be "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (*§ 1362(14)*.)

[5] NPDES stands for National Pollution Discharge Elimination System.

that establish " 'the desired [***8] condition of a waterway.' " (*Ibid.*) A water quality standard for any given water segment has two components: (1) the designated beneficial uses of the water body; and (2) the water quality criteria sufficient to protect those uses. (*Ibid.*) As enacted in 1972, the Clean Water Act mandated that an NPDES permit require compliance with state water quality standards and that this goal be met by setting forth a specific "effluent limitation," which is a restriction on the amount of pollutants that may be discharged at the point source. (*§§ 1311, 1362(11).*)

Shortly after the 1972 legislation, the EPA promulgated regulations exempting most municipal storm sewers from the NPDES permit requirements. (*Costle, supra, 568 F.2d at p. 1372*; see *Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159, 1163* (*Defenders of Wildlife*).) When environmental groups challenged this exemption in federal court, the Ninth Circuit held a storm sewer is a point source and the EPA did not have the authority to exempt categories of point sources from the Clean Water Act's NPDES permit requirements. (*Costle, supra, 568 F.2d at pp. 1374–1383.*) [***9] The *Costle* court rejected the EPA's argument that effluent-based storm sewer regulation was administratively infeasible because of the variable nature of storm water pollution and the number of affected storm sewers throughout the country. (*Id. at pp. 1377–1382.*) Although the court acknowledged the practical problems relating to storm sewer regulation, the court found the EPA had the flexibility under the Clean Water Act to design regulations that would overcome these problems. (*Id. at pp. 1379–1383.*)

[*874] During the next 15 years, the EPA made numerous attempts to reconcile the statutory requirement of point source regulation with the practical problem of regulating possibly millions of diverse point source discharges of storm water. (*Defenders of Wildlife, supra, 191 F.3d at p. 1163*; see Gallagher, *Clean Water Act* in Environmental Law Handbook (Sullivan edit., 2003) p. 300 (Environmental Law Handbook); Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff* (1995) *48 Wash. U. J. Urb. & Contemp. L. 1, 40–41* (*Regulation of Urban Stormwater Runoff*).)

CA(4)[↑] (4) Eventually,*HN4*[↑] in 1987, Congress amended the [***10] Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges. (*§ 1342(p)*; see *Defenders of Wildlife, supra, [**133] 191 F.3d at p. 1163*; *Natural Resources Defense Council v. U.S. E.P.A. (1992) 966 F.2d 1292, 1296.*) In these amendments, enacted as part of the *Water Quality Act of 1987*, Congress distinguished between industrial and municipal storm water discharges. With respect to *industrial* storm water discharges, Congress provided that NPDES permits "shall meet all applicable provisions of this section and *section 1311* [requiring the EPA to establish effluent limitations under specific timetables] ... ." (*§ 1342(p)(3)(A).*) With respect to *municipal* storm water discharges, Congress clarified that the EPA had the authority to fashion NPDES permit requirements to meet water quality standards without specific numerical effluent limits and instead to impose "controls to reduce the discharge of pollutants to the maximum extent practicable ... ." (*§ 1342(p)(3)(B)(iii)*; see *Defenders of Wildlife, supra, 191 F.3d at p. 1163.*) Because the statutory language pertaining to municipal [***11] storm sewers is at the center of this appeal, we quote the relevant portion of the statute in full:

"*HN5*[↑] (B) ... Permits for discharges from municipal storm sewers—

"(i) may be issued on a system- or jurisdiction-wide basis;

"(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

"(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and

such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (*§ 1342(p)(3)(B).*)To ensure this scheme would be administratively workable, Congress placed a moratorium on many new types of required stormwater permits until 1994 (*§ 1342(p)(1)*), and created a phased approach to necessary municipal **[*875]** stormwater permitting depending on the size of the municipality (*§ 1342(p)(2)(D)*). (See *Environmental Defense Center, Inc. v. U.S. E.P.A. (9th Cir. 2003) 344 F.3d 832, 841–842.*)

B. *State Statutory Scheme*

Three years before the 1972 Clean Water Act, the California Legislature enacted **[***12]** its own water quality protection legislation, the *Porter-Cologne Water Quality Control Act* (Porter-Cologne Act), seeking to "attain the highest water quality which is reasonable ... ." (*Wat. Code, § 13000.*) The Porter-Cologne Act created the State Water Board to formulate statewide water quality policy and established nine regional boards to prepare water quality plans (known as basin plans) and issue permits governing the discharge of waste. (*Wat. Code, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.*) The Porter-Cologne Act identified these permits as "waste discharge requirements," and provided that the waste discharge requirements must mandate compliance with the applicable regional water quality control plan. (*Wat. Code, §§ 13263, subd. (a), 13377, 13374.*)

Shortly after Congress enacted the Clean Water Act in 1972, the California Legislature added chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal requirements to ensure it would obtain EPA approval to issue NPDES permits. (*Wat. Code, § 13370, subd. (c).*) As part of these amendments, the Legislature provided that the state and regional water boards "***HN6***[↑] shall, as required or authorized **[***13]** by the [Clean Water Act], issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions **[**134]** [of the Clean Water Act], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (*Wat. Code, § 13377.*) *Water Code section 13374* provides that "***HN7***[↑] [t]he term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the [Clean Water Act]."

CA(5)[↑] (5) California subsequently obtained the required approval to issue NPDES permits. (*WaterKeepers Northern California v. State Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1453 [126 Cal. Rptr. 2d 389].*) Thus, ***HN8***[↑] the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (*Wat. Code, § 13374.*)

II. *The NPDES Permit at Issue in this Case*

Under its delegated authority and after numerous public hearings, in February 2001 the Regional Water Board issued a 52-page NPDES permit **[*876]** and Waste Discharge Requirements (the Permit) governing municipal storm sewers owned **[***14]** by San Diego County, the San Diego Unified Port District, and 18 San Diego-area cities (collectively, Municipalities). [6] The first 10 pages of the Permit contain the Regional Water Board's detailed factual findings. These findings describe the manner in which San Diego-area water runoff absorbs numerous harmful pollutants and then is conveyed by municipal storm sewers into local waters without any treatment. The findings state that these storm sewer discharges are a leading cause of water quality impairment in the San Diego region, endangering aquatic life and human health. The findings further state that to achieve applicable state water quality objectives, it is necessary not

[6] Under the Clean Water Act, entities responsible for NPDES permit conditions pertaining to their own discharges are referred to as "copermittees." (*40 C.F.R. § 122.26(b)(1).*) For clarity and readability, we shall refer to these entities as Municipalities.

only to require municipalities to comply with existing pollution-control technologies, but also to require compliance with applicable "receiving water limits" (state water quality standards) and to employ an "iterative process" of "development, implementation, monitoring, and assessment" to improve existing technologies.

[*15]** Based on these factual findings, the Regional Water Board included in the Permit several overall prohibitions applicable to municipal storm sewer discharges. Of critical importance to this appeal, these prohibitions concern two categories of restrictions. First, the Municipalities are prohibited from discharging those pollutants "which have not been reduced to the *maximum extent practicable* ... ." [7] (Italics added). Second, the Municipalities **[**135]** are prohibited from discharging pollutants "which cause or contribute to exceedances of receiving water quality objectives ... " and/or that "cause or contribute to the violation of water quality standards ... ." This second category of restrictions (referred to in this opinion as the Water Quality Standards provisions) essentially provide that a municipality may not discharge pollutants if those pollutants would cause the receiving water body to exceed the applicable water quality standard. It is these latter restrictions that are challenged by Building Industry in this appeal.

[*16]** **[*877]** Part C of the Permit (as amended) qualifies the Water Quality Standards provisions by detailing a procedure for enforcing violations of those standards through a step-by-step process of "timely implementation of control measures ...," known as an "iterative" process. Under this procedure, when a municipality "caus[es] or contribute[s] to an exceedance of an applicable water quality standard," the municipality must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. The municipality and the regional water board must then work together at improving methods and monitoring progress to achieve compliance. But the final provision of Part C states that "Nothing in this section shall prevent the [Regional Water Board] from enforcing any provision of this Order while the [municipality] prepares and implements the above report."

In addition to these broad prohibitions and enforcement provisions, the Permit requires the Municipalities to implement, or to require businesses and residents to implement, various pollution control measures referred to as "best management practices," which reflect techniques for preventing, **[***17]** slowing, retaining or absorbing pollutants produced by stormwater runoff. These best management practices include structural controls that minimize contact between pollutants and flows, and nonstructural controls such as educational and public outreach programs. The Permit also requires the Municipalities to regulate discharges associated with new development and redevelopment and to ensure a completed project will not result in significantly increased discharges of pollution from storm water runoff.

III. *Administrative and Trial Court Challenges*

After the Regional Water Board issued the Permit, the Building Industry, an organization representing the interests of numerous construction-related businesses, filed an administrative challenge with the State Water Board. Although none of the

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[7] The Permit does not precisely define this phrase, and instead, in its definition section, contains a lengthy discussion of the variable nature of the maximum extent practicable concept, referred to as MEP. A portion of this discussion is as follows: "[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their [local storm sewer plan]. Their total collective and individual activities conducted pursuant to the [plan] becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance). In the absence of a proposal acceptable to the [Regional Water Board], the [Regional Water Board] defines MEP." The definition also identifies several factors that are "useful" in determining whether an entity has achieved the maximum extent practicable standard, including "Effectiveness," "Regulatory Compliance," "Public Acceptance," "Cost," and "Technical Feasibility."

Municipalities joined in the administrative appeal, Building Industry claimed its own independent standing based on its assertion that the Permit would impose indirect obligations on the regional building community. (See *Wat. Code, § 13320* [permitting any "aggrieved person" to challenge regional water board action].) Among its numerous contentions, Building Industry argued that the Water **[***18]** Quality Standards provisions in the Permit require strict compliance with state water quality standards beyond what is "practicable" and therefore violate federal law.

In November 2001, the State Water Board issued a written decision rejecting Building Industry's appeal after making certain modifications to the Permit. (Cal. Wat. Resources Control Bd. Order WQ2001-15 (Nov. 15, 2001).) Of particular relevance here, the State Water **[*878]** Board modified the Permit to make clear that the iterative enforcement process applied to the Water Quality Standards provisions in the Permit. But the State Water Board did not delete the Permit's **[**136]** provision stating that the Regional Water Board retains the authority to enforce the Water Quality Standards provisions even if a Municipality is engaged in this iterative process.

Building Industry then brought a superior court action against the Water Boards, challenging the Regional Board's issuance of the Permit and the State Water Board's denial of Building Industry's administrative challenge. [8] Building Industry asserted numerous legal claims, including that the Water Boards: (1) violated the Clean Water Act by imposing a standard greater **[***19]** than the "maximum extent practicable" standard; (2) violated state law by failing to consider various statutory factors before issuing the Permit; (3) violated the *California Environmental Quality Act* (CEQA) by failing to prepare an environmental impact report (EIR); and (4) made findings that were factually unsupported.

Three environmental organizations, San Diego BayKeeper, Natural Resources Defense Council, and California CoastKeeper (collectively, Environmental Organizations), **[***20]** requested permission to file a complaint in intervention, seeking to uphold the Permit and asserting a direct and substantial independent interest in the subject of the action. Over Building Industry's objections, the trial court permitted these organizations to file the complaint and enter the action as parties-interveners.

After reviewing the lengthy administrative record and the parties' briefs, and conducting an oral hearing, the superior court ruled in favor of the Water Boards and Environmental Organizations (collectively, respondents). Applying the independent judgment test, the court found Building Industry failed to meet its burden to establish the State Water Board abused its discretion in approving the Permit or that the administrative findings are contrary to the weight of the evidence. In particular, the court found Building Industry failed to establish the Permit requirements were "impracticable under federal law or unreasonable under state law," and noted that there was evidence showing the Regional Water Board considered many practical aspects of the regulatory **[*879]** controls before issuing the Permit. Rejecting Building Industry's legal arguments, the court also stated that **[***21]** under federal law the Water Boards had the discretion "to require strict compliance with water quality standards" or "to require less than strict compliance with water quality standards." The court also

[8] Several other parties were also named as petitioners: Building Industry Legal Defense Foundation, California Business Properties Association, Construction Industry Coalition for Water Quality, San Diego County Fire Districts Association, and the City of San Marcos. However, because these entities were not parties in the administrative challenge, the superior court properly found they were precluded by the administrative exhaustion doctrine from challenging the administrative agencies' compliance with the federal and state water quality laws. Although these entities were named as appellants in the notice of appeal, they are barred by the exhaustion doctrine from asserting appellate contentions concerning compliance with federal and state water quality laws. However, as to any other claims (such as CEQA), these entities are proper appellants. For ease of reference and where appropriate, we refer to the appellants collectively as Building Industry.

sustained several of respondents' evidentiary objections, including to documents relating to the legislative history of the Clean Water Act.

Building Industry appeals, challenging the superior court's determination that the Permit did not violate the federal Clean Water Act. In its appeal, Building Industry does not reassert its claim that the Permit violates state law, except for its contentions pertaining to CEQA.

DISCUSSION

I. *Standard of Review*

HN9[↑] ***CA(6)***[↑] (6) A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely **[**137]** petition for writ of mandate in the superior court. (*Wat. Code, § 13330, subd. (a)*.) ***HN10***[↑] *Code of Civil Procedure section 1094.5* governs the proceedings, and the superior court must exercise its independent judgment in examining the evidence and resolving factual disputes. (*Wat. Code, § 13330, subd. [***22] (d)*.) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817 [85 Cal. Rptr. 2d 696, 977 P.2d 693]*.)

HN11[↑] ***CA(7)***[↑] (7) In reviewing the trial court's factual determinations on the administrative record, a Court of Appeal applies a substantial evidence standard. (*Fukuda v. City of Angels, supra, 20 Cal.4th at p. 824*.) However, in reviewing the trial court's legal determinations, an appellate court conducts a de novo review. (See *Alliance for a Better Downtown Millbrae v. Wade (2003) 108 Cal.App.4th 123, 129 [133 Cal. Rptr. 2d 249]*.) Thus, we are not bound by the legal determinations made by the state or regional agencies or by the trial court. (See *Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7–8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]*.) But we must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. [9] (*Ibid.*)

[*23]**

[*880] II. *Water Boards' Authority to Enforce Water Quality Standards in NPDES Permit*

Building Industry's main appellate contention is very narrow. Building Industry argues that two provisions in the Permit (the Water Quality Standards provisions) violate federal law because they prohibit the Municipalities from discharging runoff from storm sewers if the discharge would cause a water body to exceed the applicable water quality standard established under state law. [10] Building Industry contends that under federal law the "maximum extent practicable" standard is the "exclusive" measure that may be applied to municipal storm sewer discharges and a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a "maximum extent practicable" standard.

[*24]** In the following discussion, we first reject respondents' contentions that Building Industry waived these arguments by failing to raise a substantial evidence challenge to the court's factual

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[9] We note that in determining the meaning of the Clean Water Act and its amendments, federal courts generally defer to the EPA's statutory construction if the disputed portion of the statute is ambiguous. (See *Chevron U.S.A. v. Natural Res. Def. Council, Inc. (1984) 467 U.S. 837, 842–844 [81 L. Ed. 2d 694, 104 S. Ct. 2778]* (*Chevron*).) However, the parties do not argue this same principle applies to a *state agency's* interpretation of the Clean Water Act. Nonetheless, under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations in this case. (See *Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th at pp. 7–8*.)

[10] These challenged Permit provisions state "Discharges from [storm sewers] which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited" (Permit, § A.2), and "Discharges from [storm sewers] that cause or contribute to the violation of water quality standards ... are prohibited" (Permit, § C.1).

findings and/or **[**138]** to reassert its state law challenges on appeal. We then focus on the portion of the Clean Water Act (*§ 1342(p)(3)(B)(iii)*) that Building Industry contends is violated by the challenged Permit provisions. On our de novo review of this legal issue, we conclude the Permit's Water Quality Standards provisions are proper under federal law, and Building Industry's legal challenges are unsupported by the applicable statutory language, legislative purpose, and legislative history.

A. *Building Industry Did Not Waive the Legal Argument*

Respondents (the Water Boards and Environmental Organizations) initially argue that Building Industry waived its right to challenge the Permit's consistency with the maximum extent practicable standard because Building Industry did not challenge the trial court's *factual* findings that Building Industry failed to prove any of the Permit requirements were "impracticable" or "unreasonable."

In taking this position, respondents misconstrue the **[***25]** nature of Building Industry's appellate contention challenging the Water Quality Standards provisions. Building Industry's contention concerns the scope of the authority given to the Regional Water Board under the Permit terms. Specifically, **[*881]** Building Industry argues that the Regional Water Board does not have the authority to require the Municipalities to adhere to the applicable water quality standards because federal law provides that the "maximum extent practicable" standard is the exclusive standard that may be applied to storm sewer regulation. This argument—concerning the proper scope of a regulatory agency's authority—presents a purely legal issue, and is not dependent on the court's factual findings regarding the practicality of the specific regulatory controls identified in the Permit.

Respondents alternatively contend that Building Industry waived its right to challenge the propriety of the Water Quality Standards provisions under federal law because the trial court found the provisions were valid under state law and Building Industry failed to reassert its state law challenges on appeal. Under the particular circumstances of this case, we conclude Building Industry did **[***26]** not waive its rights to challenge the Permit under federal law.

CA(8)[↑] (8) Although*HN12*[↑] it is well settled that the Clean Water Act authorizes states to impose water quality controls that are more stringent than are required under federal law (*§ 1370*; see *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology (1994) 511 U.S. 700, 705 [128 L. Ed. 2d 716, 114 S. Ct. 1900]*; *Northwest Environmental Advocates v. Portland (9th Cir. 1995) 56 F.3d 979, 989*), and California law specifically allows the imposition of controls more stringent than federal law (*Wat. Code, § 13377*), the Water Boards made a tactical decision in the superior court to assert the Permit's validity based solely on federal law, and repeatedly made clear they were not seeking to justify the Permit requirements based on the Boards' independent authority to act under state law. On appeal, the Water Boards continue to rely primarily on federal law to uphold the Permit requirements, and their assertions that we may decide the matter based solely on state law are in the nature of asides rather than direct arguments. On this record, it would be improper to rely solely on state law to uphold the challenged Permit provisions. **[***27]**

B. *The Water Quality Standards Requirement Does Not Violate Federal Law*

We now turn to Building Industry's main substantive contention on appeal— **[**139]** that the Permit's Water Quality Standards provisions (fn. 10, *ante*) violate federal law. Building Industry's contention rests on its interpretation of the 1987 Water Quality Act amendments containing NPDES requirements for municipal storm sewers. The portion of the relevant statute reads: "(B) ... Permits for discharges from municipal storm sewers ... [¶] ... [¶] (iii) shall require controls to

reduce the discharge of pollutants to the *maximum extent practicable, including* management practices, control techniques and **[*882]** system, design and engineering methods, and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." (*§ 1342(p)(3)(B)(iii)*, italics added.)

1. *Statutory Language*

Focusing on the first 14 words of subdivision (iii), Building Industry contends the statute means that the maximum extent practicable standard sets the upper limit on the type of control that can be used in an NPDES permit, and that each of the phrases following the **[***28]** word "*including*" identify examples of "maximum extent practicable" controls. (*§ 1342(p)(3)(B)(iii)*, italics added.) Building Industry thus reads the final "and such other provisions" clause as providing the EPA with the authority only to include *other* types of "maximum extent practicable" controls in an NPDES storm sewer permit.

Respondents counter that the term "including" refers only to the three identified types of pollution control procedures—(1) "management practices"; (2) "control techniques"; and (3) "system, design and engineering methods"—and that the last phrase, "*and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants*," provides the EPA (or the approved state regulatory agency) the specific authority to go beyond the maximum extent practicable standard to impose effluent limitations or water-quality based standards in an NPDES permit. In support, respondents argue that because the word "system" in *section 1342(p)(3)(B)(iii)* is singular, it necessarily follows from parallel-construction grammar principles that the word "system" is part of the phrase "system, design and engineering methods" rather **[***29]** than the phrase "control techniques and system." Under this view and given the absence of a comma after the word "techniques," respondents argue that the "and such other provisions" clause cannot be fairly read as restricted by the "maximum extent practicable" phrase, and instead the "and such other provisions" clause is a separate and distinct clause that acts as a second direct object to the verb "require" in the sentence. (*§ 1342(p)(3)(B)(iii)*.)

Building Industry responds that respondents' proposed statutory interpretation is "not logical" because if the "and such other provisions" phrase is the direct object of the verb "require," the sentence would not make sense. Building Industry states that "permits" do not generally "require" provisions; they "include" or "contain" them.

CA(9)[↑] (9) As a matter of grammar and word choice, respondents have the stronger position. The second part of Building Industry's proposed interpretation—"control techniques and system, design and engineering methods"—without a comma after the word "techniques" does not logically serve as a **[*883]** parallel construct with the "and such other provisions" clause. Moreover, we disagree that the "and such other provisions" **[***30]** clause cannot be a direct object to the word "require." (*§ 1342(p)(3)(B)(iii)*.) Although it is not the clearest way of articulating the concept, ***HN13***[↑] the language of *section 1342(p)(3)(B)(iii)* does communicate the **[**140]** basic principle that the EPA (and/or a state approved to issue the NPDES permit) retains the discretion to impose "appropriate" water pollution controls in addition to those that come within the definition of " 'maximum extent practicable.' " (*Defenders of Wildlife, supra, 191 F.3d at pp. 1165–1167*.) We find unpersuasive Building Industry's reliance on several statutory interpretation concepts, *ejusdem generis, noscitur a sociis*, and *expressio unius est exclusion alterius*, to support its narrower statutory construction.

2. *Purpose and History of Section 1342(p)(3)(B)(iii)*

CA(10)[↑] (10) Further, "***HN14***[↑] [w]hile punctuation and grammar should be considered in interpreting a statute, neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature." (*In re John S. (2001) 88*

Cal.App.4th 1140, 1144, fn. 1 [106 Cal. Rptr. 2d 476]; see *Estate of Coffee (1941) 19 Cal.2d 248, 251 [120 P.2d 661]*.) If the statutory language is susceptible **[***31]** to more than one reasonable interpretation, a court must also "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340 [14 Cal. Rptr. 3d 857, 92 P.3d 350]*.)

HN15[↑] ***CA(11)***[↑] (11) The legislative purpose underlying the Water Quality Act of 1987, and *section 1342(p)* in particular, supports that Congress intended to provide the EPA (or the regulatory agency of an approved state) the discretion to require compliance with water quality standards in a municipal storm sewer NPDES permit, particularly where, as here, that compliance will be achieved primarily through an iterative process.

Before *section 1342(p)* was enacted, the courts had long recognized that the EPA had the authority to require a party to comply with a state water quality standard even if that standard had not been translated into an effluent limitation. (See *EPA v. State Water Resources Control Board, supra, 426 U.S. at p. 205, fn. 12*; *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, supra, 511 U.S. at p. 715*; **[***32]** *Northwest Environmental Advocates v. Portland (9th Cir. 1995) 56 F.3d 979, 987*; *Natural Resources Defense Council v. U.S.E.P.A. (9th Cir. 1990) 915 F.2d 1314, 1316*.) Specifically, *section 1311(b)(1)(C)* gave the regulatory agency the authority to impose "any more stringent limitation, including those necessary to meet water quality standards," and *section 1342(a)(2)* provided that "[t]he [EPA] Administrator shall **[*884]** prescribe conditions for [NPDES] permits to assure compliance" with requirements identified in *section 1342(a)(1)*, which encompass state water quality standards. The United States Supreme Court explained that when Congress enacted the 1972 Clean Water Act, it retained "[w]ater quality standards ... as a supplementary basis for effluent limitations, ... so that numerous point sources despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels. ... " (*EPA v. State Water Resources Control Board, supra, 426 U.S. at p. 205, fn. 12*; see also *Arkansas v. Oklahoma (1992) 503 U.S. 91, 101 [117 L. Ed. 2d 239, 112 S. Ct. 1046]*.)

There **[***33]** is nothing in *section 1342(p)(3)(B)(iii)*'s statutory language or legislative history showing that Congress intended to eliminate this discretion when it amended the Clean Water Act in 1987. **[**141]** To the contrary, Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act by making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators have pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary point of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context of stormwater pollution. (See *Regulation of Urban Stormwater Runoff, supra*, 48 Wash. U. J. Urb. & Contemp. L. at pp. 44–46; Environmental Law Handbook, *supra*, at p. 300; Clean Water Act Handbook, *supra*, at pp. 62–63.) In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems **[***34]** resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health. (See Remarks of Sen. Durenberger, 133 Cong. Rec. 1279 (Jan. 14, 1987); Remarks of Sen. Chaffee, 133 Cong. Rec. S738 (daily ed. Jan 14, 1987); Remarks of Rep. Hammerschmidt, 133 Cong. Rec. 986 (Jan. 8, 1987); Remarks of Rep.

Roe, 133 Cong. Rec. 1006, 1007 (Jan. 8, 1987); Remarks of Sen. Stafford, 132 Cong. Rec. 32381, 32400 (Oct. 16, 1986).) This legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act.

To support a contrary view, Building Industry relies on comments by Minnesota Senator David Durenberger during the lengthy congressional **[*885]** debates on the 1987 Water Quality Act amendments. [11] **[***36]** (132 Cong. Rec. 32400 (Oct. 16, 1986); 133 Cong. Rec. S752 (daily **[***35]** ed. Jan. 14, 1987.) In the cited portions of the Congressional Record, Senator Durenberger states that NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. Such controls include management practices, control techniques and systems, design and engineering methods, and such other provisions, as the Administrator determines appropriate for the control of pollutants in the stormwater discharge." (*Ibid.*) When viewing these statements in context, it is apparent that the Senator was merely paraphrasing the words of the proposed statute and was not intending to address the issue of whether the maximum extent practicable standard was a regulatory ceiling or whether he believed the proposed amendments limited the EPA's existing discretion. [12]

[142]** Building Industry's reliance on comments made by Georgia Representative James Rowland, who participated in drafting the 1987 Water Quality Act amendments, is similarly unhelpful. During a floor debate on the proposed amendments, Representative Rowland noted that cities have "millions of" stormwater discharge points and emphasized the devastating financial burden on cities if they were required to obtain a permit for each of these points. (133 Cong. Rec. 522 (daily ed. Feb. 3, 1987).) Representative Rowland then explained **[***37]** that the amendments would address this problem by "allow[ing] communities to obtain far less costly single jurisdictionwide permits." (*Ibid.*) Viewed in context, these comments were directed at the need for statutory provisions permitting the EPA to issue jurisdiction-wide permits thereby preventing unnecessary administrative costs to the cities, and do not reflect a desire to protect cities from the cost of complying with strict water quality standards when deemed necessary by the regulatory agency.

3. *Interpretations by the EPA and Other Courts*

CA(12)[↑] (12) Our conclusion that Congress intended *section 1342(p)(3)(B)(iii)* to provide the regulatory agency with authority to impose standards stricter than a "maximum extent practicable" standard is consistent with interpretations by **[*886]** the EPA and the Ninth Circuit. In its final rule promulgated in the Federal Register, the EPA construed *section 1342(p)(3)(B)(iii)* as providing the administrative agency with the authority to impose water-quality standard controls in an NPDES permit if appropriate under the circumstances. Specifically, the EPA stated this statutory provision requires "controls to reduce the discharge of pollutants to the **[***38]** maximum extent practicable, *and where necessary water quality-based controls ... .*"

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[11] We agree with Building Industry that the trial court's refusal to consider this legislative history on the basis that it was not presented to the administrative agencies was improper. However, this error was not prejudicial because we apply a de novo review standard in interpreting the relevant statutes.

[12] In the cited remarks, Senator Durenberger in fact expressed his dissatisfaction with the EPA's prior attempts to regulate municipal storm sewers. He pointed out, for example, that "[r]unoff from municipal separate storm sewers and industrial sites contain significant values of both toxic and conventional pollutants," and that despite the Clean Water Act's "clear directive," the EPA "has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge." (133 Cong. Rec. 1274, 1279–1280 (daily ed. Jan. 14, 1987).)

(*55 Fed.Reg. 47990, 47994 (Nov. 16, 1990)*, italics added.) ***HN16***[↑] We are required to give substantial deference to this administrative interpretation, which occurred after an extensive notice and comment period. (See *ibid.*; *Chevron, supra, 467 U.S. at pp. 842–844*.)

The only other court that has interpreted the "such other provisions" language of *section 1342(p)(3)(B)(iii)* has reached a similar conclusion. (*Defenders of Wildlife, supra, 191 F.3d at pp. 1166–1167*.) In *Defenders of Wildlife*, environmental organizations brought an action against the EPA, challenging provisions in an NPDES permit requiring several Arizona localities to adhere to various best management practice controls without requiring numeric effluent limitations. (*Id. at p. 1161*.) The environmental organizations argued that *section 1342(p)* did not allow the EPA to issue NPDES permits without requiring strict compliance with effluent limitations. (*Defenders of Wildlife, supra, at p. 1161*.) Rejecting this argument, the Ninth Circuit found *section 1342(p)(3)(B)(iii)*'s statutory language "unambiguously **[***39]** demonstrates that Congress did not require **[**143]** municipal storm-sewer discharges to comply strictly" with effluent limitations. (*Defenders of Wildlife, supra, at p. 1164*.)

But in a separate part of the opinion, the *Defenders of Wildlife* court additionally rejected the reverse argument made by the affected municipalities (who were the interveners in the action) that "the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise." (*Defenders of Wildlife, supra, 191 F.3d at p. 1166*.) The court stated: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], *§ 1342(p)(3)(B)(iii)* states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. ... [¶] *Under that discretionary provision, the EPA has the authority to determine that ensuring* **[***40]** *strict compliance with state water-quality standards is necessary to control pollutants.* The EPA also has the authority to require less than strict compliance with state water-quality standards ... . Under *33 U.S.C. § 1342(p)(3)(B)(iii)*, the EPA's choice to include either management practices or numeric limitations in the permits was within its discretion. [Citations.]" (*Defenders of Wildlife, supra, 191 F.3d at pp. 1166–1167*, second italics added.) Although dicta, this **[*887]** conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language. [13]

[*41]** To support its interpretation of *section 1342(p)(3)(B)(iii)*, Building Industry additionally relies on the statutory provisions addressing nonpoint source runoff (a diffuse runoff not channeled through a particular source), which were also part of the 1987 amendments to the Clean Water Act. (*§ 1329*.) In particular, Building Industry cites to *section 1329(a)(1)(C)*, which states, "The Governor of each State shall ... prepare and submit to the [EPA] Administrator for approval, a report which ... [¶] ... [¶] describes the process ... for identifying best management practices and measures to control each [identified] category ... of nonpoint sources and ... to reduce, to the *maximum extent practicable*, the level of pollution resulting from such category ... ." (Italics added.) Building Industry argues that because this "nonpoint source" statutory language expressly identifies only the maximum extent practicable standard, we must necessarily conclude that

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[13] Building Industry's reliance on two other Ninth Circuit decisions to support a contrary statutory interpretation is misplaced. (See *Natural Res. Def. Council, Inc. v. U.S.E.P.A., supra, 966 F.2d at p. 1308*; *Environmental Defense Center, Inc. v. U.S. E.P.A. (9th Cir. 2003) 344 F.3d 832*.) Neither of these decisions addressed the issue of the scope of a regulatory agency's authority to exceed the maximum extent practicable standard in issuing NPDES permits for municipal storm sewers.

Congress meant to similarly limit the storm sewer point source pollution regulations to the maximum extent practicable standard.

The logic underlying this analogy is flawed because the critical language in the [***42] two statutory provisions is different. In the nonpoint source statute, Congress chose to include only the maximum extent practicable standard (§ 1329(a)(1)(C)); whereas in the municipal storm sewer provisions, Congress elected to include the "and such other provisions" clause (§ 1342(p)(3)(B)(iii)). This difference leads to the reasonable inference that Congress had a different intent when it enacted the two statutory provisions. Moreover, because of a fundamental difference between point and nonpoint source pollution, Congress has historically treated the two types of pollution differently and has subjected each type to entirely different requirements. (See Pronsolino v. Nastri (9th Cir. 2002) 291 F.3d 1123, 1126–1127.) Given this different treatment, it would be improper to presume Congress intended to apply the same standard in both statutes. Building Industry's citation to comments during the 1987 congressional debates regarding nonpoint source regulation does [**144] not support Building Industry's contentions.

[*888] 4. *Contention that it is "Impossible" for Municipalities to Meet Water Quality Standards*

We also reject Building Industry's arguments woven throughout [***43] its appellate briefs, and emphasized during oral arguments, that the Water Quality Standards provisions violate federal law because compliance with those standards is "impossible." The argument is not factually or legally supported.

CA(13)[↑] (13) First, there is no showing on the record before us that the applicable water quality standards are unattainable. The trial court specifically concluded that Building Industry failed to make a factual showing to support this contention, and Building Industry does not present a proper appellate challenge to this finding sufficient to warrant our reexamining the evidence. HN17[↑] All judgments and orders are presumed correct, and persons challenging them must affirmatively show reversible error. CA(14)[↑] (14) (Walling v. Kimball (1941) 17 Cal.2d 364, 373 [110 P.2d 58].) HN18[↑] A party challenging the sufficiency of evidence to support a judgment must summarize (and cite to) *all* of the material evidence, not just the evidence favorable to his or her appellate positions. (In re Marriage of Fink (1979) 25 Cal.3d 877, 887–888 [160 Cal. Rptr. 516, 603 P.2d 881]; People v. Dougherty (1982) 138 Cal. App. 3d 278, 282 [188 Cal. Rptr. 123].) Building Industry has made [***44] no attempt to comply with this well-established appellate rule in its briefs.

In a supplemental brief, Building Industry attempted to overcome this deficiency by asserting that "[t]he record clearly establishes that [the Water Quality Standards provisions] are unattainable during the period the permit is in effect." This statement, however, is not supported by the proffered citation or by the evidence viewed in the light most favorable to the respondents. Further, the fact that many of the Municipalities' storm sewer discharges currently violate water quality standards does not mean that the Municipalities cannot comply with the standards during the five-year term of the Permit. Additionally, Building Industry's assertions at oral argument that the trial court never reached the impossibility issue and/or that respondents' counsel conceded the issue below are belied by the record, including the trial court's rejection of Building Industry's specific challenge to the proposed statement of decision on this very point. [14]

[***45] CA(15)[↑] (15) We reject Building Industry's related argument that it was respondents' burden to affirmatively show it is feasible to satisfy each of the applicable Water Quality Standards

[14] Because we are not presented with a proper appellate challenge, we do not address the trial court's factual determinations in this case concerning whether it is possible or practical for a Municipality to achieve any specific Permit requirement.

provisions. ***HN19***[↑] The party challenging the scope of an administrative permit, such as an NPDES, has the burden of **[*889]** showing the agency abused its discretion or its findings were unsupported by the facts. (See *Fukuda v. City of Angels, supra, 20 Cal.4th at p. 817*; *Huntington Park Redevelopment Agency v. Duncan (1983) 142 Cal. App. 3d 17, 25 [190 Cal. Rptr. 744]*.) Thus, it was not respondents' burden to affirmatively demonstrate it was possible for the Municipalities to meet the Permit's requirements.

Building Industry alternatively contends it was not required to challenge the facts underlying the trial court's determination that the Permit requirements were feasible **[**145]** because the court's determination was wrong as a matter of law. Specifically, Building Industry asserts that a Permit requirement that is more stringent than a "maximum extent practicable" standard is, by definition, "not practicable" and therefore "technologically impossible" to achieve under any circumstances. Building **[***46]** Industry relies on a dictionary definition of "practicable," which provides that the word means " 'something that can be done; feasible,' " citing the 1996 version of "Webster's Encyclopedic Unabridged Dictionary."

CA(16)[↑] (16) This argument is unpersuasive. The federal maximum extent practicable standard is not defined in the Clean Water Act or applicable regulations, and thus the Regional Water Board properly included a detailed description of the term in the Permit's definitions section. (See *ante*, fn. 7.) As broadly defined in the Permit, the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. This definition conveys that the Permit's maximum extent practicable standard is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning. Further, the Permit's definitional section states that the maximum extent practicable standard "considers economics and is generally, but not necessarily, *less* stringent than BAT." (Italics added.) ***HN20***[↑] BAT is an acronym **[***47]** for "best available technology economically achievable," which is a technology-based standard for industrial storm water dischargers that focuses on reducing pollutants by treatment or by a combination of treatment and best management practices. (See *Texas Oil & Gas Ass'n v. U.S. E.P.A. (5th Cir. 1998) 161 F.3d 923, 928*.) If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible. In other contexts, courts have similarly recognized that the word "practicable" does not necessarily mean the most that can possibly be done. (See *Nat. Wildlife Federation v. Norton (E.D.Cal. 2004) 306 F. Supp. 2d 920, 928, fn. 12* ["[w]hile the meaning of the term 'practicable' in the [*Endangered Species Act*] is not entirely clear, the term does not simply equate to 'possible' "]; *Primavera Familienstiftung v. Askin (S.D.N.Y. 1998) 178 F.R.D. [*890] 405, 409* [noting that "impracticability does not mean impossibility, but rather difficulty **[***48]** or inconvenience"].)

We additionally question whether many of Building Industry's "impossibility" arguments are premature on the record before us. As we have explained, the record does not support that any required control is, or will be, impossible to implement. Further, the Permit allows the Regional Water Board to enforce water quality standards during the iterative process, but does not impose any obligation that the board do so. Thus, we cannot determine with any degree of certainty whether this obligation would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard.

Finally, we comment on Building Industry's repeated warnings that if we affirm the judgment, all affected Municipalities will be in immediate violation of the Permit because they are not now

complying with applicable water quality standards, subjecting them to immediate and substantial civil penalties, and leading to a potential "shut down" of public operations. These doomsday arguments are unsupported. The Permit makes clear that Municipalities **[**146]** are required to adhere to numerous specific controls (none of which are challenged in this case) and **[***49]** to comply with water quality standards through "timely implementation of control measures" by engaging in a cooperative iterative process where the Regional Water Board and Municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified best management practices. Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative process as the centerpiece to achieving water quality standards. Moreover, the regulations provide an affected party reasonable time to comply with new permit requirements under certain circumstances. (See *40 C.F.R. § 122.47*.) There is nothing in this record to show the Municipalities will be subject to immediate penalties for violation of water quality standards.

We likewise find speculative Building Industry's predictions that immediately after we affirm the judgment, citizens groups will race to the courthouse to file lawsuits against the Municipalities and seek penalties for violation of the Water Quality Standards provisions. [15] As noted, the applicable **[***50]** laws provide time for an affected entity to comply with new standards. Moreover, although we do not reach the enforcement issue in this case, we note the **[*891]** Permit makes clear that the iterative process is to be used for violations of water quality standards, and gives the Regional Water Board the discretionary authority to enforce water quality standards during that process. Thus, it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process. (See *§ 1365(a)(1)(2)*.) **[***51]**

III.–VII.*

DISPOSITION

Judgment affirmed. Appellants to pay respondents' costs on appeal.

Benke, Acting P. J., and Aaron, J., concurred.

A petition for a rehearing was denied January 4, 2005, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied March 30, 2005. Baxter, J., and Brown, J., were of the opinion that the petition should be granted. **[***52]**

End of Document

[15] The Clean Water Act allows a citizen to sue a discharger to enforce limits contained in NPDES permits, but requires the citizen to notify the alleged violator, the state, and the EPA of its intention to sue at least 60 days before filing suit, and limits the enforcement to nondiscretionary agency acts. (See *§ 1365(a)(1)(2)*.)

* See footnote, *ante*, page 866.

TAB 17

Howard Jarvis Taxpayers Ass'n v. City of Salinas

Court of Appeal of California, Sixth Appellate District

June 3, 2002, Decided

No. H022665.

Reporter

98 Cal. App. 4th 1351 *; 121 Cal. Rptr. 2d 228 **; 2002 Cal. App. LEXIS 4198 ***; 2002 Cal. Daily Op. Service 4853; 2002 Daily Journal DAR 6161

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Appellants, v. CITY OF SALINAS et al., Defendants and Respondents.

Subsequent History: [***1] Rehearing Denied July 2, 2002.

Review Denied August 28, 2002, Reported at: *2002 Cal. LEXIS 5938*.

Prior History: Superior Court of Monterey County. Super. Ct. No. M45873. Richard M. Silver, Judge.

Disposition: The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Core Terms

storm drain, sewer, storm water, property-related, facilities, parcel, surface, runoff, sanitary, storm, property owner, services, voter, industrial waste, surface water, water service, sewer system, drainage, storm drainage system, drainage system, sewer service, city council, proportional, impervious, pollutants, ordinance, carries, defines

Case Summary

Procedural Posture

Plaintiff taxpayers filed a complaint under *Cal. Code Civ. Proc. § 863* to determine the validity of a storm drainage fee imposed by defendant city. The Monterey County Superior Court (California) ruled that the fee did not violate Cal. Const. art. XIIID, § 6. The taxpayers appealed.

Overview

The city adopted ordinances and a resolution imposing a storm water management utility fee that was imposed on the owners of every developed parcel of land within the city. The storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it was discharged into natural bodies of water. The appellate court found that: (1) Cal. Const. art. XIIID, § 6, required the city to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area because the fee was not exempt as a water service; and (2) the trial court therefore erred in ruling that Salinas, Cal., Ordinance 2350, 2351, and Salinas, Cal., Resolution 17019 were valid exercises of authority by the city council.

Outcome

The judgment of the superior court was reversed.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Elections

Tax Law > State & Local Taxes > Real

Property Taxes > General Overview

HN1[] **State & Territorial Governments, Elections**

The Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. Cal. Const. art. XIIID, § 6 (a)(2).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN2[] **State & Local Taxes, Real Property Taxes**

See Cal. Const. XIIID, § 6(c).

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN3[] **Overview & Legal Concepts, Ownership**

Cal. Const. art. XIIID, § 2(e), defines a "fee" under the article as a levy imposed upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN4[] **Overview & Legal Concepts, Ownership**

A "property-related service" is a public service having a direct relationship to property ownership. Cal. Const. art. XIIID, § 2(h).

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN5[] **State & Local Taxes, Real Property Taxes**

Salinas, Cal., Resolution 17019 plainly establishes a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the city. The resolution expressly states that each owner and occupier of a developed lot or parcel of real property within the city, is served by the city's storm drainage facilities and burdens the system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property should therefore pay for the improvement, operation and maintenance of such facilities. Accordingly, the resolution makes the fee applicable to each and every developed parcel of land within the city.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN6[] **State & Local Taxes, Real Property Taxes**

Cal. Proposition 218, § 5, specifically states that the provisions of the Right to Vote On Taxes Act, Cal. Const. art. XIIID, § 6, shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

The appellate court is obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Tax Law > ... > Personal Property Taxes > Exemptions > General Overview

HN8[↓] **Personal Property Taxes, Exemptions** The exception in Cal. Const. art. XIIID, § 6(c), applies to fees for sewer, water, and refuse collection services.

Governments > Legislation > Interpretation

HN9[↓] **Legislation, Interpretation** The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN10[↓] **Legislation, Interpretation** Exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage.

Governments > Legislation > Interpretation

HN11[↓] **Legislation, Interpretation** *Cal. Gov't Code § 53750* is enacted to explain some of the terms used in Cal. Const. art. XIIIC, XIIID, and defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1a)[↓] (1a) ***CA(1b)***[↓] (1b)

Drains and Sewers § 3 > Fees and Assessments > Storm Drain Fee > Application of Voter Approval Requirement for Property-related Fees: Property Taxes § 7.8 > Special Taxes.

--A storm water management fee resolution established a property-related fee for a property-

related service, the management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 (Cal. Const., art. XIII D, § 6, subd. (c)). The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C.]

CA(2)[⬇] (2)

Constitutional Law § 12 > Construction > Ordinary Language > Amendments.

--Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

Counsel: Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

Judges: Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.

Opinion by: Elia

Opinion

[*1352] [229] ELIA, J.**

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, section 6, subdivision (c), which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee **[*1353]** and (2) it met the exemption **[***2]** for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

BACKGROUND

In an effort to comply with the 1987 amendments to the federal Clean Water Act (*33 U.S.C. § 1251 et seq.*; *40 C.F.R. § 122.26(a) et seq. (2001)*), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system.

The resolution specifically states: "There is hereby imposed on each [***3] and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer . . . ." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area" [1] on that parcel.

[***4] [**230] Undeveloped parcels--those that had not been altered from their natural state--were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services.

[*1354] On September 15, 1999, plaintiffs filed a complaint under *Code of Civil Procedure section 863* to determine the validity of the fee. [2] Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

[***5] *DISCUSSION*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D [3] ***HN1***[↑] requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), ***HN2***[↑] which states, in relevant part: "Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."

HN3[↑] Section 2 [***6] defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) ***HN4***[↑] A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) ***CA(1a)***[↑] (1a) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 ***HN5***[↑] plainly established

[1] "Impervious Area," according to resolution No. 17019, is "any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development."

[2] Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

[3] All further unspecified section references are to article XIII D of the California Constitution.

a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the [*1355] City. The resolution [**231] expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the [***7] system to a greater extent than if the property were undeveloped. Those owners and occupiers of developed property "should therefore pay for the improvement, operation and maintenance of such facilities." Accordingly, the resolution makes the fee applicable to "*each and every developed parcel* of land within the City." (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 838 [102 Cal. Rptr. 2d 719, 14 P.3d 930]* [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal. App. 4th 79 [101 Cal. Rptr. 2d 905]* [water usage rates are not within the scope of art. XIII D].)

The "Proportional Reduction" clause on which the City relies does not alter the nature of the fee as property related. [4] A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee [***8] nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple "opt-out" arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large "impervious area" (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged $ 18.66 based on that assumption.

Proposition 218 ***HN6***[↑] specifically stated that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local [***9] government revenue and enhancing taxpayer consent." (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) ***CA(2)***[↑] (2) ***HN7***[↑] We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers--in this case, the voters of California--in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 244-245 [149 Cal. Rptr. 239, 583 P.2d 1281]*; *Arden Carmichael, Inc. v. County of Sacramento (2000) 93 Cal. App. 4th 507, 514-515 [113 Cal. Rptr. 2d 248]*; *Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 863 [167 [*1356] Cal. Rptr. 820, 616 P.2d 802]*.) ***CA(1b)***[↑] (1b) To interpret the storm drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by "frustrat[ing] the purposes of voter approval for tax increases." (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee "burden[s] landowners *as landowners*," and is therefore subject [***10] to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra, 24 Cal. 4th at p. 842*.)

[**232] *EXCEPTION FOR "SEWER" OR "WATER" SERVICE*

As an alternative ground for its decision, the trial court found that the storm drainage fee was "clearly a fee related to 'sewer' and 'water' services." ***HN8***[↑] The exception in section 6(c) applies to fees

[4] According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

"for sewer, water, and refuse collection services." Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the "commonly accepted" meaning of "sewer," noting the broad dictionary definition of this word. [5] **[***11]** The City also points to *Public Utilities Code section 230.5* and the Salinas City Code, which describe storm drains as a type of sewer. [6]

Plaintiffs "do not disagree that storm water is carried off in storm sewers," but they argue that we must look beyond mere definitions of "sewer" to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the **[*1357]** Attorney General, who observed that several California **[***12]** statutes differentiate between management of storm drainage and sewerage systems. [7] *(81 Ops.Cal.Atty.Gen. 104, 106 (1998).)* Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that "if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted." (*In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827 [46 Cal. Rptr. 2d 198].*) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically **[**233]** for "*sewers*, water, flood control, [and] *drainage systems*" (italics added), the exceptions listed in section 6(c) pertain only to "sewer, water, and refuse collection services." Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

[*13]** The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, "although useful at times, is no more than a rule of reasonable inference" and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 350 [45 Cal. Rptr. 2d 279, 902 P.2d 297]*; *Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991 [73 Cal. Rptr. 2d 682, 953 P.2d 858].*) On the other hand, invoking the plain-meaning rule only begs the question of whether the term "sewer services" was intended to encompass the more specific

[5] Webster's Third New International Dictionary, for example, defines "sewer" as "1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of "carrying off sewage or rainwater." (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining "sewer" as "an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city."

[6] *Public Utilities Code section 230.5* defines "Sewer system" to encompass all property connected with "sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Salinas City Code section 36-2, subdivision (31) defines "storm drain" as "a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water."

[7] For example, *Government Code section 63010* specifies "storm sewers" in delimiting the scope of " '[d]rainage,' " while separately identifying the facilities and equipment used for " '[s]ewage collection and treatment.' " (*Gov. Code, § 63010, subd. (q)(3), (10).*) *Government Code section 53750*, part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D " '[d]rainage system' " means "any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage." *Health and Safety Code section 5471* sets forth government power to collect fees for "services and facilities . . . in connection with its water, sanitation, storm drainage, or sewerage system."

sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. ***HN9***[↑] The popular, nontechnical sense of sewer service, particularly when placed next to "water" and "refuse collection" services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term "sewer services" is ambiguous in the context of both section 6(c) and Proposition 218 as a whole. We must keep in mind, however, the voters' **[***14]** intent that the constitutional provision be construed liberally to curb the rise in "excessive" taxes, assessments, and fees exacted **[*1358]** by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that ***HN10***[↑] exceptions to a general rule of an enactment must be strictly construed, thereby giving "sewer services" its narrower, more common meaning applicable to sanitary sewerage. [8] (Cf. *Estate of Banerjee (1978) 21 Cal. 3d 527, 540 [147 Cal. Rptr. 157, 580 P.2d 657]*; *City of Lafayette v. East Bay Mun. Utility Dist. (1993) 16 Cal. App. 4th 1005 [20 Cal. Rptr. 2d 658]*.)

The City itself treats storm drainage differently **[***15]** from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing the discharge of "non-storm water" into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water. [9] **[***16]** The Salinas City Code contains requirements **[**234]** addressed specifically to the management of storm water runoff. [10] (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is "for . . . water services." *Government Code section 53750*, ***HN11***[↑] enacted to explain some of the terms used in articles XIII C and XIII D, defines " '[w]ater' " as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (*Gov. Code, § 53750, subd. (m)*.) The average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of **[*1359]** the affected area. The trial court therefore **[***17]** erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

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[8] Sanitary sewerage carries "putrescible waste" from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

[9] Resolution No. 17019 defined "Storm Drainage Facilities" as "the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [that] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City. . . ." The "storm drainage system" was defined to include pipes, culverts, streets and gutters, "storm water sewers," ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining "storm drainage system"].)

[10] Storm water under ordinance No. 2350 includes "stormwater runoff, snowmelt runoff, and surface runoff and drainage." (Salinas City Code, former § 29-3, subd. (dd).)

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, 2002, and respondents' petition for review by the Supreme Court was denied August 28, 2002.

End of Document

TAB 18

Cal Const, Art. XIII A § 4

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > ***CONSTITUTION OF THE STATE OF CALIFORNIA*** > ***Article XIII A. [TAX LIMITATION INITIATIVE]***

§ 4. Special local taxes

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

History

Adopted June 6, 1978.

End of Document

TAB 19

Cal Const, Art. XIII B § 6

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > CONSTITUTION OF THE STATE OF CALIFORNIA > Article XIII B. GOVERNMENT SPENDING LIMITATION

§ 6. Reimbursement for new programs and services

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I. **(b)**

(1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section. **(c)** A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and

counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

History

Adopted November 6, 1979. Amendment approved by voters, Prop. 1A, effective November 3, 2004; amendment approved by voters, Prop. 42, effective June 4, 2014.

End of Document

TAB 20

Cal Const, Art. XIII C § 1

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > CONSTITUTION OF THE STATE OF CALIFORNIA > Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

§ 1. Definitions

As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(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.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, 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.

History

Adopted by voters, Prop. 218 § 3, effective November 6, 1996. Amendment approved by voters, Prop. 26 § 3, effective November 3, 2010.

End of Document

Cal Const, Art. XIII C § 2

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > CONSTITUTION OF THE STATE OF CALIFORNIA > Article XIII C. [VOTER APPROVAL FOR LOCAL TAX LEVIES]

§ 2. Local government tax limitation

Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) 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. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

History

Adopted by voters, Prop. 218 § 3, effective November 6, 1996.

End of Document

TAB 21

Cal Const, Art. XIII D § 2

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > CONSTITUTION OF THE STATE OF CALIFORNIA > Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

§ 2. Definitions

As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

History

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

Cal Const, Art. XIII D § 3

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > *CONSTITUTION OF THE STATE OF CALIFORNIA* > *Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]*

§ 3. Limitation of property taxes, assessments, fees and charges

(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 except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

History

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

End of Document

Cal Const, Art. XIII D § 6

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

California Constitution > CONSTITUTION OF THE STATE OF CALIFORNIA > Article XIII D. [ASSESSMENT AND PROPERTY RELATED FEE REFORM]

§ 6. Property related fees and charges

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

History

Adopted by voters, Prop. 218 § 4, effective November 6, 1996.

End of Document

TAB 22

Cal Wat Code § 13001

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > *WATER CODE* > *Division 7. Water Quality* > *Chapter 1. Policy*

§ 13001. Power and duty of state board and regional boards

It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. The state board and regional boards in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970.

Historical Derivation:

(a) Former § 13000.3, as added Stats 1959 ch 1299 § 3, amended Stats 1965 ch 1657 § 3.

(b) Former § 13003, as added Stats 1959 ch 1299 § 3, amended Stats 1965 ch 1657 § 3.

End of Document

TAB 23

Cal Wat Code § 13050

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 2. Definitions

§ 13050. Terms used in this division

As used in this division:

(a) "State board" means the State Water Resources Control Board.

(b) "Regional board" means any California regional water quality control board for a region as specified in Section 13200.

(c) "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law.

(d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(e) "Waters of the state" means any surface water or groundwater, including saline waters, within the boundaries of the state.

(f) "Beneficial uses" of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

(g) "Quality of the water" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.

(h) "Water quality objectives" means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.

(i) "Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.

(j) "Water quality control plan" consists of a designation or establishment for the waters within a specified area of all of the following:

(1) Beneficial uses to be protected.

(2) Water quality objectives.

(3) A program of implementation needed for achieving water quality objectives.

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l)

(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

(m) "Nuisance" means anything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(n) "Recycled water" means water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource.

(o) "Citizen or domiciliary" of the state includes a foreign corporation having substantial business contacts in the state or which is subject to service of process in this state.

(p)

(1) "Hazardous substance" means either of the following:

(A) For discharge to surface waters, any substance determined to be a hazardous substance pursuant to Section 311(b)(2) of the Federal Water Pollution Control Act *(33 U.S.C. Sec. 1251* et seq.).

(B) For discharge to groundwater, any substance listed as a hazardous waste or hazardous material pursuant to *Section 25140 of the Health and Safety Code*, without regard to whether the substance is intended to be used, reused, or discarded, except that "hazardous substance" does not include any substance excluded from Section 311(b)(2) of the Federal Water Pollution Control Act because it is within the scope of Section 311(a)(1) of that act.

(2) "Hazardous substance" does not include any of the following:

(A) Nontoxic, nonflammable, and noncorrosive stormwater runoff drained from underground vaults, chambers, or manholes into gutters or storm sewers.

(B) Any pesticide which is applied for agricultural purposes or is applied in accordance with a cooperative agreement authorized by *Section 116180 of the Health and Safety*

Code, and is not discharged accidentally or for purposes of disposal, the application of which is in compliance with all applicable state and federal laws and regulations.

(C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act.

(D) Any discharge to land which results, or probably will result, in a discharge to groundwater if the amount of the discharge to land is less than a reportable quantity, as determined by regulations adopted pursuant to Section 13271, for substances listed as hazardous pursuant to *Section 25140 of the Health and Safety Code*. No discharge shall be deemed a discharge of a reportable quantity until regulations set a reportable quantity for the substance discharged.

(q)

(1) "Mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in *Section 2732 of the Public Resources Code*, and tailings, slag, and other processed waste materials, including cementitious materials that are managed at the cement manufacturing facility where the materials were generated.

(2) For the purposes of this subdivision, "cementitious material" means cement, cement kiln dust, clinker, and clinker dust.

(r) "Master recycling permit" means a permit issued to a supplier or a distributor, or both, of recycled water, that includes waste discharge requirements prescribed pursuant to Section 13263 and water recycling requirements prescribed pursuant to Section 13523.1.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1969 ch 800 § 2.5; Stats 1970 ch 202 § 1; Stats 1980 ch 877 § 1; *Stats 1989 ch 642 § 2*; *Stats 1991 ch 187 § 1 (AB 673)*; *Stats 1992 ch 211 § 1 (AB 3012)*; *Stats 1995 ch 28 § 17 (AB 1247)*, ch 847 § 2 (SB 206); *Stats 1996 ch 1023 § 429 (SB 1497)*, effective September 29, 1996.

Historical Derivation:

(a) Former Wat C § 13005, as added Stats 1949 ch 1549 § 1, amended Stats 1957 ch 603 § 1, Stats 1959 ch 1299 § 5, Stats 1963 ch 1463 § 4, Stats 1965 ch 1656 § 1, ch 1657 § 7, Stats 1967 ch 70 § 1, ch 284 § 139, ch 1447 § 6.

(b) Former Wat C § 13005.1, as added Stats 1967 ch 1446 § 2, amended Stats 1967 ch 1447 § 20.

TAB 24

Cal Wat Code § 13241

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 3. Regional Water Quality Control Plans

§ 13241. Water quality objectives; Establishment; Factors considered

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1979 ch 947 § 8; *Stats 1991 ch 187 § 2 (AB 673)*.

End of Document

TAB 25

Cal Wat Code § 13260

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 4. Waste Discharge Requirements

§ 13260. Reports; Fees; Recoverable Costs; Waiver; Exemptions

(a) Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board:

(1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.

(2) A person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.

(3) A person operating, or proposing to construct, an injection well.

(b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.

(c) Each person subject to subdivision (a) shall file with the appropriate regional board a report of waste discharge relative to any material change or proposed change in the character, location, or volume of the discharge.

(d)

(1)

(A) Each person who is subject to subdivision (a) or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs may include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, adopting, reviewing, and revising water quality control plans and state policies for water quality control, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out these actions.

(D) In establishing the amount of a fee that may be imposed on a confined animal feeding and holding operation pursuant to this section, including, but not limited to, a dairy farm, the state board shall consider all of the following factors:

(i) The size of the operation.

(ii) Whether the operation has been issued a permit to operate pursuant to Section 1342 of Title 33 of the United States Code.

(iii) Any applicable waste discharge requirement or conditional waiver of a waste discharge requirement.

(iv) The type and amount of discharge from the operation.

(v) The pricing mechanism of the commodity produced.

(vi) Any compliance costs borne by the operation pursuant to state and federal water quality regulations.

(vii) Whether the operation participates in a quality assurance program certified by a regional water quality control board, the state board, or a federal water quality control agency.

(2)

(A) Subject to subparagraph (B), the fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund, which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, solely for the purposes of carrying out this division.

(B)

(i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

(ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region.

(iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

(3) A person who would be required to pay the annual fee prescribed by paragraph (1) for waste discharge requirements applicable to discharges of solid waste, as defined in *Section 40191 of the Public Resources Code*, at a waste management unit that is also regulated under Division 30 (commencing with *Section 40000) of the Public Resources Code*, shall be entitled to a waiver of the annual fee for the discharge of solid waste at the waste management unit imposed by paragraph (1) upon verification by the state board of payment of the fee imposed by *Section 48000 of the Public Resources Code*, and provided that the fee established pursuant

to *Section 48000 of the Public Resources Code* generates revenues sufficient to fund the programs specified in *Section 48004 of the Public Resources Code* and the amount appropriated by the Legislature for those purposes is not reduced.

(e) Each person that discharges waste in a manner regulated by this section shall pay an annual fee to the state board. The state board shall establish, by regulation, a timetable for the payment of the annual fee. If the state board or a regional board determines that the discharge will not affect, or have the potential to affect, the quality of the waters of the state, all or part of the annual fee shall be refunded.

(f)

(1) The state board shall adopt, by emergency regulations, a schedule of fees authorized under subdivision (d). The total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity. The state board shall automatically adjust the annual fees each fiscal year to conform with the revenue levels set forth in the Budget Act for this activity. If the state board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the Budget Act, the state board may further adjust the annual fees to compensate for the over and under collection of revenue.

(2) The emergency regulations adopted pursuant to this subdivision, any amendment thereto, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with *Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.* The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with *Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code*, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board.

(g) The state board shall adopt regulations setting forth reasonable time limits within which the regional board shall determine the adequacy of a report of waste discharge submitted under this section.

(h) Each report submitted under this section shall be sworn to, or submitted under penalty of perjury.

(i) The regulations adopted by the state board pursuant to subdivision (f) shall include a provision that annual fees shall not be imposed on those who pay fees under the national pollutant discharge elimination system until the time when those fees are again due, at which time the fees shall become due on an annual basis.

(j) A person operating or proposing to construct an oil, gas, or geothermal injection well subject to paragraph (3) of subdivision (a) shall not be required to pay a fee pursuant to subdivision (d) if the injection well is regulated by the Division of Oil and Gas of the Department of Conservation, in lieu of the appropriate California regional water quality control board, pursuant to the memorandum of understanding, entered into between the state board and the Department of Conservation on May 19, 1988. This subdivision shall remain operative until the memorandum of understanding is revoked by the state board or the Department of Conservation.

(k) In addition to the report required by subdivision (a), before a person discharges mining waste, the person shall first submit both of the following to the regional board:

(1) A report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination. The report shall include the results of all tests required by regulations adopted by the board, any test adopted by the Department of Toxic Substances Control pursuant to *Section 25141 of the Health and Safety Code* for extractable, persistent, and bioaccumulative toxic substances in a waste or other material, and any other tests that the state board or regional board may require, including, but not limited to, tests needed to determine the acid-generating potential of the mining waste or the extent to which hazardous substances may persist in the waste after disposal.

(2) A report that evaluates the potential of the discharge of the mining waste to produce, over the long term, acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

(l) Except upon the written request of the regional board, a report of waste discharge need not be filed pursuant to subdivision (a) or (c) by a user of recycled water that is being supplied by a supplier or distributor of recycled water for whom a master recycling permit has been issued pursuant to Section 13523.1.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1980 ch 656 § 1; Stats 1984 ch 268 § 32.8, effective June 30, 1984; Stats 1985 ch 653 § 1, ch 1591 § 4; Stats 1986 ch 31 § 1, effective March 21, 1986, ch 1013 § 5, effective September 23, 1986; *Stats 1988 ch 1026 § 1*; *Stats 1989 ch 627 § 1*, ch 642 § 5. Supplemented by the Governor's Reorganization Plan No. 1 of 1991 § 194, effective July 17, 1991. Amended *Stats 1992 ch 211 § 2 (AB 3012)*; *Stats 1993 ch 656 § 57 (AB 1220)*, effective October 1, 1993; *Stats 1995 ch 28 § 20 (AB 1247)*; *Stats 1997 ch 775 § 1 (AB 1186)*; *Stats 2002 ch 1124 § 56 (AB 3000)*, effective September 30, 2002. Amended Stats 2003 1st Ex Sess 2003-2004 ch 1 § 3 (AB 10X); *Stats 2011 ch 2 § 28 (AB 95)*, effective March 24, 2011.

Historical Derivation:

(a) Former Wat C § 13054, as added Stats 1949 ch 1549 § 1, amended Stats 1951 ch 1139 § 3, Stats 1959 ch 1299 § 15, Stats 1967 ch 1447 § 9.

(b) Former Wat C § 13054.1, as added Stats 1959 ch 1299 § 16, amended Stats 1967 ch 1447 § 10.

End of Document

TAB 26

Cal Wat Code § 13267

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 4. Regional Water Quality Control > Article 4. Waste Discharge Requirements

§ 13267. Board's investigations; Requiring technical or monitoring program reports, and availability and use thereof; Inspection of facilities; State board authority

(a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.

(b)

(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

(2) When requested by the person furnishing a report, the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies. However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

(c) In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with *Section 1822.50) of Part 3 of the Code of Civil Procedure.* However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant.

(d) The state board or a regional board may require any person, including a person subject to a waste discharge requirement under Section 13263, who is discharging, or who proposes to discharge,

wastes or fluid into an injection well, to furnish the state board or regional board with a complete report on the condition and operation of the facility or injection well, or any other information that may be reasonably required to determine whether the injection well could affect the quality of the waters of the state.

(e) As used in this section, "evidence" means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action.

(f) The state board may carry out the authority granted to a regional board pursuant to this section if, after consulting with the regional board, the state board determines that it will not duplicate the efforts of the regional board.

History

Added Stats 1969 ch 482 § 18, operative January 1, 1970. Amended Stats 1970 ch 918 § 5; Stats 1986 ch 1013 § 8, effective September 23, 1986; *Stats 1992 ch 729 § 1 (SB 1277)*; *Stats 2001 ch 869 § 3 (AB 1664)*; *Stats 2006 ch 293 § 2 (SB 729)*, effective January 1, 2007.

Historical Derivation:

Former Wat C § 13055, as added Stats 1949 ch 1549 § 1, amended Stats 1951 ch 1139 § 3.5, Stats 1959 ch 1299 § 21, Stats 1965 ch 1657 § 20, Stats 1967 ch 1447 § 14.

End of Document

TAB 27

Cal Wat Code § 13370

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

§ 13370. Public interest in state implementation of provisions of federal act, etc.

The Legislature finds and declares as follows:

(a) The Federal Water Pollution Control Act *(33 U.S.C. Sec. 1251* et seq.), as amended, provides for permit systems to regulate the discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

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

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

History

Added Stats 1972 ch 1256 § 1, effective December 19, 1972. Amended Stats 1978 ch 746 § 1; Stats 1980 ch 676 § 319; *Stats 1987 ch 1189 § 1.*

End of Document

TAB 28

Cal Wat Code § 13374

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

§ 13374. "Waste discharge requirements"

The term "waste discharge requirements" as referred to in this division is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act, as amended.

History

Added Stats 1972 ch 1256 § 1, effective December 19, 1972.

End of Document

TAB 29

Cal Wat Code § 13383

Deering's California Codes are current with urgency legislation through Chapter 9 of the 2017 Regular Session.

Deering's California Code Annotated > WATER CODE > Division 7. Water Quality > Chapter 5.5. Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972

§ 13383. Monitoring, inspection, entry, reporting, and recordkeeping requirements

(a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements, as authorized by Section 13160, 13376, or 13377 or by subdivisions (b) and (c) of this section, for any person who discharges, or proposes to discharge, to navigable waters, any person who introduces pollutants into a publicly owned treatment works, any person who owns or operates, or proposes to own or operate, a publicly owned treatment works or other treatment works treating domestic sewage, or any person who uses or disposes, or proposes to use or dispose, of sewage sludge.

(b) The state board or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required.

(c) The state board or a regional board may inspect the facilities of any person subject to this section pursuant to the procedure set forth in subdivision (c) of Section 13267.

History

Added *Stats 1987 ch 1189 § 8.* Amended *Stats 2003 ch 683 § 6 (AB 897)*.

Former Sections:

Former § 13383, similar to the present section, was added Stats 1972 ch 1256 § 1, effective December 19, 1972, amended Stats 1978 ch 746 § 7, and repealed *Stats 1987 ch 1189 § 7.*

End of Document

TAB 30

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2015-0075

In the Matter of Review of

Order No. R4-2012-0175, NPDES Permit No. CAS004001

WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, EXCEPT THOSE DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH MS4

Issued by the
California Regional Water Quality Control Board,
Los Angeles Region

SWRCB/OCC FILES A-2236 (a)-(kk)

BY THE BOARD:

In this order, the State Water Resources Control Board (State Water Board) reviews Order No. R4-2012-0175 (NPDES Permit No. CAS004001) adopted by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) on November 8, 2012. Order No. R4-2012-0175 regulates discharges of storm water and non-storm water from the municipal separate storm sewer systems (MS4s) located within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach MS4, and is hereinafter referred to as the "Los Angeles MS4 Order" or the "Order." We received 37 petitions challenging various provisions of the Los Angeles MS4 Order. For the reasons discussed herein, we generally uphold the Los Angeles MS4 Order, but with a number of revisions to the findings and provisions in response to issues raised in the petitions and as a result of our own review of the Order.

I. BACKGROUND

The Los Angeles MS4 Order regulates discharges from the MS4s operated by the Los Angeles County Flood Control District, Los Angeles County, and 84 municipal permittees (Permittees) in a drainage area that encompasses more than 3,000 square miles and multiple watersheds. The Order was issued by the Los Angeles Water Board in

accordance with section 402(p)(3)(B) of the Clean Water Act[1] and sections 13263 and 13377 of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act),[2] as a National Pollutant Discharge Elimination System (NPDES) permit to control storm water and non-storm water discharges that enter the area's water bodies from the storm sewer systems owned or operated by the multiple governmental entities named in the Order. The Los Angeles MS4 Order superseded Los Angeles Water Board Order No. 01-182 (2001 Los Angeles MS4 Order), and is the fourth iteration of the NPDES permit for MS4 discharges in the relevant area.

The Los Angeles MS4 Order incorporates most of the pre-existing requirements of the 2001 Los Angeles MS4 Order, including the water quality-based requirement to not cause or contribute to exceedances of water quality standards in the receiving water. The Los Angeles MS4 Order also requires Permittees to comply with new water quality-based requirements to implement 33 watershed-based total maximum daily loads (TMDLs) for the region. The Order links both of these water quality-based requirements to the programmatic elements of the Order by allowing Permittees to comply with the water quality-based requirements, in part, by developing and implementing a watershed management program (WMP) or enhanced watershed management program (EWMP), as more specifically defined in the Order.

Following adoption of the Los Angeles MS4 Order, we received 37 timely petitions challenging various provisions of the Order and, in particular, the provisions implementing TMDLs and integrating water quality-based requirements and watershed-based program implementation. Several petitioners asked that their petitions be held in abeyance;[3] however, due to the number of active petitions also seeking review, we declined to hold those petitions in abeyance at that time.[4] Five petitioners additionally requested that we partially stay the Los Angeles MS4 Order. Following review, the Executive Director of the State Water Board denied the stay requests for failure to comply with the prerequisites for a stay as specified in California Code of Regulations, title 23, section 2053.

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[1] 33 U.S.C. § 1342(p)(3)(B).

[2] Wat. Code, §§ 13263, 13377.

[3] See Cal. Code Regs., tit. 23, § 2050.5, subd. (d).

[4] By letter dated January 30, 2013, we provided an opportunity for petitioners to submit an explanation for why a petition should be held in abeyance notwithstanding the existence of the active petitions. In response, two petitioners, City of Signal Hill and the City of Claremont, argued that their petitions raised unique issues not common to the remaining petitions and therefor appropriate for abeyance. We thereafter denied their requests on July 29, 2013, finding that the unique issues could nevertheless be resolved concurrently with the issues in the other petitions. On October 9, 2013, the City of Claremont withdrew two of the claims in its petition.

We deemed the petitions complete by letter dated July 8, 2013, and, as permitted under our regulations,[5] consolidated the petitions for review.

An issue front and center in the petitions is the appropriateness of the approach of the Los Angeles MS4 Order in addressing what we generally refer to as "receiving water limitations." Receiving water limitations in MS4 permits are requirements that specify that storm water and non-storm water discharges must not cause or contribute to exceedances of water quality standards in the waters of the United States that receive those discharges. In precedential State Water Board Order WQ 99-05 (*Environmental Health Coalition*), we directed that all MS4 permits contain specific language that explains how the receiving water limitations will be implemented. (For clarity, we refer to MS4 permit language that relates to implementation of the permit's receiving water limitations as "receiving water limitations provisions.") We held a workshop on November 20, 2012, concerning receiving water limitations in MS4 permits. The purpose of the workshop was to receive public comment on an issue paper discussing several alternatives to the receiving water limitations provisions currently included in MS4 permits as directed by Order WQ 99-05 (Receiving Water Limitations Issue Paper).[6]

Because the Los Angeles MS4 Order contains new provisions that authorize the Permittees to develop and implement WMP/EWMPs in lieu of requiring compliance with the receiving water limitations provisions, we view our review of the Order as an appropriate avenue for resolving some of the issues raised in our November 20, 2012 workshop. Through notice to all interested persons, we bifurcated the responses to the petitions and solicited two separate sets of responses: (1) Responses to address issues related to whether the WMP/EWMP alternatives contained in the Los Angeles MS4 Order are an appropriate approach to revising the receiving water limitations provisions in MS4 permits (August 15, 2013 Receiving Water Limitations Submissions); and (2) Responses to address all other issues raised in the petitions (October 15, 2013 Responses).[7] We held a workshop on October 8, 2013, to hear public comment on the first set of responses.

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[5] Cal. Code Regs., tit. 23, § 2054.

[6] Information on that workshop is available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml> (as of Nov 18, 2014).

[7] We requested the bifurcated responses initially by letter dated July 15, 2013. Subsequent letters on July 29, 2013, and September 18, 2013, clarified the nature of the submissions and extended the submission deadline for the second response.

State Water Board regulations generally require final disposition on petitions within 270 days of the date a petition is deemed complete.[8] However, in this case, we required additional time to review the large number of issues raised in the petitions. When the State Water Board anticipates addressing a petition on the merits after the review period passes, it may indicate that it will review the matter on its own motion.[9] On April 1, 2014, we adopted Order WQ 2014-0056 taking up review of the issues in the petitions on our own motion.[10]

We now resolve the issues in the petitions with this order.

II. ISSUES AND FINDINGS

The 37 petitions raise over sixty contentions claiming deficiencies in the Los Angeles MS4 Order. This Order addresses the most significant contentions. To the extent petitioners raised issues that are not discussed in this Order, such issues are dismissed as not raising substantial issues appropriate for State Water Board review.[11]

Before proceeding to the merits of the petitions, we will resolve several procedural issues.

Requests to Take Official Notice or Supplement the Record with Additional Evidence

We received a number of requests to take official notice of documents not in the administrative record of the adoption of the Los Angeles MS4 Order by the Los Angeles Water Board (hereinafter Administrative Record)[12] and a number of requests to admit supplemental evidence not considered by the Los Angeles Water Board.[13] We reviewed the requests with

[8] Cal. Code Regs., tit. 23, § 2050.5, subd. (b).

[9] See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

[10] To avoid premature litigation on the petition issues as a result of our review extending past the 270 day-regulatory review period, at our suggestion most of the petitioners asked that their petitions be placed in abeyance until adoption by the State Water Board of a final order. We granted those requests. Simultaneously with adopting this order, we are removing the petitions from abeyance and acting upon them.

[11] *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107, 1114; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

[12] The Administrative Record was prepared by the Los Angeles Water Board and is available at <http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/AdminRecordOrderNoR4_2012_0175/index.shtml> (as of Nov. 18, 2014).

[13] Several requests for official notice or to admit supplemental evidence were received concurrently with submission of the petitions, with the August 15, 2013 Receiving Water Limitations Submissions, and with the October 15, 2013 Responses. Additional requests for official notice were submitted concurrently with comments on first and revised public drafts of this order and were opposed by several parties. (Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay, Jan. 21, 2015; Request for Official Notice, Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay, June 2, 2015.) Although we have reviewed these additional requests for official notice, we have not granted the requests for the various reasons articulated in this section, in Section II.B.8, and in footnote 74.

consideration of whether they were appropriate for notice or admission based on the legal standards governing our proceedings[14] and whether the documents would materially aid in our review of the issues in the proceedings. We grant the requests with regard to documents 1-7 below, and additionally take official notice on our own motion of documents 8, 9, and 10:[15]

1. Order No. 2013-0001-DWQ, NPDES Permit for Storm Water Discharges from Small MS4s, adopted by State Water Board, February 5, 2013;[16]
2. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia issued by the United States Environmental Protection Agency (USEPA), November 9, 2012, and a responsiveness summary issued in support of its original adoption of the permit, October 7, 2011;[17]
3. Administrative Procedures Update Number 90-004 on Antidegradation Policy Implementation for NPDES Permitting, issued by the State Water Board, July 2, 1990;[18]
4. Chapter 7 of the NPDES Permit Writers' Manual, updated by USEPA, September 2010;[19]
5. Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA, August 8, 2012;[20]

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[14] For official notice see Cal. Code Regs., tit. 23, § 648.2; Gov. Code, § 11515; Evid. Code, § 452. For admission of supplemental evidence see Cal. Code Regs., tit. 23, § 2050.6.

[15] We note that two documents for which we received requests for official notice are already in the administrative record: USEPA, Memorandum Setting Forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (Nov. 12, 2010) (Administrative Record, section 10.II, RB-AR23962-23968); USEPA, Chapter 6 of the NPDES Permit Writers' Manual (updated Sept. 2010) (Administrative Record, section 10.IV, RB-AR24905-24932).

[16] County of Los Angeles October 15, 2013 Response, Att. C; also available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf> (as of Nov. 18, 2014).

[17] Los Angeles Water Board Request for State Water Board to Take Official Notice of Or Accept as Supplemental Evidence Exhibit A through SS (Oct. 15, 2013) (Los Angeles Water Board Request for Official Notice), Exh.'s A, B; also available at <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/MS4FinalLimitedModDocument/FinalModifiedPermit_10-25-12.pdf> and <http://www.epa.gov/reg3wapd/pdf/pdf_npdes/stormwater/DCMS4/FinalPermit2011/DCMS4FINALResponsivenessSummary093011.pdf> (as of Nov. 18, 2014).

[18] Los Angeles Water Board Request for Official Notice, Exh.C; also available at <http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf> (as of Nov.18, 2014).

[19] Chapter 7 of USEPA's NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010 (NPDES Permit Writers' Manual) was submitted as Exhibit C to Natural Resources Defense Council, Los Angeles Waterkeeper and Heal the Bay Request for Official Notice (Dec. 10, 2012) (Environmental Petitioners' Request for Official Notice). The chapter may additionally be accessed through links at <http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm> (as of Nov.18, 2014).

6. Memorandum to the Water Management Division Directors, Regions I-X, and NPDES State Directors, issued by USEPA, 1989;[21]
7. "Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12," issued by USEPA, Region 9, June 3, 1987;[22]
8. Order WQ 2014-0077-DWQ, amending NPDES Statewide Storm Water Permit for State of California Department of Transportation, Order 2012-0011-DWQ, adopted by State Water Board, May 20, 2014;[23]
9. Statement from USEPA soliciting comments on the USEPA Memorandum Setting forth Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs (November 12, 2010), issued March 17, 2011.[24]
10. Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,'" issued by USEPA, November 26, 2014.[25]

In addition, we are incorporating the administrative record of the November 20, 2012 workshop on receiving water limitations, including the Receiving Water Limitations Issue Paper and comments by interested persons, into our record for the petitions on the Los Angeles MS4 Order.[26]

(continued from previous page)

[20] Environmental Petitioners' Request for Official Notice, Exh.B, available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[21] Environmental Petitioners' Request for Official Notice, Exh.D; also available at <http://www.epa.gov/npdes/pubs/owm0231.pdf> (as of Nov. 18, 2014).

[22] Environmental Petitioners' Request for Official Notice, Exh.E; available at <http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2236/a2236m_rfon.pdf> (as of Nov. 18, 2014).

[23] Available at <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2014/wqo2014_0077_dwq.pdf> (as of Nov. 18, 2014).

[24] Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).

[25] Available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf> (as of March 30, 2015).

[26] The Receiving Water Limitations Issue Paper and comments and workshop presentations by interested person are available at <http://www.waterboards.ca.gov/water_issues/programs/stormwater/rwl.shtml>.

Among other requests, we are not granting the requests to take official notice of or supplement the Administrative Record with the notices of intent, workplans, draft programs, and other documents filed by Permittees toward development of WMPs/EWMPs and associated monitoring programs following adoption of the Los Angeles MS4 Order or comments submitted on those documents, or the conditional approvals of several of the programs. With regard to factual evidence regarding actions taken by Permittees to comply with the Los Angeles MS4 Order after it was adopted, we believe it appropriate to close the record with the adoption of the Los Angeles MS4 Order. However, we are keenly aware that the success of the Los Angeles MS4 Order in addressing water quality issues depends primarily on the careful and effective development and implementation of programs consistent with the requirements of the Order; we speak to that issue later in our discussion.

City of El Monte's Amended Petition

Petitioner City of El Monte (El Monte) timely filed a petition on December 10, 2012, challenging a number of provisions of the Los Angeles MS4 Order. Thereafter, on February 19, 2013, El Monte filed an amended petition, based on information it asserted was not available prior to the deadline for submission of the petition.

Water Code section 13320, subdivision (a) provides that a petition for review of a regional water quality control board (regional water board) action must be filed within 30 days of the regional water board's action.[27] The State Water Board interprets that requirement strictly and petitions filed more than 30 days from regional water board action are rejected as untimely. El Monte asserted that the two additional arguments raised in the amended petition were based on information that was not available prior to the deadline for submitting the petition and were therefore appropriate for State Water Board consideration.

Even if we were required by statute or regulation to accept amended petitions based on new information, here, El Monte's new arguments are not supported by information previously unavailable. First, El Monte argues that the Supreme Court's decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council* (2013) 133 S.Ct. 710 invalidated certain provisions of the Los Angeles MS4 Order that require compliance with water quality standards and total maximum daily load requirements through receiving water monitoring. Contrary to El Monte's assertion, the decision by the Supreme Court did not invalidate any requirements of the Los Angeles MS4 Order and did not result in any changes to

[27] See also Cal. Code Regs., tit. 23, § 2050.

the Order. The Supreme Court decision, to the extent it applies to the legal issues before us in this matter, constitutes precedential case law and must be considered in our review of the Los Angeles MS4 Order, but it does not constitute new information that supports an amended petition.[28]

Second, El Monte argues that the Los Angeles Water Board failed to consider various provisions of the California Watershed Improvement Act of 2009[29] when it adopted the Los Angeles MS4 Order. To the extent El Monte believed that the California Watershed Improvement Act was relevant to adoption of the Los Angeles MS4 Order, El Monte had the opportunity to raise that issue in comments before the Los Angeles Water Board and in its timely petition to the State Water Board. Having failed to raise the issue before the Los Angeles Water Board and in its timely petition, El Monte cannot raise the issue in an amended petition.[30]

We reject El Monte's amended petition as untimely.

Environmental Petitioners' Motion to Strike

Petitioners Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (Environmental Petitioners), submitted a motion on November 11, 2013, requesting that the State Water Board strike sections of the October 15, 2013 Responses by six petitioners (Motion to Strike). The relevant sections respond to a collateral estoppel argument made by the Environmental Petitioners in their August 15, 2013 Receiving Water Limitations Submission to the State Water Board. Several parties asserted in their petitions that requiring compliance with water quality standards in MS4 permits violates federal law or conflicts with prior State Water Board precedent. The Environmental Petitioners responded in their August 15, 2013 Receiving Water Limitations Submission that these arguments were barred by collateral estoppel because the claims were settled in prior court cases challenging the 2001 Los Angeles MS4 Order. Six of the October 15, 2013 Responses, namely those by the Cities of

[28] We note that the State Water Board has the option of allowing additional briefing when there are material legal developments concerning issues raised in a petition, but we did not find such briefing would aid review of the petitions in this case.

[29] Wat. Code, § 16100 et seq.

[30] In addition to being untimely, El Monte's argument lacks merit. The California Watershed Improvement Act of 2009 grants authority to local government permittees regulated by an MS4 permit to develop and implement watershed improvement plans, but does not limit the authority of a regional water board to impose terms related to watershed management in an MS4 permit. Further, the terms of the WMPs/EWMPs are largely consistent with the watershed improvement plans authorized by the Act, so a permittee can comply with the Los Angeles MS4 Order while also using the authority provided by the California Watershed Improvement Act of 2009 if it so chooses.

Arcadia, Claremont, Covina, Duarte and Huntington Park, San Marino et al.,[31] and Sierra Madre, incorporated a response to the collateral estoppel argument.

We stated in a July 15, 2013 letter that"[i]nterested persons may not use the [October 15][32] deadline for responses on the remaining petition issues as an opportunity to respond to comments filed on the receiving water limitations approach." We clarified further in a July 29, 2013 letter: "[W]hen submitting subsequent responses to the petitions in accordance with the [October 15] deadline, petitioners and interested persons should not raise new issues related to the specific questions regarding the watershed management program/enhanced watershed management program or respond to any August 15, 2013, submissions; however petitioners and interested persons will not be precluded from responding to specific issues raised in the original petitions on grounds that the issues are related to the receiving water limitations language."

We find that the collateral estoppel responses by the six petitioners are disallowed by the direction we provided in our July 15 and July 29, 2013 letters. However, as will be apparent in our discussion in section II.A, we do not rely on the Environmental Petitioners' collateral estoppel argument in resolving the petitions. Our determination that portions of the October 15, 2013 Responses are disallowed is, therefore, immaterial to the resolution of the issues.[33]

Having resolved the procedural issues, we turn to the merits of the Petitions.

A. Implementation of the Iterative Process as Compliance with Receiving Water Limitations

The Los Angeles MS4 Order includes receiving water limitations provisions that are consistent with our direction in Order WQ 99-05 in Part V.A of the Los Angeles MS4 Order. Part V.A. provides, in part, as follows:

1. Discharges from the MS4 that cause or contribute to the violation of receiving water limitations are prohibited.

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[31] The cities of San Marino, Rancho Palos Verdes, South El Monte, Norwalk, Artesia, Torrance, Beverly Hills, Hidden Hills, Westlake Village, La Mirada, Vernon, Monrovia, Agoura Hills, Commerce, Downey, Inglewood, Culver City, and Redondo Beach submitted a joint October 15, 2013 Response.

[32] The July 15, 2013 letter set a deadline of September 20, 2013, which was subsequently extended to October 15, 2013.

[33] In a November 21, 2013 letter, we indicated that we would consider the Motion to Strike concurrently with drafting of this Order, but that we would not accept any additional submissions in this matter, including any responses to the Motion to Strike. City of San Marino objected to the letter and submitted an opposition to the Motion to Strike. Several petitioners submitted joinders in City of San Marino's motion. For the same reasons articulated above, we are not accepting these submissions; they would not affect our resolution of the issues.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible [footnote omitted], shall not cause or contribute to a condition of nuisance.

3. The Permittees shall comply with Parts V.A.1 and V.A.2 through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the storm water management program and its components and other requirements of this Order including any modifications. . . .[34]

The petitioners that are permittees (hereinafter referred to as "Permittee Petitioners")[35] argue that the above language either means, or should be read and/or clarified to mean, that good faith engagement in the requirements of Part V.A.3, traditionally referred to as the "iterative process," constitutes compliance with Parts V.A.1. and V.A.2. The position put forth by Permittee Petitioners is one we took up when we initiated a process to re-examine the receiving water limitations and iterative process in MS4 permits statewide with our Receiving Water Limitations Issue Paper and the November 20, 2012 workshop. We summarize the law and policy regarding Permittee Petitioners' position again here and ultimately disagree with Permittee Petitioners that implementation of the iterative process does or should constitute compliance with receiving water limitations.

The Clean Water Act generally requires NPDES permits to include technology-based effluent limitations and any more stringent limitations necessary to meet water quality standards.[36] In the context of NPDES permits for MS4s, however, the Clean Water Act does not explicitly reference the requirement to meet water quality standards. MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the Maximum Extent Practicable (MEP) in all cases, but requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations) is at the discretion of the permitting agency.[37] Specifically the Clean Water Act states as follows:

> Permits for discharges from municipal storm sewers –
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> . . .
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

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[34] Los Angeles MS4 Order, Part V.A, pp. 38-39.

[35] For ease of reference, where an argument is made by multiple Permittee Petitioners, even if not by all, we attribute that argument to Permittee Petitioners generally, and do not list which of the 37 Permittee Petitioners in fact make the argument. Where only one or two Permittee Petitioners make a particular argument, we have identified the specific Permittee Petitioner(s).

[36] 33 U.S.C. §§ 1311, 1342(a).

[37] 33 U.S.C. § 1342(p)(3)(B); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.

> (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 State determines appropriate for the control of such pollutants.[38]

Thus, a permitting agency imposes requirements related to attainment of water quality standards where it determines that those provisions are "appropriate for the control of [relevant] pollutants" pursuant to the Clean Water Act municipal storm water provisions.

Under the Porter-Cologne Act, waste discharge requirements must implement applicable water quality control plans, which include the beneficial uses to be protected for a given water body and the water quality objectives reasonably required for that protection.[39] In this respect, the Porter-Cologne Act treats MS4 dischargers and other dischargers even-handedly and anticipates that all waste discharge requirements will implement the water quality control plans. However, when implementing requirements under the Porter-Cologne Act that are not compelled by federal law, the State Water Board and regional water boards (collectively, "water boards") have some flexibility to consider other factors, such as economics, when establishing the appropriate requirements.[40] Accordingly, since the State Water Board has discretion under federal law to determine whether to require strict compliance with the water quality standards of the water quality control plans for MS4 discharges, the State Water Board may also utilize the flexibility under the Porter-Cologne Act to decline to require strict compliance with water quality standards for MS4 discharges.

We have previously exercised the discretion we have under federal law in favor of requiring compliance with water quality standards, but have required less than strict compliance. We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters,[41] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs

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[38] 33 U.S.C. § 1342(p)(3)(B).

[39] Wat. Code, § 13263. The term "water quality standards" encompasses the beneficial uses of the water body and the water quality objectives (or "water quality criteria" under federal terminology) that must be met in the waters of the United States to protect beneficial uses. Water quality standards also include the federal and state antidegradation policy.

[40] Wat. Code, §§ 13241, 13263; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.

[41] State Water Board Orders WQ 98-01 (*Environmental Health Coalition*), WQ 99-05 (*Environmental Health Coalition)*, WQ 2001-15 (*Building Industry Association of San Diego*).

expected to better meet water quality standards, and implementation of these new BMPs.[42] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions.[43] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.

There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.[44]

The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions. The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in

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[42] State Water Board Order WQ 99-05, pp. 2-3; see also State Water Board Order WQ 2001-15, pp. 7-9. Additionally, consistent with federal law, we found it appropriate to require implementation of BMPs in lieu of numeric water quality-based effluent limitations to meet water quality standards. *See* State Water Board Orders WQ 91-03 (*Citizens for a Better Environment)*, WQ 91-04 (*Natural Resources Defense Council*), WQ 98-01, WQ 2001-15. This issue is discussed in greater detail in Section II.C. of this order.

[43] See State Water Board Orders WQ 99-05, WQ 2001-15.

[44] Several Permittee Petitioners have argued that the State Water Board's opinion in State Water Board Order WQ 2001-15 must be read to endorse a safe harbor in the iterative process. We disagree. Regardless, the State Water Board's position that the iterative process of the subject permit did not create a "safe harbor" from compliance with receiving water limitations was clearly established in subsequent litigation on that order. (See *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (Super. Ct. 2003, No. GIC780263), affd. *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.)

the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard."[45] The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards.[46] The California Court of Appeal has come to the same conclusion in interpreting similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002.[47]

While we reiterate that the judicial rulings have been consistent with the water boards' intention and position regarding the relationship between the receiving water limitations and the iterative process, we acknowledge that some in the regulated community perceived the 2011 Ninth Circuit opinion in particular as a re-interpretation of that relationship. Our Receiving Water Limitations Issue Paper and subsequent workshop reflected our desire to re-examine the issue in response to concerns expressed by the regulated community in the aftermath of that ruling.

As stated above, both the Clean Water Act and the Porter-Cologne Act afford some discretion to not require strict compliance with water quality standards for MS4 discharges. In each of the discussed court cases above, the court's decision is based on the specific permit language; thus the cases do not address our authority with regard to requiring compliance with water quality standards in an MS4 permit as a threshold matter, and they do not require us to continue to exercise our discretion as we decided in State Water Board Order

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[45] *In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal's decision.

[46] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880, rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135.

[47] *Building Industry Assn. of San Diego County, supra,*124 Cal.App.4th 866; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377.

WQ 99-05. Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process,[48] we may even have the flexibility to reverse[49] our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance.[50]

However, with this Order, we now decline to do either. As the storm water management programs of municipalities have matured, an increasing body of monitoring data indicates that many water quality standards are in fact not being met by many MS4s. The iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards. Compliance with water quality standards is and should remain the ultimate goal of any MS4 permit. We reiterate and confirm our determination that provisions requiring compliance with receiving water limitations are "appropriate for the control of . . . pollutants" addressed in MS4 permits and that therefore, consistent with our authority under the Clean Water Act, we will continue to require compliance with receiving water limitations.[51]

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[48] See, e.g. Modified NPDES Permit No. DC0000022 for the MS4 for the District of Columbia, *supra*, fn. 17.

[49] Of course any change of direction would be subject to ordinary principles of administrative law. (See Code Civ. Proc., § 1094.5, subd. (b).)

[50] As such, it is not necessary to address the collateral estoppel arguments raised by the Environmental Petitioners and opposed by Permittee Petitioners. We agree that it is settled law that we have the discretion to require compliance with water quality standards in an MS4 permit under federal and state law. We also agree that it is settled law that the receiving water limitations provisions currently spelled out in our MS4 permits do not carve out a safe harbor in the iterative process. But the question for us is whether we should continue to exercise our discretion to utilize the same approach to receiving water limitations established under our prior precedent, or proceed in a new direction.

[51] Several Permittee Petitioners argued in comments submitted on the first draft of this order that, because we find that we have some discretion under Clean Water Act section 402(p)(3) to not require compliance with receiving water limitations, the Los Angeles Water Board's action in requiring such compliance -- and our action in affirming it -- is pursuant to state authority. (See, e.g., Cities of Arcadia, Claremont, and Covina, Comment Letter, Jan. 21, 2015.) The Permittee Petitioners argue that the action is therefore subject to evaluation in light of the factors set out in Water Code section 13263 and 13241 pursuant to *City of Burbank, supra,* 35 Cal.4th 613. Under *City of Burbank,* a regional water board must consider the factors specified in section 13241 when issuing waste discharge requirements under section 13263, subdivision (a), but only to the extent those waste discharge requirements exceed the requirements of the federal Clean Water Act. (35 Cal.4th at 627.) Nowhere in our discussion in this section do we mean to disavow either that the Los Angeles Water Board acted under federal authority to impose "such other provisions as . . .determine[d] appropriate for the control of . . . pollutants" in adopting the receiving water limitations provisions of the Los Angeles MS4 Order in the first instance or that we are acting under federal authority in upholding those provisions. (33 U.S.C. § 1342(p)(3)(B)(iii).) The receiving water limitations provisions do not exceed the requirements of federal law. We nevertheless also point out that the Los Angeles Water Board engaged in an analysis of the factors under section 13241 when adopting the Order. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-139 to F-155.)

As we explained in 2001, "[u]rban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses."[52] More than a decade later, this is still true. By definition, many of our urban waterways will never attain water quality standards and fully realize their beneficial uses if municipal runoff is allowed to continue to cause or contribute to exceedances of water quality standards. Further, the efforts of other dischargers who are required to not cause or contribute to exceedances of water quality standards would be largely in vain if we did not regulate MS4 dischargers with a somewhat even hand.

Such an approach is additionally consistent with the Porter-Cologne Act's emphasis on water quality control plans as the cornerstone of water quality planning and regulation and the act's expectation that all waste discharge requirements will implement the water quality control plans. We believe that direct enforcement of water quality standards is necessary to protect water quality, at a minimum as a back-stop where dischargers fail to meet requirements of the Order designed to achieve progress toward meeting the standards. We will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards. We accordingly also decline to direct any revisions to the receiving water limitations provisions of the Los Angeles MS4 Order, which are consistent with our precedential language.[53]

Yet, we are sympathetic to the assertions made by MS4 dischargers that the receiving water limitations provisions mandated by our Order WQ 99-05 may result in many years of permit noncompliance, because it may take years of technical efforts to achieve compliance with the receiving water limitations, especially for wet weather discharges.

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[52] State Water Board Order WQ 2001-15, p. 7.

[53] We disagree with Permittee Petitioners' argument that the receiving water limitations in Part V.A of the Los Angeles MS4 Order are confusing, unclear, or overbroad, because they prohibit causing or contributing to a violation of a receiving water limitation rather than a violation of water quality standards. The Los Angeles Water Board defines "receiving water" as "[a] 'water of the United States' in to which waste and/or pollutants are or may be discharged." (Los Angeles MS4 Order, Att. A., p. A-16.) The Los Angeles Water Board further defines "receiving water limitations" as "[a]ny applicable numeric or narrative water quality objective or criterion, or limitation to implement the applicable water quality objective or criterion, for the receiving water as contained in Chapter 3 or 7 of the Water Quality Control Plan for the Los Angeles Region (Basin Plan), water quality control plans or policies adopted by the State Water Board, or federal regulations, including but not limited to, 40 CFR §131.38." (*Ibid.*) Receiving water limitations are therefore the water quality standards, including water quality objectives and criteria, that apply to the receiving water as expressed in the water quality control plan for the region, statewide water quality control plans that specify objectives for water bodies in the region, State Water Board policies for water quality control, and federal regulations.

Accordingly, we believe that the MS4 permits should incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

With the WMP/EWMP provisions of the Los Angeles MS4 Order, the Los Angeles Water Board is striving to allow one such alternative compliance path. As such, the fundamental issue for review before us in this matter is whether the Los Angeles MS4 Order's WMP/EWMP provisions constitute a legal and technically sound compliance alternative for achieving receiving water limitations. We discuss and resolve this issue in the next section.

B. WMP/EWMP as Alternative Compliance Options for Complying with Receiving Water Limitations

The WMP/EWMP provisions allow Permittees to choose an integrated and collaborative watershed-based approach to meeting the requirements of the Los Angeles MS4 Order, including the receiving water limitations. Permittees develop a plan, either collaboratively or individually, that addresses water quality priorities within a watershed. Permittees first prioritize water quality issues within each watershed. Permittees may use the WMP/EWMP to address water body-pollutant combinations for which a TMDL has been developed, giving highest priority to those with interim and final compliance deadlines within the permit term. Permittees may also address water body-pollutant combinations for which no TMDL has been developed, but where the water body is impaired or shows exceedances of the standards for the relevant pollutant from an MS4 source. Once prioritization is completed, Permittees assess the sources of the pollutants and select watershed strategies that are designed to eliminate non-storm water discharges to the MS4 that are a source of pollutants, that meet all applicable TMDL-derived interim and final water quality-based effluent limitations (WQBELs) and/or limitations to be met in the receiving water (referred to herein as "other TMDL-specific limitations")[54] pursuant to corresponding compliance schedules, and that ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations. Except as described below for storm water retention projects, Permittees conduct a "reasonable assurance analysis" for each water body-pollutant combination incorporated into the

[54] Some of the TMDL limitations of the Los Angeles MS4 Order are expressed not as WQBELs but as standards to be met in the receiving water. The Los Angeles MS4 Order refers to these limitations as "receiving water limitations;" however, in order to avoid confusion with the general receiving water limitations in Part V.A., we will use the term "other TMDL-specific limitations." Accordingly, while the Los Angeles MS4 Order uses the term "receiving water limitations" to refer to both the receiving water limitations in part V.A and some of the TMDL-based requirements in Attachments L-R, when we use the term we refer only to the receiving water limitations in part V.A.

WMP/EWMP to demonstrate the ability of the program to meet those objectives. Permittees additionally implement an integrated monitoring and assessment program to determine progress, adapting strategies and measures as necessary.[55]

In addition to all the requirements above, for those Permittees that choose to develop and implement an EWMP, the EWMP provisions also require that Permittees collaborate on multi-benefit regional projects and, wherever feasible, retain all non-storm runoff, as well as all storm water runoff from the 85th percentile 24-hour storm event (hereinafter "storm water retention approach") for the drainage areas tributary to the projects.[56]

The primary controversy concerning the WMP/EWMP provisions of the Los Angeles MS4 Order is the manner in which they interact with the receiving water limitations and the WQBELs and other TMDL-specific limitations. Under certain conditions detailed in the Order, Permittees may be deemed in compliance with the receiving water limitations and the WQBELs and other TMDL-specific limitations by fully implementing the WMP/EWMP, rather than by demonstrating that the receiving water limitations and the WQBELs and other TMDL-specific limitations have actually been achieved. Specifically:

1. Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP.[57]

2. Permittees fully in compliance with the requirements and dates of achievement of the WMP/EWMP are deemed in compliance with the *interim* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the WMP/EWMP.[58]

3. Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.[59]

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[55] Los Angeles MS4 Order, Part VI.C., pp. 49-67.

[56] *Id.*, Part VI.C.1.g., pp. 48-49.

[57] *Id.*, Part VI.C.2.b., p. 52.

[58] *Id.*, Parts VI.C.3.a., p. 53, VI.E.2.d.i.4., pp. 143-44. The Los Angeles MS4 Order establishes separate requirements for Trash TMDLs and the WMP/EWMP are not a means of achieving compliance with the Trash TMDL provisions. (See Part VI.E.5, pp. 147-154.) References to TMDLs in this section exclude the Trash TMDLs.

[59] *Id.*, Part VI.E.2.e.i.(4), p. 145. As with Part VI.E.2.d.i.4, this Part does not apply to Trash TMDLs.

4. Because the Order additionally provides that full compliance with the general TMDL requirements in Part VI.E and the WQBELs and other TMDL-specific limitations in Attachments L through R constitutes compliance with the receiving water limitations in V.A for the specific pollutants addressed by the relevant TMDL, [60] provisions 2 and 3 above also constitute compliance with the receiving water limitations for the particular water body-pollutant combinations.

5. Finally, Permittees that have declared their intention to develop a WMP/EWMP may be deemed in compliance with receiving water limitations and with interim WQBELs with compliance deadlines occurring prior to approval of the WMP/EWMP if they meet certain conditions during the development phase.[61]

Both Environmental Petitioners and Permittee Petitioners put forth a number of arguments to the effect that the WMP/EWMP provisions of the Los Angeles MS4 Order are contrary to federal and state law or reflect poor policy. We discuss each argument below.

1. Anti-backsliding

The Environmental Petitioners argue that the inclusion of the WMP/EWMP in the Los Angeles MS4 Order violates the anti-backsliding provisions of the Clean Water Act and of the federal regulations.[62] The Clean Water Act generally prohibits the relaxation of an effluent limitation established in an NPDES permit when that permit is renewed; the federal regulations include similar provisions. The Environmental Petitioners argue that the WMP/EWMP of the Los Angeles MS4 Order, by allowing a discharger to be deemed in compliance with receiving water limitations, even where a discharger may in fact be causing or contributing to an exceedance of a water quality standard, represent a relaxation of the receiving water limitations provisions contained in the 2001 Los Angeles MS4 Order.[63]

We do not agree with the Environmental Petitioners that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the anti-backsliding provisions of either the Clean Water Act or the federal regulations. Anti-backsliding provisions are an important aspect

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[60] *Id.*, Part VI.E.2.c.ii., p. 143. Although this provision reflects a departure from provisions in previous MS4 permits, the provision has not generated controversy and has not been contested in the petitions. The State Water Board supports this provision in MS4 permits, as discussed at section II.B.5.b. of this order.

[61] *Id.*, Parts VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.

[62] 33 U.S.C. § 1342(o); 40 C.F.R. §122.44(*l*).

[63] The receiving water limitations of the 2001 Los Angeles MS4 Order (like the receiving water limitations in Section V.A. of the Los Angeles MS4 Order) were modeled on the precedential language in State Water Board Order WQ 99-05.

of the Clean Water Act that generally promote continued progress toward clean water, but the provisions do not apply in all circumstances and are subject to certain exceptions. The 2001 Los Angeles MS4 Order required compliance with receiving water limitations, directed Permittees to achieve those limitations through the iterative process, but retained the Los Angeles Water Board's discretion to enforce compliance with the receiving water limitations at any time. The Los Angeles MS4 Order requires compliance with receiving water limitations, but allows implementation of control measures through the WMPs/EWMPs to constitute such compliance, and reserves direct enforcement of the receiving water limitations to situations where a permittee fails to comply with the WMP/EWMP provisions. The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations – but through distinct paths that are not easily comparable for purposes of the specific, technical anti-backsliding requirements laid out in federal law.[64] We nevertheless discuss the provisions below.

The Clean Water Act contains both statutory anti-backsliding provisions in section 402(o) and regulatory anti-backsliding provisions in 40 C.F.R. section 122.44(*l*). The Clean Water Act's statutory prohibition against backsliding applies under a narrow set of criteria specified in Clean Water Act section 402(o). First, section 402(o) prohibits relaxing effluent limitations originally established based on best professional judgment, when there is a newly revised effluent limitation guideline.[65] The WMP/EWMP is not derived from an effluent limitation guideline, so this first prohibition is inapplicable. Second, section 402(o) prohibits relaxing effluent limitations imposed pursuant to Clean Water Act sections 301(b)(1)(C) or 303(d) or (e).[66] The receiving water limitations provisions in the 2001 Los Angeles MS4 Order were not

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[64] Responding to an argument that NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia violated anti-backsliding requirements by removing certain numeric limitations in the prior permit, USEPA stated: "The Commenter implies that a Permit that replaces a numeric effluent limit with a non-numeric one is somehow automatically less stringent on that parameter. However, the narrative requirement only violates the anti-backsliding prohibition if the two provisions are comparable. . . . In this case, the two provisions are not comparable: EPA has determined that compliance with the performance standards in the Final Permit will result in more water quality protections for the DC MS4's receiving streams than did the previous aggregate numeric limit." (Responsiveness Summary, p. 84, *supra,* fn.17, citing *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal. App. 4th 1313.)

[65] 33 U.S.C. § 1342(o)(1) ("In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.").

[66] *Ibid.* ("In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.").

established based on either section 301(b)(1)(C) or section 303(d) or (e), so this prohibition on backsliding is inapplicable.[67] The receiving water limitations provisions in MS4 permits are imposed under section 402(p)(3)(B) of the Clean Water Act rather than under section 301(b)(1)(C),[68] and are accordingly not subject to the anti-backsliding requirements of section 402(o).

With respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(*l*), the non-applicability is less clear cut. USEPA promulgated 40 Code of Federal Regulations section 122.44(*l*)(1) and its predecessor anti-backsliding regulations prior to the Water Quality Act of 1987, which established the municipal permitting requirements of section 402(p)(3)(B). There is ample regulatory history to demonstrate USEPA's intent in establishing the anti-backsliding policy and regulations with respect to evolving technology standards for traditional point sources.[69] We have found no definitive guidance, however, since that time from USEPA or the courts applying the general provisions of section 122.44(*l*) in the context of municipal storm water permits.[70] Further, we have previously noted that anti-backsliding principles may be difficult to assess in the context of non-

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[67] The Environmental Petitioners do not argue that the Los Angeles MS4 Order is contrary to Clean Water Act section 303(d)(4) (33 U.S.C. § 1313(d)(4)), which also sets out anti-backsliding requirements. Section 303(d)(4) sets out the conditions under which effluent limitations based on TMDL wasteload allocations may be relaxed. Specifically, effluent limitations for a discharge impacting an impaired water body where standards have not yet been attained may only be relaxed if either the cumulative effect of the revisions still assures the attainment of the water quality standards or the designated use that is not being attained is removed. (33 U.S.C. § 1313(d)(4)(A).) Where a water body has attained standards, effluent limitations may only be relaxed consistent with the federal antidegradation policy. (33 U.S.C. § 1313(d)(4)(B).)

[68] *Defenders of Wildlife*, *supra*, 191 F.3d at pp. 1165-1166.

[69] See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979) (describing codification of predecessor regulation codified at 40 C.F.R. 122.15(i).) In the context of municipal storm water, the MEP standard is the technology standard; the record here supports that MEP, as reflected in the permit conditions, has evolved since the issuance of the 2001 Los Angeles MS4 Order to become more stringent. (See, e.g., Los Angeles MS4 Order, Part VI.D.9.h.vii., p.132, compared to 2001 Los Angeles MS4 Order, Part 4.F.5.c., pp.48-49 [trash controls]; Los Angeles MS4 Order, Part VI.D.7.c., pp. 97-109, as compared to 2001 Los Angeles MS4 Order, Part 4.D.3., pp.36-37 [new development/redevelopment project performance criteria]; Los Angeles MS4 Order, Part VI.D.8.d., pp.113-114, as compared to 2001 Los Angeles MS4 Order, Part 4.E., pp.42-45 [requirements for construction sites less than one acre].)

[70] As requested by the Environmental Petitioners, we took official notice of a Letter to the Water Management Administration, Maryland Department of the Environment, issued by USEPA Region III on August 8, 2012. (See fn. 19). We acknowledge that the letter states at page 3 that a provision in the Prince George County, Maryland, Phase I MS4 draft permit allowing for more time to complete tasks that were required under the previous permit constituted backsliding. The letter refers in passing to section 122.44(*l*)(1), but the letter has no regulatory effect and, further, is devoid of any analysis. The Environmental Petitioners have also pointed us to discussion of the regulatory anti-backsliding provisions in the NPDES Permit Writers' Manual. (NPDES Permit Writers' Manual, p. 7-4.) The relevant section of the NPDES Permit Writers' Manual does not explicitly distinguish between municipal storm water permits and traditional NPDES Permits in its discussion of the applicability of regulatory anti-backsliding provisions; however, nor does it specifically direct application of the anti-backsliding regulatory provisions to municipal storm water permits. We do not find this discussion to be to be determinative on the issue.

quantitative, non-numeric requirements such as BMPs and plans.[71] It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because, assuming for the sake of argument they do apply, the WMP/EWMP provisions would qualify for an exception to backsliding as discussed below.

Even if the receiving water limitations in MS4 permits could be considered subject to the anti-backsliding requirements of the Clean Water Act or the federal regulations, backsliding would be permissible based on the new information available to the Los Angeles Water Board when it developed and adopted the Los Angeles MS4 Order. The Clean Water Act and federal regulations contain exceptions to the anti-backsliding requirements where new information is available to the permitting authority that was not available at the time of the issuance of the prior permit and that would have justified the imposition of less stringent effluent limitations at that time.[72] The Los Angeles Water Board makes a compelling argument in its October 15, 2013 Response that the development of 33 watershed-based TMDLs adopted since 2001, the inclusion and implementation of three of those TMDLs in the 2001 Los Angeles MS4 Order, and the TMDL-specific and general monitoring and analysis during implementation, have made new information available to the Los Angeles Water Board that fundamentally shaped the WMP/EWMP alternative of the Los Angeles MS4 Order. The Los Angeles Water Board states that the new information resulted in a new understanding that "time to plan, design, fund, operate and maintain [best management practices (BMPs)] is necessary to attain water quality improvements, and these BMPs are best implemented on a watershed scale."[73] The Los Angeles Water Board further points out that, in terms of water supply, there has been a paradigm shift in the last decade from viewing storm water as a liability to viewing it as a regional asset, and that the Los Angeles MS4 Order was drafted to incorporate this new paradigm into its structure.

The WMP/EWMP approach represents a comprehensive attempt to implement the Board's new understanding regarding how to make progress toward achieving water quality

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[71] See Order WQ 96-13 (*Save San Francisco Bay Association*) at pp. 8-10. Although the relevant portion of that decision primarily concerned Clean Water Act section 402(o), its analysis is equally instructive with respect to 40 C.F.R. section 122.44(*l*). (In passing, we note that the order appears to assume that the permit's water quality-based requirements for the MS4 permit were derived pursuant to section 301(b)(1)(C); however, that assumption is in error based on the *Defenders of Wildlife* decision and subsequent State Water Board precedent.)

[72] See 33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(*l*)(1) (anti-backsliding does not apply if the circumstances on which the previous permit was based have materially and substantially changed and would constitute cause for permit modification under 40 C.F.R. section 122.62); 40 C.F.R. § 122.62(a)(2) (stating that new information not available at the time the previous permit was issued is cause for modification); see also 40 C.F.R. §122.44(*l*)(2)(i)(B)(1).

[73] Los Angeles Water Board October 15, 2013 Response, p. 51.

standards as well as supporting the development of new water supplies.[74] The anti-backsliding requirements of the Clean Water Act and the federal regulations thus did not foreclose the incorporation of the WMP/EWMP alternatives into the Los Angeles MS4 Order even though the alternatives allow additional time to achieve receiving water limitations as compared to the immediate compliance required under the 2001 Los Angeles MS4 Order.

We shall amend Finding II.N. and Part III.D.4, page F-20, of Attachment F, Fact Sheet, as follows:

Finding II.N:

N. Anti-Backsliding Requirements. Section 402(o)(2) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit. **The Fact Sheet of this Order contains further discussion regarding anti-backsliding.**

Attachment F, Fact Sheet, Part III.D.4:

4. Anti-Backsliding Requirements. Sections 402(o)(2) and 303(d)(4) of the CWA and federal regulations at 40 CFR section 122.44(l) prohibit backsliding in NPDES permits. These anti-backsliding provisions require effluent limitations in a reissued permit to be as stringent as those in the previous permit, with some exceptions where limitations may be relaxed. ~~All effluent limitations in this Order are at least as stringent as the effluent limitations in the previous permit.~~ **While this Order allows implementation of Watershed Management Plans/EWMPs to constitute compliance with receiving water limitations under certain circumstances, the availability of that alternative and the corresponding availability of additional time to come into compliance with receiving water limitations, does not violate the anti-backsliding provisions. The receiving**

[74] The Environmental Petitioners argue that information relied on to develop the WMP/EWMP approach was available to the Los Angeles Water Board at the time of the issuance of the 2001 Los Angeles MS4 Order, since regional and watershed based strategies and technologies in storm water planning, as well as the potential benefits of storm water for water supply, were considered prior to the last permit cycle. Similarly, the Environmental Petitioners argue that some of the data gathered through TMDL development was through the process of assessing impairments and through preparing drafts of the TMDL and was therefore available to the Los Angeles Water Board in 2001. (Environmental Petitioners, Written Comments, Jan. 21, 2015, pp. 15-17, 23-25.) The Environmental Petitioners have asked us to take official notice of several documents that support these assertions. It is not necessary for us to do so because we do not disagree with the Environmental Petitioners that some of the information that the Los Angeles Water Board has cited in support of an exception to the anti-backsliding requirements was available at the time of the adoption of the 2001 Los Angeles MS4 Order. We nevertheless concur with the Los Angeles Water Board that the more than a decade of implementation of storm water requirements, as well as the development and implementation of TMDL requirements, since 2001, has, as a whole, fundamentally reshaped our understanding of the physical and time scale on which such measures must be implemented to bring MS4s into compliance with receiving water limitations. Further, we find that all regional water boards are informed by the information gained in the Los Angeles region, so that any regional water board that adopts an alternative compliance path in a subsequent Phase I permit would not be in violation of anti-backsliding requirements, regardless of the particular storm water permitting history of that region.

water limitations provisions of this Order are imposed under section 402(p)(3)(B) of the Clean Water Act rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or (e), and are accordingly not subject to the anti-backsliding requirements of section 402(o). Although the non-applicability is less clear with respect to the regulatory anti-backsliding provisions in 40 Code of Federal Regulations section 122.44(*l*), the regulatory history suggests that USEPA's intent was to establish the anti-backsliding regulations with respect to evolving technology standards for traditional point sources. (See, e.g., 44 Fed.Reg. 32854, 32864 (Jun. 7, 1979)). It is unnecessary, however, to resolve the ultimate applicability of the regulatory anti-backsliding provisions, because the WMP/EWMP provisions qualify for an exception to backsliding as based on new information. The Watershed Management Plan/EWMP provisions of this Order were informed by new information available to the Board from experience and knowledge gained through the process of developing 33 watershed-based TMDLs and implementing several of the TMDLs since the adoption of the previous permit. In particular, the Board recognized the significance of allowing time to plan, design, fund, operate and maintain watershed-based BMPs necessary to attain water quality improvements and additionally recognized the potential for municipal storm water to benefit water supply. Thus, even if the receiving water limitations are subject to anti-backsliding requirements, they were revised based on new information that would support an exception to the anti-backsliding provisions. (33 U.S.C. § 1342(o)(2)(B)(i); 40 C.F.R. § 122.44(l)(1); 40 C.F.R. §122.44(l)(2)(i)(B)(1)).

2. Antidegradation

The Environmental Petitioners argue that the WMP/EWMP provisions of the Los Angeles MS4 Order violate the federal and state antidegradation policies.[75] The federal and state antidegradation policies generally require that the existing quality of water bodies be maintained, unless degradation is justified through specific findings. At a minimum, any degradation may not lower the quality of the water below the water quality standards.[76]

The federal and state antidegradation policies are not identical; however, where the federal antidegradation policy is applicable, the State Water Board has interpreted State Water Board Resolution No. 68-16, the state antidegradation policy, to incorporate the federal antidegradation policy.[77] In the context of the Los Angeles MS4 Order, a federal NPDES permit, compliance with the federal antidegradation policy would require consideration of the following: First, the Los Angeles MS4 Order must ensure that "existing instream uses and the level of

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[75] 40 C.F.R. § 131.12; State Water Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16).

[76] *Ibid.*

[77] State Water Board Order WQ 86-17 (*Fay*), pp. 16-19.

water quality necessary to protect the existing uses" is maintained and protected.[78] Second, if the baseline quality of a water body for a given constituent "exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected" through the requirements of the Los Angeles MS4 Order unless the Los Angeles Water Board makes findings that (1) any lowering of the water quality is "necessary to accommodate important economic or social development in the area in which the waters are located;" (2) "water quality adequate to protect existing uses fully" is assured; and (3) "the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control" are achieved.[79]

The Los Angeles MS4 Order must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy.[80] In particular, the Los Angeles Water Board must find that not only present, but also anticipated future uses of water are protected, and must ensure "best practicable treatment or control" of the discharges."[81] The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.[82]

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[78] 40 C.F.R. § 131.12(a)(1). This provision has been interpreted to mean that, "[i]f baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives." (State Water Board, Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004 (APU 90-004), p. 4.) This provision is completely consistent with, and implemented by, the receiving water limitations provisions discussed above.

[79] 40 C.F.R. § 131.12(a)(2); see also State Water Board Resolution No. 68-16, Resolve 2. The federal regulations additionally require strict maintenance of water quality for "outstanding national resources." (40 C.F.R. § 131.12(a)(3).) There are no designated outstanding national resource waters covered by the Los Angeles MS4 Order.

[80] See State Water Board Order WQ 86-17 (*Fay*), p. 23, fn. 11.

[81] State Water Board Resolution No. 68-16, Resolve 2. Best practicable treatment or control is not defined in Resolution No. 68-16; however, the State Water Board has evaluated what level of treatment or control is technically achievable using "best efforts." (See State Water Board Orders WQ 81-5 (*City of Lompoc*), WQ 82-5 (*Chino Basin Municipal Water District)*, WQ 90-6 (*Environmental Resources Protection Council*).) A Questions and Answers document on Resolution No. 68-16 by the State Water Board states as follows: "To evaluate the best practicable treatment or control method, the discharger should compare the proposed method to existing proven technology; evaluate performance data, e.g. through treatability studies; compare alternative methods of treatment or control; and/or consider the method currently used by the discharger or similarly situated dischargers . . .The costs of the treatment or control should also be considered . . . ." (Questions and Answers, Resolution No. 68-16, State Water Board (Feb. 16, 1995), pp. 5-6.)

[82] APU 90-004, p.4. The baseline for application of the federal antidegradation policy is 1975. For state antidegradation requirements, see also *Asociacion de Gente Unida por el Agua v. Central Valley Water Board* (2012) 210 Cal.App.4th 1255,1270. The baseline for the application of the state antidegradation policy is generally the highest water quality achieved since 1968. However, where a water quality objective for a particular constituent was adopted after 1968, the baseline for that constituent is the highest water quality achieved since the adoption of the *(Continued)*

The Los Angeles MS4 Order contains a conclusory antidegradation finding, but the Fact Sheet contains additional discussion.[83] The Fact Sheet discussion essentially conveys that, where there are high quality waters in the region, the antidegradation requirements are met because the Order requires best practicable treatment or control in the form of MEP and water quality standards compliance and, further, where the water quality is already impaired, the Order requires implementation of TMDL requirements to achieve water quality standards over time. The Fact Sheet also finds that the Los Angeles MS4 Order does not authorize an increase in waste discharges. The Los Angeles Water Board argues that it was not required to make more detailed findings because, using its best professional judgment and available data, it concluded that the Los Angeles MS4 Order would prevent any degradation. For this proposition, the Los Angeles Water Board cites to State Water Board guidance from 1990 (APU 90-004).[84] The guidance may be construed to exempt the Los Angeles Water Board from conducting an extensive pollutant by pollutant analysis for each water body in the region, but it does not exempt the Board from clearly stating its basis for finding that its action is consistent with the antidegradation policies.

The Los Angeles Water Board has provided a more extensive analysis of why the Los Angeles MS4 Order complies with the antidegradation policies in its October 15, 2013 Response. The Los Angeles Water Board argues that most of the water bodies impacted by the Los Angeles MS4 Order are already impaired for multiple constituents and that, even if some of these water bodies may have been higher quality in 1968, a scenario largely contradicted by the available data,[85] the appropriate baseline for the quality of such waters is the level of control achieved under the prior permit. The Los Angeles Water Board further argues that the Los Angeles MS4 Order has provisions that are equally or more stringent than those of the

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objective. Resolution 68-16 requires a comparison of the existing quality to "the quality established in policies as of the date on which such policies become effective." (Resolution 68-16, Resolve 1.)

[83] Los Angeles MS4 Order, Finding II.M; Fact Sheet, Att. F, pp. F19-F20.

[84] APU 90-004, p. 2.

[85] We reviewed the Administrative Record, including the 1998 Clean Water Act section 303(d) List (May 12, 1999) (Administrative Record, section 10.VI.E., RB-AR35684-35733), the 2010 Clean Water Act section 303(d) List (Oct.11, 2011) (Administrative Record, section 10.VI.E., RB-AR35734-35785), Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indication Organisms and Human Enteric Viruses from Two Santa Monica Bay Storm Drains (1990) (Administrative Record, section 10.VI.E, RB-AR43363-43413), Toxic Substances Monitoring Program, 10 Year Summary Report 1978-1987 (Administrative Record, Order No. 01-182, R0044602-0045053) and comments submitted by interested persons to the Los Angeles Water Board (Administrative Record RB-AR1006-1038, RB-AR1100-1128, RB-AR1768-2119, RB-AR2653-2847, RB-AR5642-17888). We found no specific evidence presented to the Los Angeles Water Board of high quality waters in the region with regard to pollutants typically associated with storm water discharges; however, we also recognize that in the absence of specific evidence of high quality waters, a blanket statement that there are no high quality water body-pollutant combinations may be overbroad.

2001 Los Angeles MS4 Order and therefore will not allow water quality to degrade below the level of control achieved under the prior permit.

We agree with the Los Angeles Water Board that the Los Angeles MS4 Order maintains and improves the level of control achieved under the 2001 Los Angeles MS4 Order. We expect that the Los Angeles MS4 Order's TMDL requirements and receiving water limitations, which may be implemented through the WMP/EWMP provisions, will be the means for achieving water quality standards for the majority of degraded water bodies in the region. To assert, as the Environmental Petitioners do, that compliance with the receiving water limitations provisions of the 2001 Los Angeles Order is more stringent than establishing specific implementation requirements with clear deadlines for TMDL and receiving water limitations compliance is misguided. We are concerned with the totality of the provisions in the two permits and find that, viewed from that broader perspective, the Los Angeles MS4 Order is at least as stringent in addressing degradation as its predecessor.[86] The Los Angeles MS4 Order improves on past practices that have been inadequate to protect water quality, and includes a monitoring and assessment program that will identify any changes in water quality.[87] In general, under the Los Angeles MS4 Order, we expect to see a trajectory away from any past degradation, even if there may be some continued short-term degradation.

We are not persuaded, however, that the level of control achieved under the 2001 Los Angeles MS4 Order necessarily represents the baseline for purposes of an antidegradation analysis. The 2001 Los Angeles MS4 Order had only minimal findings regarding antidegradation and it is not apparent that any degradation that may have continued under the conditions of the 2001 Los Angeles MS4 Order was anticipated by the Los Angeles Water Board and supported with appropriate analysis regarding economic and social benefits[88] and best practicable treatment or control. We therefore find that the appropriate baseline remains 1968 or the highest quality of receiving waters attained since 1968. We acknowledge

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[86] In making this finding we also recognize that the Permittees may be deemed in compliance with receiving water limitations prior to approval of the WMP/EWMP. (Los Angeles MS4 Order Parts VI.C.2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144.) As discussed further under section II.B.6., we find that the Los Angeles Water Board reasonably exercised its discretion in allowing for compliance during the program development phase and further that the program development phase does not detract from the overall effectiveness of the permit provisions.

[87] *See Asociacion de Gente Unida, supra*, 210 Cal.App.4th at p. 1278.

[88] We note that the administrative record provides evidence that some discharge of storm water is to the maximum benefit of the people of the state because such discharge is necessary for flood control and public safety and helps accommodate development. (See, e.g., Administrative Record, section 10.VI.C, RB-AR30101; RB-AR32557-32558.)

that the evidence in the record indicates that it is unlikely that many water bodies were high quality even as far back as 1968, but we cannot make a blanket statement to that effect.[89]

Despite this conclusion, we will not remand the antidegradation issue to the Los Angeles Water Board for further consideration, but will make the findings ourselves based on the record before us. Our findings are necessarily made at a generalized level. Even if the directive of APU 90-004 to carry out a complete antidegradation analysis for each water body-pollutant combination is applicable here, there is simply insufficient data available (to us or the Los Angeles Water Board) to make such findings. The APU 90-004 contemplates the appropriate antidegradation analysis for a discrete discharge or facility. It has limited value when considering antidegradation in the context of storm water discharges from diffuse sources, conveyed through multiple outfalls, with multiple pollutants impacting multiple water bodies within a municipality, or in this case, region, especially given that reliable data on the baseline water quality from 1968 is not available.[90]

The Environmental Petitioners propose that antidegradation be addressed in subsequent actions of the Los Angeles Water Board by requiring that the reasonable assurance analysis (discussed in greater detail in section II.B.4.c. of this Order) supporting a WMP/EWMP also demonstrate that the proposed control measures will maintain high quality of waters with regard to pollutants for which they are not impaired. We reject this approach for two reasons. First, the Los Angeles Water Board was required under the federal and state antidegradation policies to evaluate whether permit conditions would lead to degradation of high quality waters at the time of permit issuance. Second, requiring Permittees to incorporate an evaluation of all water body-pollutant combinations, including those where there are no impairments or exceedances, would require them to expand the reasonable assurance analysis beyond its useful function and manageable scope.

We shall amend Finding II.M and Part D.3 at pages F-19 to F-20 of Attachment F, the Fact Sheet, as follows:

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[89] See fn. 85.

[90] We note that USEPA did not conduct a detailed antidegradation analysis in issuing NPDES Permit No. DC00000221 for MS4 discharges to the District of Columbia, presumably for similar reasons. The court in *Asociacion de Gente Unida* relied on APU 90-004 in part in rejecting an antidegradation analysis conducted by the Central Valley Regional Water Quality Control Board for discharges of pollutants to groundwater from dairy facilities region-wide, but the court's objection was to the regional water board's reliance on an illusory prohibition of discharge to groundwater in finding that no antidegradation analysis was required, not to the sufficiency of any generalized antidegradation analysis the Board might have conducted in lieu of its reliance on the prohibition. (210 Cal.App.4th at pp. 1271-1273.)

Finding II. M.

M. Antidegradation Policy
40 CFR section 131.12 requires that state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. Resolution No. 68-16 requires that existing water quality be maintained unless degradation is justified based on specific findings. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the state and federal antidegradation policies. The permitted discharge is consistent with the antidegradation provision of section 131.12 and State Water Board Resolution No. 68-16 **as set out in the Fact Sheet.**

Attachment F, Fact Sheet Part III.D.3.

3. Antidegradation Policy. 40 CFR section 131.12[4] requires that the state water quality standards include an antidegradation policy consistent with the federal antidegradation policy. The State Water Board established California's antidegradation policy in State Water Board Resolution No. 68-16 ("Statement of Policy with Respect to Maintaining the Quality of the Waters of the State"). Resolution No. 68-16 incorporates the federal antidegradation policy where the federal policy applies under federal law. The Regional Water Board's Basin Plan implements, and incorporates by reference, both the State and federal antidegradation policies. Resolution No. 68-16 and 40 CFR section 131.12 require the Regional Water Board to maintain high quality waters of the State **unless degradation is justified based on specific findings. First, the Board must ensure that "existing instream uses and the level of water quality necessary to protect the existing uses" are maintained and protected. Second, if the baseline quality of a water body for a given constituent exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected through the requirements of the Order unless the Board makes findings that (1) any lowering of the water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) water quality adequate to protect existing uses fully is assured; and (3) the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control are achieved. The Board must also comply with any requirements of State Water Board Resolution No. 68-16 beyond those imposed through incorporation of the federal antidegradation policy. In particular, the Board must find that not only present, but also anticipated future uses of water are protected, and must ensure best practicable treatment or control of the discharges. The baseline quality considered in making the appropriate findings is the best quality of the water since 1968, the year of the adoption of Resolution No. 68-16, or a lower level if that lower level was allowed through a permitting action that was consistent with the federal and state antidegradation policies.** ~~until it is demonstrated that any change in quality will~~

~~be consistent with maximum benefit to the people of the State, will not unreasonably affect beneficial uses, and will not result in water quality less than that described in the Regional Water Board's policies. Resolution 68-16 requires that discharges of waste be regulated to meet best practicable treatment or control to assure that pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained.~~

The discharges permitted in this Order are consistent with the antidegradation provisions of 40 CFR section 131.12 and Resolution 68-16 **as set out in the Findings below:**~~.~~

1. ~~Many of the water bodies within the area covered by this Order are of high quality. The Order requires the Permittees to meet best practicable treatment or control to meet water quality standards. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p).~~ Many of the waters within the area covered by this Order are impaired ~~and~~ **for multiple pollutants discharged through MS4s and are not high quality waters with regard to these pollutants. In most cases, there is insufficient data to determine whether these water bodies were impaired as early as 1968, but the limited available data shows impairment dating back for more than two decades. Many such water bodies are** listed on the State's CWA Section 303(d) List and either the Regional Water Board or USEPA has established TMDLs to address the impairments. **This Order ensures that existing instream (beneficial) water uses and the level of water quality necessary to protect the existing uses is maintained and protected**. This Order requires the Permittees to comply with permit provisions to implement the WLAs set forth in the TMDLs in order to restore the beneficial uses of the impaired water bodies consistent with the assumptions and requirements of the TMDLs. **This Order further requires compliance with receiving water limitations to meet water quality standards in the receiving water either by demonstrating compliance pursuant to Part V.A and the Permittee's monitoring and reporting program pursuant to Part VI.B or by implementing Watershed Management Programs/EWMPs with a compliance schedule**. This Order includes requirements to develop and implement storm water management programs, achieve water quality-based effluent limitations, and effectively prohibit non-storm water discharges through the MS4.

2. To the extent that some of the water bodies within the jurisdiction are high quality waters with regard to some constituents, this Order finds as follows:

a. Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the

area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation.

b. The Order requires the highest statutory and regulatory requirements and requires that the Permittees meet best practicable treatment or control. The Order prohibits all non-storm water discharges, with a few enumerated exceptions, through the MS4 to the receiving waters. As required by 40 CFR section 122.44(a), the Permittees must comply with the "maximum extent practicable" technology-based standard set forth in CWA section 402(p), and implement extensive minimum control measures in a storm water management program. Recognizing that best practicable treatment or control may evolve over time, the Order includes new and more specific requirements as compared to Order No. 01-182. The Order incorporates options to implement Watershed Management Programs or EWMPs that must specify concrete and detailed structural and non-structural storm water controls that must be implemented in accordance with an approved time schedule. The Order contains provisions to encourage, wherever feasible, retention of the storm water from the 85th percentile 24-hour storm event.

~~The issuance of this Order does not authorize an increase in the amount of discharge of waste. The Order includes new requirements to implement WLAs assigned to Los Angeles County MS4 discharges that have been established in 33 TMDLs, most of which were not included in the previous Order.~~

3. Compliance Schedules and the Appropriateness of Enforcement Orders

The Environmental Petitioners concede that immediate compliance with receiving water limitations is not achievable in many instances and that some additional time to reach compliance is warranted. They have proposed an alternative to the WMP/EWMP that would incorporate many of the provisions of those programs but require implementation through the mechanism of a time schedule order or other enforcement order rather than as permit conditions. The Los Angeles MS4 Order already provides that Permittees who are out of compliance with final WQBELs and other TMDL-specific limitations may request a time schedule order.[91] Under the alternative proposed by the Environmental Petitioners, all Permittees that are currently out of compliance with receiving water limitations not addressed by a TMDL as well as with interim TMDL requirements with passed compliance deadlines, would be issued a time schedule order or other enforcement order not to exceed the five year term of

[91] Los Angeles MS4 Order, Part VI.E.4., pp.146-147.

the permit. The Permittees would then implement a WMP/EWMP type plan to achieve compliance with the appropriate limitations within the confines of the enforcement order.

In the prior two sections, we found that the WMP/EWMP provisions are not contrary to the anti-backsliding or antidegradation requirements of federal and state law. We therefore disagree with the Environmental Petitioners that the relevant provisions must be stricken from the Order and incorporated instead into an enforcement order for those reasons. We also find that, given that strict compliance with water quality standards is discretionary in MS4 permits, the Los Angeles Water Board was not restricted to limiting the schedule for compliance with receiving water limitations to the term of the Los Angeles MS4 Order.

Further, from a policy perspective, we find that the MS4 Permittees that are developing and implementing a WMP/EWMP should be allowed additional time to come into compliance with receiving water limitations and interim and final TMDLs through provisions built directly into their permit, rather than through enforcement orders. Building a time schedule into the permit itself, as the Los Angeles MS4 Order does, is appropriate because it allows a more efficient regulatory structure compared to having to issue multiple enforcement orders. More importantly, it is appropriate to regulate Permittees in a manner that allows them to strive for compliance with the permit terms, provided no provision of law otherwise precludes including the schedule in the NPDES permit. For example, for traditional point source discharges subject to strict compliance with water quality standards pursuant to section 301(b)(1)(C), the terms of a compliance schedule are dictated by our compliance schedule policy (State Water Board Resolution 2008-0025) and any additional time for compliance could only be under the auspices of an enforcement order outside the permit.[92]

The WMP/EWMP provisions constitute an effort to set ambitious, yet achievable, targets for Permittees; receiving water limitations, on the other hand, while the ultimate goal of MS4 permitting, may not in all cases be achievable within the five-year permit cycle. Generally, permits are best structured so that enforcement actions are employed when a discharger shows some shortcoming in achieving a realistic, even if ambitious, permit condition and not under circumstances where even the most diligent and good faith effort will fail to achieve the required condition. We add that it is our intention to encourage a watershed-based approach to addressing storm water issues going forward and that it would be contrary to that intention to

[92] We also note that the State Water Board's Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2005) (State Implementation Policy) and the CTR itself (40 C.F.R. § 131.38(e)) restrict the scope of compliance schedules for effluent limitations addressing the discharge of toxic pollutants; however the policy does not apply to storm water discharges. (State Implementation Policy, p.3, fn.1.)

structure the watershed-based requirements as an enforcement order. We will not require Permittees that propose and timely implement a WMP/EWMP to request time schedule orders or other enforcement orders as a precondition of being in compliance with the receiving water limitations or interim TMDL requirements of the Los Angeles MS4 Order.

While declining to structure the WMP/EWMP provisions generally as an enforcement order, we acknowledge that time schedule orders are appropriate under some circumstances. We have already noted that the Los Angeles MS4 Order allows a Permittee to request a time schedule order where a final compliance deadline for a state-adopted TMDL has passed and the Permittee believes that additional time to comply with the requirement is necessary.[93] We expect that a Permittee will request a time schedule order also if the Permittee fails to meet a final compliance deadline for a TMDL after the adoption date of the Los Angeles MS4 Order. We will also provide that a Permittee may request a time schedule order if the Permittee fails to meet a final compliance deadline for a receiving water limitation set in the Permittee's WMP/EWMP.

We shall add a new Part VI.C.6.b and revise Part VI.E.4.b as follows:

Part VI.C.6

b. Where a Permittee believes that additional time to comply with a final receiving water limitation compliance deadline set within a WMP/EWMP is necessary, and the Permittee fails to timely request or is not granted an extension by the Executive Officer, a Permittee may, no less than 90 days prior to the final compliance deadline, request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

Part VI.E.4

b. Where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days of Order adoption**, or no less than 90 days prior to the final compliance deadline if after adoption of the Order,** request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.

4. Rigor and Accountability in the WMPs/EWMPs

We now turn to a consideration, from a technical as well as policy lens, as to whether the WMPs/EWMPs are structured in a manner that will maximize the likelihood of

[93] *Ibid.*

reaching the ultimate goal of the compliance alternative – achieving receiving water limitations.[94] We can support an alternative approach to compliance with receiving water limitations only to the extent that that approach requires clear and concrete milestones and deadlines toward achievement of receiving water limitations and a rigorous and transparent process to ensure that those milestones and deadlines are in fact met. Conversely, we cannot accept a process that leads to a continuous loop of iterative WMP/EWMP implementation without ultimate achievement of receiving water limitations.

We find below that the WMP/EWMP provisions generally ensure the appropriate rigor, transparency, and accountability, and that, with the few revisions we direct, are designed to lead to achievement of receiving water limitations.[95]

a. Milestones and Compliance Deadlines

We first consider whether the WMP/EWMP provisions require clear, concrete, and finite milestones and deadlines.

For water body-pollutant combinations addressed by TMDLs, the Los Angeles MS4 Order requires the Permittees to incorporate the compliance schedules found in Attachments L through R of the Order, which reflect previously adopted TMDL-based requirements, into the WMP/EWMP, and, as necessary, to develop interim milestones and dates for their achievement.[96] A Permittee that does not thereafter comply with the approved compliance schedule must instead demonstrate compliance with the WQBELs and other TMDL-specific limitations of the Order.[97] For water body-pollutant combinations not addressed by a TMDL, but where the relevant pollutant is one for which the water body is identified as impaired on the Clean Water Act section 303(d) List and the pollutant is in the same class as a TMDL pollutant, the Order requires that the WMP/EWMP incorporate a schedule consistent with the TMDL schedule for the same class pollutant.[98] A Permittee that does not thereafter comply with

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[94] From a legal standpoint, our analysis serves to verify that the Los Angeles MS4 Order's alternative compliance approach through WMPs/EWMPs is supported by the findings and by evidence in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

[95] We do not agree with Permittee Petitioners that the WMP/EWMP provisions are precluded by the program requirements of 40 Code of Federal Regulations section 122.26. Nor do we agree that the requirements are vague or lack definition. The WMP/EWMP provisions of the Order are guidelines for development of a subsequent program with more specificity to be approved by the Los Angeles Water Board or its Executive Officer.

[96] Los Angeles MS4 Order, Part VI.C.5.c., pp.64-65.

[97] *Id.*, Part VI.E.2.d.i(4)(c), p.144.

[98] *Id.*, Part VI.C.2.a.i., pp. 49-50.

the approved compliance schedule must instead demonstrate immediate compliance with the receiving water limitations in Part V.A.[99] We will not disturb these provisions.

With regard to exceedances of receiving water limitations not addressed by a TMDL, and where the pollutant is not in the same class as a pollutant addressed by a TMDL, the Order requires that the WMP/EWMP include milestones based on measurable criteria or indicators and a schedule for achieving the milestones. The WMP/EWMP must also incorporate a final date for achievement of receiving water limitations, but that date is circumscribed simply as "as soon as possible."[100] Parts VI.C.2.a.ii.(4) and VI.C.2.a.iii.(2)(c) help clarify the meaning of "as soon as possible:"

> Permittees shall identify enforceable requirements and milestones and dates for their achievement to control MS4 discharges such that they do not cause or contribute to exceedances of receiving water limitations within a timeframe(s) that is as short as possible, taking into account the technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary. The time between dates shall not exceed one year. Milestones shall relate to a specific water quality endpoint (e.g., x% of the MS4 drainage area is meeting the receiving water limitations) and dates shall relate either to taking a specific action or meeting a milestone.[101]

We will make a revision to the compliance schedule provisions to make it clear that the term "as soon as possible" is to be interpreted consistent with the more specific direction cited above. However, because the WMP/EWMP, and therefore the proposed compliance schedule, is subject to public review and comment and approval by the Los Angeles Water Board or its

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[99] *Id.*, Part VI.C.2.c., p.52.

[100] *Id.*, Part VI.C.5.c.iii.(3), p. 65. If the pollutant is not in the same class as those addressed in a TMDL, but the water body is still identified as impaired for that pollutant, the WMP/EWMP must either have a final compliance deadline within the 5 year permit term or Permittees are expected to initiate development of a stakeholder-proposed TMDL and incorporate a compliance schedule consistent with the TMDL. (*Id.*, Part VI.C.2.a. ii., pp. 50-51) (If the exceedances are in a drainage area implementing the storm water retention approach, there is no requirement to initiate the TMDL development process.) The requirement to address receiving water limitations is ongoing. As exceedances are found through monitoring for water body-pollutant combinations not identified on the 303(d) List, Permittees must either meet receiving water limitations or include the water body-pollutant combination in the WMP/EWMP and set enforceable requirements and milestones and dates for their achievement within a time frame that is as short as possible. (*Id.*, Part VI.C.2.a.iii, pp. 51-52.) Permittees are deemed in compliance with receiving water limitations only for water body-pollutant combinations addressed in the WMP/EWMPs. Thus, as pointed out by several interested parties, for lower priority water body-pollutant combinations not incorporated into a WMP/EWMP for which exceedances are detected, Permittees may be in violation of the receiving water limitations. A Permittee always has the ability to reprioritize a water body-pollutant combination from low priority to high priority and amend its WMP/EWMP to incorporate measures to address that water body-pollutant combination.

[101] *Id.*, Parts VI.C.2.a.ii.4, p. 50, VI.C.2.a.iii.(2)(c), p. 51 (identical language).

Executive Officer,[102] we do not find it necessary to constrain the determination of milestones and dates for the achievement of receiving water limitations any further.

We shall amend Part VI.C.5.c.iii.(3)(b) as follows:

(b) A final date for achieving the receiving water limitations as soon as possible**, consistent with Parts VI.C.2.a.ii.(4) & VI.C.2.a.iii.(2)(c)**.

b. Constraints on Extension of Deadlines

The fact that the Los Angeles MS4 Order requires the establishment of concrete and rigorous deadlines within the WMP/EWMP for the achievement of receiving water limitations is critical to ensuring progress on such achievement; however, the Order also contemplates that the deadlines, with the exception of those compliance deadlines established in a TMDL, may be extended.[103] The WMP/EWMP is subject to an adaptive management process. Based on the results of that process the Permittees may propose modifications, including modifications to compliance deadlines and interim milestones, in the Annual Report.[104]

The potential for multiple extensions is nevertheless ameliorated by the fact that extensions of compliance deadlines and interim milestones require Los Angeles Water Board Executive Officer approval,[105] and are accordingly, subject to a 30-day public comment period.[106] The public comment period will allow all other interested persons to weigh in on the appropriateness of any requested extensions. If thereafter dissatisfied with the determination made by the Executive Officer, interested persons may additionally seek review of the Executive Officer's decision by the Los Angeles Water Board.[107] Of course, in cases where no extension

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[102] *Id.*, Part VI.C.4.c., p.56, Table 9, p. 54, Part VI.A.5.b., p. 42, Att. F, Fact Sheet, p. F-42. Under Part VI.A.5.b, "[a]ll documents submitted to the Regional Water Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment."

[103] *Id.*, Parts VI.C.7, p.66, VI.C.8, pp.66-67.

[104] *Id.*, Part, VI.C.8, p.67. Under another provision of the Order, Permittees may at any time request an extension of deadlines for achievement of interim milestones established to address exceedances of receiving water limitations not otherwise addressed by a TMDL. (*Id.*, Part VI.C.6.a., p.65.) (We note that the cited provision refers to "milestones established pursuant to Part VI.C.4.c.ii.(3)," but the intent appears to have been to reference Part VI.C.5.c.iii.(3).) But as we read the Los Angeles MS4 Order, extensions of not just interim deadlines for achievement of milestones but also final compliance deadlines to achieve receiving water limitations are already allowed under the adaptive management provisions of Part VI.C.8.a.ii.: "Based on the results of the adaptive management process, Permittees shall report any modifications, including where appropriate *new compliance deadlines* and interim milestones, with the exception of those compliance deadlines established in a TMDL, necessary to improve the effectiveness of the Watershed Management Program or EWMP, in the Annual Report . . . ." (Emphasis added.)

[105] *Id.*, Parts VI.C.8, p.67, VI.C.6.a., p.65. We recognize that as currently written the adaptive management provisions in effect deem any modifications to the WMPs/EWMPs approved if the Executive Officer "expresses no objections" within 60 days. (*Id.*, Part VI.C.8.a.iii., p. 67.) With our revisions, any deadline extensions must be affirmatively approved by the Executive Officer.

[106] *Id.*, Part VI.A.5.b, p. 42.

[107] *Id.*, Part VI.A.6, p.42.

is available, as with final deadlines established in TMDLs, [108] or where no extension is requested or granted, failure to meet a deadline means that the Permittee will have to comply from that time forward with the receiving water limitations or WQBELs and other TMDL-specific limitations or request a time schedule order. Therefore, Permittees cannot rely on the certainty of a deadline extension, and Permittees have a strong incentive to implement control measures that will in fact get them to compliance by the established deadline. Given that the Permittees and the Los Angeles Water Board are working with limited data regarding storm water impacts and control measure performance, especially where TMDLs have not been developed, we are hesitant to remove all flexibility for deadline extensions, and find that the Order strikes an appropriate balance.

Permittee Petitioners seek even greater flexibility under the WMP/EWMP provisions for adjusting approved control measures and time lines. They advocate for amendments that would allow a Permittee to propose alternative controls or time lines upon a demonstration that required controls for timely achievement of a limitation are either technically infeasible or otherwise constitute a substantial hardship to the Permittee. We have found above that, in the case of final deadlines set in the WMP/EWMP for achievement of receiving water limitations not otherwise addressed in a TMDL, the Los Angeles MS4 Order already provides for an opportunity to propose new deadlines through the adaptive management process. We will make a clarifying revision below to confirm that Permittees may ask for extensions in meeting receiving water limitations not addressed by a TMDL. Technical infeasibility or substantial hardship may be grounds for such a request. The Los Angeles Water Board Executive Officer, in turn, may, after allowing for public review and comment, choose to (1) extend the deadline, (2) decline the extension but approve any time schedule order requested by the Permittee, or (3) decline the extension and not approve a time schedule order, with the result that the Permittee will be out of compliance with the provision of the WMP/EWMP and therefore the receiving water limitations of Part V.A. As stated previously, interested persons may thereafter ask the Los Angeles Water Board to review the Executive Officer's determination. [109]

With regard to final deadlines for WQBELs and other TMDL-specific limitations, we will not amend the WMP/EWMP provisions to add flexibility for extensions. We find that the only option appropriately available to a Permittee unable to meet final deadlines that are set out in a TMDL and incorporated into the Los Angeles MS4 Order and the WMP/EWMPs, is to

[108] *Id.*, Part VI.C.8.a.ii., p.67.

[109] *Id.*, Part VI.A.6, p.42.

request a time schedule order, consistent with Part VI.E.2.e. of the Order, as that Part was amended in section II.B.3. above.[110]

We shall amend Part VI.C.6.a as follows:

a. Permittees may request an extension of deadlines for achievement of interim milestones **and final compliance deadlines** established pursuant to Part VI.C.4**5**.c.iii.~~(3) only~~**, with the exception of those final compliance deadlines established in a TMDL**. Permittees shall provide requests in writing at least 90 days prior to the deadline and shall include in the request the justification for the extension. Extensions ~~shall be subject to approval by~~ **must be affirmatively approved by** the Regional Water Board Executive Officer, **notwithstanding Part VI.C.8.a.iii.**

c. Rigor and Accountability in the Process

We see three additional components of the WMPs/EWMPs as essential to ensuring that the proposed WMPs/EWMPs are in fact designed to achieve receiving water limitations within the appropriate time frame.

First, as documents to be approved by either the Los Angeles Water Board or its Executive Officer, the WMPs/EWMPs are subject to a public review and comment period.[111] Such review includes consideration of proposed control measures, deadlines for achievement of final limitations, and the reasonable assurance analysis that supports the WMP/EWMP. We expect this public process to vet the proposed WMPs/EWMPs and facilitate revisions to strengthen the programs as needed, thereby providing some assurance that approved WMPs/EWMPs will achieve the water quality targets set out.

Second, the requirement for a reasonable assurance analysis in particular is designed to ensure that Permittees are choosing appropriate controls and milestones for the WMP/EWMP.[112] Competent use of the reasonable assurance analysis should facilitate achievement of final compliance within the specified deadlines.[113]

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[110] Final TMDL deadlines are established and incorporated into the Basin Plans during the TMDL development process. That process invites stakeholder participation and the proposed schedule is subject to public review and comment and approval by the relevant regional water board, the State Water Board, and USEPA. The deadlines are established with consideration of the time needed for compliance for all dischargers contributing to an impairment, including industrial and construction storm water dischargers and traditional NPDES dischargers. Although we recognize that it may not always be feasible for municipal storm water dischargers to meet final TMDL deadlines, short of amending the Basin Plan to modify the deadlines (see *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438), we find it appropriate for the dischargers to request time schedule orders rather than be granted an extension within the provisions of the Los Angeles MS4 Order.

[111] See Los Angeles MS4 Order, Parts VI.C.4.d., p. 57, VI.C.6, p. 65, Table 9, p.54; see also id., Part VI.A.5., p. 42.

[112] *Id.*, Part VI.C.5.b.iv.(5), pp. 63-64.

[113] We note that the Los Angeles Water Board has released guidance on the development of a reasonable assurance analysis. The guidance was released after adoption of the Los Angeles MS4 Order and accordingly is not *(Continued)*

Third, the adaptive management provisions of the Order ensure that the Permittees will evaluate monitoring data and other new information every two years and consider progress up to that point on achieving WQBELs and other TMDL-specific limitations. Permittees are required as part of the adaptive management process to propose modifications to improve the effectiveness of the WMP/EWMP and implement those modifications.[114]

While we are supportive of all of these measures, we find that they should be strengthened. As a preliminary matter, we will require the Permittees to submit specific information, concurrently with the two-year adaptive management process, that will assist the Los Angeles Water Board in determining how effective the WMP/EWMP path is in spurring the completion of on-the-ground structural control measures that lead to measurable water quality improvement. As we discuss further in Section II.B.8 of this Order, we will direct the Los Angeles Water Board to report to the State Water Board periodically on the effectiveness of the WMP/EWMP approach and expect the additional information submitted by the Permittees to inform that report.

More significantly, we will add a provision that requires Permittees to comprehensively update the reasonable assurance analysis and the WMP/EWMP, following an opportunity to implement the adaptive management process. Given the limitations inherent in models, as well as the potential incentive to choose the lowest effort and cost level predicted by the model to achieve receiving water limitations,[115] we are concerned that reliance on one initial reasonable assurance analysis is insufficient to ensure that in the long term WMPs/EWMPs will

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part of the Administrative Record. We nevertheless take this opportunity to state that we expect any revisions and updates to the guidance to be subject to a public process as part of reissuance of the Los Angeles MS4 Order.

[114] Los Angeles MS4 Order, Part VI.C.8., pp. 66-67. We add that the adaptive management process will also allow Permittees to revise their WMPs/EWMPs to take advantage of funding opportunities as they arise in the future, including funding opportunities through Assembly Bill 2403 (approved by Governor, June 28, 2014 (2013-2014 Reg. Sess.)) and Proposition 1 (approved by ballot Nov. 4, 2014). We are cognizant of criticism that the adaptive management process is just another version of the ineffective iterative process of the receiving water limitations. These arguments are misplaced. Unlike the iterative process of the receiving water limitations, the adaptive management process is only one component of a series of actions required under the WMP/EWMP and acts as a periodic check to ensure that all the other requirements are achieving the stated goals of the WMP/EWMP within clearly stated deadlines. As our discussion above makes clear, we would not endorse an alternative compliance path with the sole requirement to adaptively manage implemented control measures. Further, the adaptive management process in the Los Angeles MS4 Order differs from the iterative process in that Permittees must carry out the adaptive management process every two years, limiting any discretionary determination as to when the program must be evaluated. (Los Angeles MS4 Order, Part VI.C.8.a.)

[115] The numerical analysis methods and models approved for use by Permittees for estimating hydrologic conditions and contaminant fate and transport in the watersheds should, in principle, be able to propagate any and all known uncertainty to the outputs and results. It is in the public interest that the Los Angeles Water Board communicate this uncertainty to all stakeholders, as the results in most cases will affect the beneficial uses of California waters. Moreover, it is highly desirable that, to the extent possible, the Los Angeles Water Board define a minimum level of uncertainty (or level of confidence) acceptable for a reasonable assurance analysis to be approved.

achieve relevant water quality goals. . Currently, as stated above, the Permittees are required to implement the adaptive management process every two years from the date of program approval. Under the provision we add, the Permittees will be required to comprehensively update the reasonable assurance analysis (including potentially considering whether the model itself and its assumptions require updating) and the WMP/EWMP after several years of adaptive management, based on previous years' monitoring data and other performance measures. The Permittee will submit a full revised package to the Los Angeles Water Board Executive Officer for approval, following public review.

Given that the WMPs/EWMPs in many cases address water quality targets that are to be achieved a decade or more in the future, a periodic, complete re-consideration and recalibration of the assumptions and predictions that support the proposed control measures and implementation schedule in light of new data, above and beyond the two-year adaptive management requirements of the Los Angeles MS4 Order, is essential, notwithstanding the additional time and effort that Permittees must expend on the update. We also recognize that such review is a staff intensive process for the Los Angeles Water Board, but addressing storm water impacts is a priority for that Board. Although we expect that the update will be necessary in most cases, the new requirements provide that the Executive Officer of the Los Angeles Water Board may waive the requirement for an update if the Permittee demonstrates through water quality monitoring that the WMP/EWMP is meeting appropriate targets. Our direction to require a comprehensive update of the reasonable assurance analyses and the WMPs/EWMPs after several cycles of adaptive management should in no way be construed as limiting the Los Angeles Water Board Executive Officer's discretion to request such updates earlier in the implementation process or the obligation of the Permittees to initiate such updates earlier in the implementation process based on the ongoing adaptive management process.

The second added provision will not be relevant for the permit term of the order before us; however, we anticipate that the next iteration of an MS4 Order for the Los Angeles area will closely track the Los Angeles MS4 Order to allow for continued implementation of the WMP/EWMPs.

We shall amend Part VI.C.8 by adding new subsections a.iv. and b. as follows:

a.

iv. Permittees shall report the following information to the Regional Water Board concurrently with the reporting for the adaptive management process:

(1) On-the-ground structural control measures completed;

(2) Non-structural control measures completed;

(3) Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

(4) Comparison of the effectiveness of the control measures to the results projected by the RAA;

(5) Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the Watershed Management Program or EWMP;

(6) Control measures proposed to be completed in the next two years pursuant to the Watershed Management Program or EWMP and the schedule for completion of those control measures;

(7) Status of funding and implementation for control measures proposed to be completed in the next two years.

b. Watershed Management Program Resubmittal Process

i. In addition to adapting the Watershed Management Program or EWMP every two years as described in Part VI.C.8.a., Permittees must submit an updated Watershed Management Program or EWMP with an updated Reasonable Assurance Analysis by June 30, 2021, or sooner as directed by the Regional Water Board Executive Officer or as deemed necessary by Permittees through the Adaptive Management Process, for review and approval by the Regional Water Board Executive Officer. The updated Reasonable Assurance Analysis must incorporate both water quality data and control measure performance data, and any other information informing the two-year adaptive management process, gathered through December 31, 2020. As appropriate, the Permittees must consider any new numeric analyses or other methods developed for the reasonable assurance analysis. The updated Watershed Management Program or EWMP must comply with all provisions in Part VI.C. The Regional Water Board Executive Officer will allow a 60-day public review and comment period with an option to request a hearing. The Regional Water Board Executive Officer must approve or disapprove the updated Watershed Management Program or EWMP by June 30, 2022. The Executive Officer may waive the requirement of this provision, following a 60-day public review and comment period, if a Permittee demonstrates through water quality monitoring data that the approved Watershed Management Program or EWMP is meeting appropriate water quality targets in accordance with established deadlines.

5. Determination of Compliance with Final Requirements

a. Compliance with Final TMDL Requirements[116]

Part VI.E.2.e.i.4. of the Los Angeles MS4 Order provides that Permittees will be deemed in compliance with the final WQBELs and other TMDL-specific limitations if "[i]n drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water."[117] Part VI.E.2.e.i.4 is one of four options available to the Permittee in Part VI.E.2.e. to be deemed in compliance with WQBELs and other TMDL-specific limitations. The other three options allow a Permittee to establish compliance with a final WQBEL or other TMDL-specific limitation by showing that (1) there are no violations of the final WQBEL; (2) there are no exceedances of the receiving water limitation for the specific pollutant in the receiving water at or downstream of the Permittee's outfall, or (3) there is no direct or indirect discharge from the Permittee's MS4 to the receiving water during any relevant time period.[118] These three options ensure that either the receiving water limitations or WQBELs and other TMDL-specific limitations are in fact being complied with. In contrast, the storm water retention approach assumes compliance with *final* WQBELs and other TMDL-specific limitations, and accordingly, compliance with the receiving water limitations in Part V for the relevant water body-pollutant combinations,[119] even if the final WQBELs and other TMDL-specific limitations are not actually being achieved. The Environmental Petitioners argue that the Los Angeles Water Board has failed to establish through findings and record evidence that the storm water retention approach will in fact achieve compliance with the WQBELs and other TMDL-specific limitations and that the Los Angeles

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[116] The Los Angeles MS4 Order additionally deems compliance with *interim* WQBELs and other TMDL-specific limitations if the "Permittee has submitted and is fully implementing an approved" WMP/EWMP. (Los Angeles MS4 Order, Part VI.E.2.d.i.(4), p. 143; see also *id.*, Part VI.C.3.a., p. 53.) Because Permittees are required to incorporate into the WMP/EWMP compliance schedules "compliance deadlines occurring within the permit term for all applicable interim . . . water quality-based effluent limitations and/or receiving water limitations in Part VI.E and Attachments L through R," we expect that in most cases full implementation of the WMP/EWMP necessarily results in compliance with interim WQBELs and other TMDL-specific limitations. However, to the extent this is not the result reached, we find that requiring implementation of the WMP/EWMP with control measures designed to achieve interim WQBELs and other TMDL-specific limitations, in lieu of showing actual compliance with any *interim* numeric requirements, is consistent with the assumptions and requirements of the wasteload allocations of the relevant TMDLs. (40 C.F.R. § 122.44(d)(1)(vii)(B).)

[117] Los Angeles MS4 Order, Part VI.E.2.e.i.(4), p. 145.

[118] *Id.*, Part VI.E.2.e.i.(1)-(3), pp. 144-45.

[119] We note again that Part VI.E.2.c.i. states that Part VI.E establishes the manner of achieving compliance with the receiving water limitations in Part V.A where the receiving water limitations are associated with water body-pollutant combinations addressed in a TMDL.

MS4 Order's reliance on the storm water retention approach for final compliance determination is therefore contrary to the law.

We are supportive of the EWMP's use of the storm water retention approach as a technical requirement. Retention of storm water is likely to be an effective path to water quality improvement. Furthermore, in addition to preventing pollutants from reaching the receiving water except as a result of high precipitation events (which also generally result in significant dilution in the receiving water), the storm water retention approach has additional benefits including recharge of groundwater, increased water supply, reduced hydromodification effects, and creation of more green space to support recreation and habitat.[120]

We have some concerns, however, with the lack of verification in the Los Angeles MS4 Order that final WQBELs and other TMDL-specific limitations or receiving water limitations will in fact be met as a result of implementation of the storm water retention approach. We acknowledge that, in most cases, the final TMDLs have deadlines outside of the permit term for the Los Angeles MS4 Order and that, therefore, with regard to those, our concerns are more theoretical at this point than immediate. Nevertheless, we agree with the Environmental Petitioners that the evidence in the Administrative Record is not sufficient to establish that the storm water retention approach will in all cases result in achievement of final WQBELs and other TMDL-specific limitations and, more importantly, are concerned that the Order itself does not incorporate clear requirements that would provide for such verification in the process of implementation.

With regard to evidence in the Administrative Record, it is clear that the storm water retention approach is a promising approach for achieving compliance with receiving water limitations, with multiple additional environmental benefits. But the research regarding the storm water retention approach is still in early stages and we cannot say with certainty at this point that implementation will lead to compliance with receiving water limitations in all cases.[121]

With that conclusion in mind, we look to the Los Angeles MS4 Order itself to determine if there are sufficient additional provisions to assure that, in the long run, the storm water retention approach will achieve the ultimate goal of compliance with receiving water limitations. We first note that the Order does not require a reasonable assurance analysis when

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[120] See e.g. Administrative Record, section 10.VI.C, RB-AR29263-29311, RB-AR32318-32350.

[121] We reviewed the citations to the Administrative Record provided in the Los Angeles Water Board October 15, 2013 Response and in the October 15, 2013 Responses of many of the Petitioners. We find that the cited studies show the storm water retention to be a promising approach to meeting water quality standards, but do not establish, at a sufficiently high level of confidence, that the storm water retention approach will definitively achieve compliance with the receiving water limitations.

a Permittee opts for the storm water retention approach. Permittees are required to conduct a reasonable assurance analysis for each water body-pollutant combination addressed by a WMP, with the objective of demonstrating the ability of the controls to ensure that MS4 discharges achieve applicable WQBELs and do not cause or contribute to exceedances of receiving water limitations.[122] The relevant provisions reference EWMPs, but elsewhere the Order states that the reasonable assurance analysis is only required for areas covered by the EWMP where retention of the 85th percentile, 24-hour storm event is not feasible.[123] The Fact Sheet also implies that the requirement for a reasonable assurance analysis is confined to situations where the storm water retention approach is not feasible.[124] In sum, then, Permittees that choose to develop and implement an EWMP are required to conduct a reasonable assurance analysis for each waterbody-pollutant combination addressed by the EWMP, except in the drainage areas that are tributary to the storm water retention projects.

The fact that the storm water retention approach does not require a reasonable assurance analysis prior to implementation to demonstrate the ability of the approach to achieve compliance with the limitations is mitigated in part by required monitoring and adaptive management to verify compliance following implementation. Although the provision could be clearer, we read the language "[i]n drainage areas where Permittees are implementing an EWMP" in Part VI.E.2.e.i.(4) to require Permittees to be in compliance with all aspects of the EWMP, including the monitoring and adaptive management provisions of Parts VI.C.7 and 8, to be deemed in compliance with final limitations through the storm water retention approach. As we read the Order, a Permittee's showing that it has retained all non-storm water and all storm water up to and including the volume equivalent to the 85th percentile, 24-hour event, establishes compliance, but only if the Permittee continues to conduct monitoring and adapt the EWMP in response to the monitoring. The Los Angeles Water Board appears to read the Order the way we do, as it states in its October 15, 2013 Response that "the Permit requires monitoring and adaptive management, which will continue to inform the Los Angeles Water Board regarding the efficacy of this storm water retention approach in conjunction with implementation of the other storm water management program elements and any needed

[122] Los Angeles MS4 Order, Part VI.C.5.b.iv.(5), pp. 63-64.

[123] *Id.*, Part VI.C.1.g., p. 48.

[124] *Id.*, Att. F, Fact Sheet, p. F-39.

modifications to the approach."[125] The Los Angeles Water Board further states in comments submitted on a draft of this order, as follows:

> The Los Angeles MS4 Order does not exclude EWMPs or areas within an EWMP where the stormwater retention standard is achieved from the integrated watershed monitoring, assessment and adaptive management processes. Neither does the Los Angeles MS4 Order specify or contemplate an end to the monitoring, assessment and adaptive management processes in the case of a Watershed Management Program (WMP) or EWMP. These required elements, including receiving water and outfall monitoring, evaluation of these monitoring data, and modification of the EWMP to improve its effectiveness, will be continually conducted throughout the Watershed Management Area addressed by the EWMP. . . . The Los Angeles Water Board understood that these regional multi-benefit projects would take time to implement and that Permittees needed to be afforded this time in the Los Angeles MS4 Order. The Los Angeles Water Board will continually evaluate progress during the implementation period. If, as full implementation nears, some Receiving Water Limitations are still not achieved, the Los Angeles Water Board and State Water Board have a variety of tools that can be used at a regional or statewide level including reconsideration of TMDLs, Basin Planning actions, policy development and permitting, among others.[126]

We will make a revision to Part VI.E.2.e.i. to make it clear that the Permittee must be in compliance with all other requirements of the EWMP in addition to implementation of the storm water retention approach in order to be deemed in compliance with the final WQBELs and other TMDL-specific limitations.

With no definitive evidence in the record establishing that the storm water retention approach will achieve final requirements, no reasonable assurance analysis required at the outset, and reliance only on subsequent monitoring and adaptive management to improve results if final limitations are not in fact achieved, the storm water retention approach does not provide a level of assurance of success that would lead us to conclude that its implementation, with nothing else, is sufficient to constitute compliance with final WQBELs and other TMDL-specific limitations. We understand that there are nevertheless very good reasons to encourage its use. Certainly for all non-storm water and for all storm water generated in storms up to the 85th percentile storm, the storm water retention approach achieves compliance because there is no discharge. And there are significant benefits beyond water quality, including most importantly benefits to water supply. We also believe that public projects requiring investment of this magnitude are unlikely to be carried out without a commitment from the water boards that Permittees will be considered in compliance even if the resulting improvement in water quality

[125] Los Angeles Water Board, October 15, 2013 Response, p. 62.

[126] Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3.

does not rise all the way to complete achievement of the final WQBELs and other TMDL-specific limitations.

We are not willing to go as far as saying that compliance with the storm water retention approach alone constitutes compliance with final WQBELs and other TMDL-specific limitations for all time, regardless of the actual results.[127] Nonetheless, we anticipate that implementation of such projects will bring the drainage area most and, in many cases, all of the way to achievement of water quality standards. Where there is still a gap in required water quality improvement, we expect the Executive Officer of the Los Angeles Water Board to require appropriate actions, consistent with the provisions of the Los Angeles MS4 Order and the Los Angeles Water Board's stated interpretation of those provisions,[128] to close that gap with additional control measures in order for the Permittee to be considered in compliance with the WQBEL or other TMDL-specific limitation. There are various mechanisms to provide assurances that additional control measures will be implemented to achieve the WQBEL or other TMDL-specific limitation, and in some instances, it may be appropriate for the Los Angeles Water Board to issue a time schedule order governing the implementation of further control measures. Further, as acknowledged by the Los Angeles Water Board in its comments, in some circumstances, reconsideration of the underlying TMDLs and the final deadlines within those TMDLs may instead be warranted.[129] We additionally recognize that municipal storm water management is an area of continued development and, with continued research and data evaluation, water quality standards may evolve and become more nuanced or sophisticated over time.

While we decline to interpret the storm water retention approach to, in and of itself, constitute compliance with final WQBELs and other TMDL-specific limitations, we emphasize here that any additional control measures to reach compliance that may be required by the Los Angeles Water Board must not require changes to installed storm water retention projects. Any revisions should be prospective in nature and should not disturb projects that Permittees have already installed in good faith to comply with the provisions of their EWMP.

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[127] Further, Permittees still have substantial incentive to develop and implement an EWMP. If a permittee pursues an EWMP, it will be deemed in compliance with the receiving water limitations during the EWMP development phase, and it may also recognize significant non-water quality benefits.

[128] Los Angeles Water Board, Comment Letter, January 21, 2015, pp. 2-3. As explained in footnote 110, at this time we see limited options available to the Los Angeles Water Board in addressing compliance with final deadlines for WQBELs and other TMDL-specific limitations.

[129] We also acknowledge the need for and commit to supporting state-wide solutions for source reduction as appropriate, similar to the brake pad legislation adopted to address copper discharges. (Senate Bill 346 (approved by the Governor September 27, 2010).)

Ultimately, we must set out to verify through appropriate monitoring that final WQBELs and other TMDL-specific limitations can be achieved through the storm water retention approach, or be willing to revise that approach. However, new or additional measures required at that point should be additive to the storm water retention approach measures already installed.

In sum, despite the uncertainty inherent in allowing the storm water retention approach, we concur in its use in the Los Angeles MS4 Order, with the clarification that ultimate compliance is subject to continued planning, monitoring and adaptive management. We shall amend Part VI.E.2.e.i. as follows:

> i. A Permittee shall be deemed in compliance with an applicable final water quality-based effluent limitation and final receiving water limitation for the pollutant(s) associated with a specific TMDL if any of the following is demonstrated:
>
> . . .
>
> (4) In drainage areas where Permittees are implementing an EWMP, (i) all non-storm water and (ii) all storm water runoff up to and including the volume equivalent to the 85th percentile, 24 hour event is retained for the drainage area tributary to the applicable receiving water**, and the Permittee is implementing all requirements of the EWMP, including, but not limited to, Parts VI.C.7 and VI.C.8 of this Order**. This provision (4) shall not apply to final trash WQBELs.

b. Compliance with Final Receiving Water Limitations

The Los Angeles MS4 Order states that for receiving water limitations associated with water-body pollutant combinations addressed in a TMDL, compliance with the TMDL requirements of the Order in Part VI.E and Attachments L through R constitutes compliance with the receiving water limitations in Part V.A.[130] In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation. No petitioner has contested this provision and we find that it constitutes an appropriate approach to compliance with receiving water limitations for water body-pollutant combinations that are addressed by a TMDL.

For exceedances of receiving water limitations for a water body-pollutant combination not addressed by a TMDL, as previously discussed, the Permittee must either incorporate control measures to address the exceedances into the Permittee's WMP/EWMP or comply directly with the receiving water limitations provisions of Part V.A of the Order. For

[130] Los Angeles MS4 Order, Part VI.E.2.c.ii., p. 143.

Permittees that choose the WMP/EWMP approach, the WMP/EWMP must incorporate "a final date for achieving the receiving water limitation."[131] To the extent the Permittee does not achieve the limitation by that final date and does not request and receive an extension, the Permittee has "fail[ed] to meet [a] requirement or date for its achievement in an approved Watershed Management Program or EWMP"[132] and is immediately subject to the receiving water limitations provisions of the Order, with the same result that it is out of compliance. In other words, implementation of non-structural and structural control measures in accordance with the timelines established in the WMP/EWMP constitutes compliance with the receiving water limitations up until the final deadline for achievement of the relevant receiving water limitation; however, at the deadline for final compliance, there must be verification of achievement based on the receiving water limitation itself. While we find that the Order provisions lead to this result as written, for the sake of greater clarity, we will specifically state that final compliance with receiving water limitations must be determined through verification that the receiving water limitation is actually being achieved.

We shall amend Part VI.C.2.c. as follows:

> **c.** If a Permittee fails to meet any requirement or date for its achievement in an approved Watershed Management Program or EWMP, the Permittee shall be subject to the provisions of Part V.A. for the waterbody-pollutant combination(s) that were to be addressed by the requirement. **For water body-pollutant combinations that are not addressed by a TMDL, final compliance with receiving water limitations is determined by verification through monitoring that the receiving water limitation provisions in Part V.A.1 and 2 have been achieved.**

c. Compliance with the Non-Storm Water Discharge Prohibition

The Environmental Petitioners suggest that the Los Angeles MS4 Order is unclear as to whether compliance with the WMP/EWMP may also constitute compliance with the non-storm water discharge prohibition of the Order. We disagree that the Los Angeles MS4 Order is unclear on this issue. The Permittees' obligation to comply with the receiving water limitations and WQBELs and other TMDL-specific limitations in Parts V.A and VI.E is independent of the Permittees' obligation to comply with the effective prohibition of non-storm water discharges in Part III.A. The several provisions stating that Permittees will be deemed to be in compliance with the receiving water limitations of the Los Angeles MS4 Order for implementing the WMP/EWMP specifically reference Parts V.A and VI.E of the Order and not

[131] *Id.*, Part VI.C.5.c.iii.(3)(b), p. 65.

[132] *Id.*, Part VI.C.2.c., p. 52.

III.A.[133] This notwithstanding, Parts VI.C.1.d and VI.C.5.b.iv.(2) require that a Permittee's WMP/EWMP include program elements and control measures to effectively prohibit non-storm water discharges consistent with Part III.A and Part VI.D.4.d or VI.D.10. Therefore, a Permittee's implementation of program elements and control measures consistent with Part III.A and Part VI.D.4.d or VI.D.10, through its approved WMP/EWMP, may provide a mechanism for compliance with Part III.A. Although we accordingly see no need to direct revisions to the Order, we provide this clarification here to respond to the Environmental Petitioners' concern and address any confusion that may exist.

6. "Safe Harbor" During the Planning Phase for the WMP/EWMP

Under the Los Angeles MS4 Order, a Permittee that has declared its intention to develop a WMP/EWMP is deemed in compliance with the receiving water limitations and with interim WQBELs with due dates prior to approval of the WMP/EWMP for the water body-pollutant combinations the WMP/EWMP addresses, provided it meets certain conditions, even though the Permittee is developing, not implementing the WMP/EWMP. Specifically, the Permittee is deemed in compliance if the Permittee (1) provides timely notice of its intent to develop a WMP/EWMP; (2) meets all interim and final deadlines for development of a WMP/EWMP; (3) targets implementation of watershed control measures in the existing program

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[133] Los Angeles MS4 Order, Parts VI.C.2.b., p. 52, VI.C.3.a., p. 53, VI.E.2.c.ii., p. 143, VI.C. 2.d., pp. 52-53, VI.E.2.d.i.(4)(d), p. 144. To the extent that a non-storm water discharge authorized by Part III.A may be causing or contributing to an exceedance of receiving water limitations in V.A, compliance with the WMP/EWMP provisions would constitute compliance with the receiving water limitations and any relevant interim WQBELs and other TMDL-specific limitations, as long as the WMP/EWMP addresses the water body-pollutant combination for that water body. However, the discharger would have to additionally comply with requirements in Part III.A. and Part VI.D.4.d or VI.D.10 through its approved WMP/EWMP for conditionally exempt non-storm water discharges that are found to cause or contribute to an exceedance in the receiving water. (See *id.*, Part III.A.4.c.-e., pp. 31-32.) We disagree that every discharge from a Permittee's MS4 to the receiving water of non-storm water that is not specifically authorized under Part III.A will necessarily be subject to enforcement under the Los Angeles MS4 Order. Section 402(p)(3)(B)(ii) of the Clean Water Act imposes a requirement to "effectively prohibit" non-storm water discharges. Part III.A of the Los Angeles MS4 Order effectuates that requirement with a requirement for the Permittee to prohibit non-storm water discharges: "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters, except where such discharges are . . . [listing exceptions]." (Los Angeles MS4 Order, Part III.A.1, p. 27.) The Los Angeles MS4 Order incorporates a specific and detailed programmatic requirement – the Illicit Connections and Illicit Discharges Elimination Program – for the Permittees to achieve their obligation to effectively prohibit non-storm water discharges. (Los Angeles MS4 Order, Parts VI.D.4.d., pp. 81-86, VI.D.10, pp. 137-141.) We recognize that even the most comprehensive efforts to address unauthorized non-storm water discharges may not eliminate all such discharges. Where a Permittee is fully implementing its Illicit Connections and Illicit Discharges Elimination Program, either pursuant to Parts VI.D.4.d. or VI.D.10, or by incorporation of customized actions into a WMP/EWMP as approved by the Los Angeles Water Board (see Los Angeles MS4 Order Part VI.D.1.a., p. 67), we would expect any enforcement action under Part III.A to be supported by a fact-specific analysis of the nature and source of the unauthorized non-storm water discharge and the efforts of the Permittee to prohibit the discharge.

to address known contributions of pollutants; and (4) receives approval of the WMP/EWMP within the specified time periods.[134]

The Environmental Petitioners object to the availability of a "safe harbor" during the planning phase. We disagree with the Environmental Petitioners that providing a "safe harbor" in the planning phase is disallowed by applicable law -- see our discussion of anti-backsliding requirements in section II.B.1. and antidegradation requirements in section II.B.2. However, we understand that deeming a discharger in compliance with receiving water limitations during the planning phase, not just the implementation phase, could weaken the incentive for Permittees to efficiently and timely seek approval of a WMP/EWMP and to move on to implementation. It is the implementation of the WMP/EWMP that will in fact lead to progress toward compliance with receiving water limitations; the planning phase is essential, but should be only as long as necessary for a well-planned program with carefully analyzed controls to be developed. Given the significance of the water quality issues addressed by the WMP/EWMPs, it is paramount that implementation begin as soon as feasible. Accordingly, the "safe harbor" in the planning phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to approval and implementation and is structured with clear, enforceable provisions.

Having reviewed the planning sections of the WMP/EWMP provisions carefully, we find that the Los Angeles MS4 Order does sufficiently constrain the planning phase, so that the "safe harbor" provided is not unreasonable. As already stated, compliance is deemed only if the Permittee is meeting the relevant deadlines for development and approval of the WMP/EWMP.[135] There are no provisions in the Order that allow for extensions to these deadlines. If a Permittee fails to obtain approval within the allowed number of months for the development of a WMP/EWMP, the Order states that the Permittee must then instead demonstrate actual compliance with receiving water limitations and with applicable interim WQBELs.[136] The Los Angeles MS4 Order is also clear that achievement of any TMDL-associated final deadlines occurring prior to the approval deadlines for the WMP/EWMP cannot be excused through commitment to planning for a WMP/EWMP.[137]

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[134] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[135] *Id.*, Parts VI.C.2.d., p. 52, VI.C.3.b., p. 53, VI.E.2.d.i.(4)(d), p. 144.

[136] *Id.*, Part VI.C.4.e., p. 58.

[137] *Id.*, Parts VI.C.3.c., p. 53, VI.C.4.d.iii, p. 58. Under Part VI.C.4.d.iii., Permittees must ensure that MS4 discharges achieve compliance with interim, in addition to final, trash WQBELs during the planning phase.

Further, Permittees are subject to a number of conditions during the planning phase that will ensure that progress toward achievement of receiving water limitations is not put on hold pending approval of the plan. These include requirements to put in place Low Impact Development (LID) ordinances and green streets policies[138] and to continue to implement watershed control measures in the existing storm water management programs, including those to eliminate non-storm water discharges,[139] but in a manner that is targeted to address known pollutants.[140]

Given the clear, enforceable requirements limiting the planning phase of the WMP/EWMP provisions, we find that the Los Angeles MS4 Order's inclusion of provisions deeming compliance with the receiving water limitations and with interim WQBELs during development of the programs is reasonable.

In fact, we are concerned that the Los Angeles Water Board has left no room for any deviation from the prescribed development schedule for WMP/EWMPs. A Permittee working in good faith to develop a WMP/EWMP over multiple months may encounter an issue that requires it to ask for a short extension on an interim or final deadline. Under such circumstances, the Los Angeles Water Board should be able to consider the request for the extension, rather than have its hands tied and have to reject a WMP/EWMP based on lack of timeliness. We will add a provision to the Order that provides the Los Angeles Water Board or its Executive Officer discretion in granting such extensions, but the Permittee will not be deemed in compliance with the applicable receiving water limitations and WQBELs during the period of the extension.

We shall add a new Part VI.C.4.g. as follows:

g. Permittees may request an extension of the deadlines for notification of intent to develop a Watershed Management Program or EWMP, submission of a draft plan, and submission of a final plan. The extension is subject to approval by the Regional Water Board or the Executive Officer. Permittees that are granted an extension for any deadlines for development of the WMP/EWMP shall be subject to the baseline requirements in Part VI.D 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 pursuant to subparts VI.E.2.d.i.(1)-(3) until the Permittee has an approved WMP/EWMP in place.

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[138] *Id.*, Part VI.C.4.c., pp. 56-57.

[139] *Id.*, Part VI.C.4.d.i.-ii., pp. 57-58.

[140] *Id.*, Parts VI.C.2.d.iii., pp. 52-53, VI.C.3.b.iii., p. 53, VI.E.2.d.i.(4)(d)(3), p. 144.

7. Conclusion

In conclusion, we uphold the WMP/EWMP provisions as a reasonable alternative compliance option for meeting receiving water limitations and uphold the WMP/EWMP provisions in all other aspects, except as specifically stated above. We find that the WMP/EWMP approach is a clearly defined, implementable, and enforceable alternative to the receiving water limitations provisions that we mandated in Order WQ 99-05, and that the alternative provides Permittees an ambitious, yet achievable, path forward for steady and efficient progress toward achievement of those limitations while remaining in compliance with the terms of the permit.

We direct all regional water boards to consider the WMP/EWMP approach to receiving water limitations compliance when issuing Phase I MS4 permits going forward.[141] In doing so, we acknowledge that regional differences may dictate a variation on the WMP/EWMP approach, but believe that such variations must nevertheless be guided by a few principles.[142] We expect the regional water boards to follow these principles unless a regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

1. The receiving water limitations provisions of Phase I MS4 permits should continue to require compliance with water quality standards in the receiving water and should not deem good faith engagement in the iterative process to constitute such compliance. The Phase I MS4 permits should therefore continue to use the receiving water limitations provisions as directed by State Water Board Order WQ 99-05.

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[141] We acknowledge that small MS4s permitted under the statewide General Permit for WDRs for Storm Water Discharges from Small MS4s (Order No. 2013-0001-DWQ) (General Phase II MS4 Permit) have similar practical issues as Phase I permittees in complying with receiving water limitations. Nevertheless, because the General Phase II MS4 Permit is issued by the State Water Board, not the regional water boards, we limit our guidance to regional water boards to the Phase I permits. The State Water Board is committed to working with small MS4s, the regional water boards, and interested persons in developing an alternative compliance option for the General Phase II MS4 Permit.

[142] In considering appropriate guidance for regional water boards drafting alternative compliance paths in municipal storm water permits, we have reviewed the proposed "strategic compliance program" model language that was submitted by the California Stormwater Quality Association (CASQA) and supported in whole or in part by a number of interested persons. (CASQA August 15, 2013 Receiving Water Limitations Submission, Attachment A, Section E.) While we have not in these proceedings adopted the CASQA language, or, for that matter, any specific language, for alternative compliance path provisions, regional water boards remain free to consider and incorporate the CASQA approach into their municipal storm water permits to the extent they determine and document that the approach, including any modifications, satisfies the principles we set out in this section as well as all other direction we have provided in this order.

2. The Phase I MS4 permits should include a provision stating that, for water body-pollutant combinations with a TMDL, full compliance with the requirements of the TMDL constitutes compliance with the receiving water limitations for that water body-pollutant combination.
3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent alternative compliance path that allows permittees appropriate time to come into compliance with receiving water limitations without being in violation of the receiving water limitations during full implementation of the compliance alternative.
4. The alternative compliance path should encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements.
5. The alternative compliance path should encourage the use of green infrastructure and the adoption of low impact development principles.
6. The alternative compliance path should encourage multi-benefit regional projects that capture, infiltrate, and reuse storm water and support a local sustainable water supply.
7. The alternative compliance path should have rigor and accountability. Permittees should be required, through a transparent process, to show that they have analyzed the water quality issues in the watershed, prioritized those issues, and proposed appropriate solutions. Permittees should be further required, again through a transparent process, to monitor the results and return to their analysis to verify assumptions and update the solutions. Permittees should be required to conduct this type of adaptive management on their own initiative without waiting for direction from the regional water board.

8. Direction to the Los Angeles Water Board to Report to the State Water Board on Implementation

We recognize that our review has been limited to the provisions of the Los Angeles MS4 Order. The success of the WMP/EWMP approach depends in large part on the steps that follow adoption of these provisions, i.e., the effort invested by Permittees in developing WMPs/EWMPs that truly address the stringent provisions of the Order, the precision with which the Los Angeles Water Board reviews the draft programs and requires revisions, and, most importantly, the actual implementation and appropriate enforcement of the programs once approved. The work going forward must ensure that the WMPs/EWMPs in fact exhibit the rigor and accountability the provisions of the Los Angeles MS4 Order demand. We expect that the Los Angeles Water Board will make careful oversight and enforcement a priority and that they will be aided in this process by the public review and comment opportunities built into the terms of the Order.

The process of developing the WMPs/EWMPs is currently ongoing -- the Los Angeles Water Board has been reviewing draft and revised draft WMPs and workplans for EWMPs – and, although we have been asked by the Environmental Petitioners to take official notice of some of the submissions and conditional approvals in the process, it is premature for the State Water Board to speak to the sufficiency of the resulting WMPs/EWMPs until the Los Angeles Water Board, with full input from the stakeholders, has had the opportunity to consider, revise, and finally approve the programs. We note again that all documents submitted to the Los Angeles Water Board Executive Officer for approval are subject to a 30-day public comment period[143] and that any formal determination or approval by the Executive Officer may be reviewed by the Los Angeles Water Board upon request by an interested person.[144] And an interested person may petition the State Water Board to review an action or failure to act of the Los Angeles Water Board.[145]

Once the WMPs/EWMPs are approved, ensuring that they are diligently and timely implemented must remain a top priority for the Los Angeles Water Board. We expect that the Los Angeles Water Board will continue to work cooperatively and closely with the Permittees, the Environmental Petitioners, and other interested persons in this process, but that the Board will also use its enforcement authority to ensure that appropriate progress is made toward water quality goals. We intend to remain involved in this process, as we must learn statewide from the successes and shortcomings of the approach we are endorsing with this order. We accordingly direct the Los Angeles Water Board to report to us on progress in implementation of the WMPs/EWMPs, and progress in improving water quality during this and the next permit term by February 28, 2018, by February 29, 2020, and by March 31, 2022. Specifically, we ask that the Los Angeles Water Board report on region-wide data for the following:

- On-the-ground structural control measures completed;
- Non-structural control measures completed;
- Monitoring data that evaluates the effectiveness of implemented control measures in improving water quality;

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[143] Los Angeles MS4 Order, Part V.A.5.b, p. 42.

[144] *Id.*, Part V.A.6, p. 42.

[145] Wat. Code, § 13320. On April 28, 2015, the Executive Officer of the Los Angeles Water Board conditionally approved several submitted WMPs. On May 28, 2015, the Environmental Petitioners filed a petition challenging the conditional approvals and requesting review by the Los Angeles Water Board and by the State Water Board of the Executive Officer's determination.

- Comparison of the effectiveness of the control measures to the results projected by the reasonable assurance analyses;
- Comparison of control measures completed to date with control measures projected to be completed to date pursuant to the WMPs/EWMPs;
- Control measures proposed to be completed in the next two years pursuant to the WMPs/EWMPs and the schedule for completion of those control measures;
- Status of funding and implementation for control measures proposed to be completed in the next two years;
- Trends in receiving water quality related to pollutants typically associated with storm water;
- Available permit compliance data, including requests for compliance extensions;
- Enforcement actions taken and results.

In addition to covering the above information, the third report shall summarize and reflect the comprehensive information gathered through the updates of the reasonable assurance analyses and WMPs/EWMPs conducted by the Permittees in the second permit term.

C. Appropriateness of TMDL Requirements

Section 303(d) of the Clean Water Act requires the water boards to identify impaired water bodies that do not meet water quality standards after applying required technology-based effluent limitations.[146] TMDLs are developed by either the regional water boards or by USEPA in response to section 303(d) listings of impaired water bodies. A TMDL is defined as the sum of the individual wasteload allocations for point sources of pollution, the load allocations for nonpoint sources of pollution, and the contribution from background sources of pollution,[147] and represents the maximum amount of a pollutant that a water body may receive and still achieve water quality standards. TMDLs developed by regional water boards include implementation provisions[148] and are typically incorporated into the regional water board's water quality control plan.[149] TMDLs developed by USEPA typically contain the total load and load allocations required by section 303(d), but do not set out comprehensive implementation provisions.[150] Most TMDLs are not self-executing, but instead rely upon subsequently-issued permits to impose requirements on discharges that implement the TMDLs' wasteload

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[146] 33 U.S.C. § 1313(d).

[147] 40 C.F.R. § 130.2(i).

[148] Wat. Code, §§ 13050, subd. (j), 13242.

[149] See 40 C.F.R. §§ 130.6(c)(1).

[150] *Am. Farm Bureau Fed'n v. U.S. E.P.A.* (M.D. Pa. 2013) 984 F. Supp. 2d 289, 314.

allocations.[151] The Los Angeles MS4 Order includes TMDL-specific requirements that implement 33 TMDLs (twenty-five adopted by the Los Angeles Water Board, seven established by USEPA, and one adopted by the Santa Ana Regional Water Quality Control Board that assigned requirements to two Permittees of the Los Angeles MS4 Order) in Part VI.E and in Attachments L-R.

Petitioners raise a number of challenges to the TMDL-based requirements of the Los Angeles MS4 Order. We take up several of those arguments in this section.[152]

1. Inclusion of Numeric WQBELs

Permittee Petitioners argue that the numeric WQBELs incorporated into the Los Angeles MS4 Order as TMDL-based limitations are contrary to the Clean Water Act and to state law and policy. We disagree.

Under the federal regulations implementing the Clean Water Act, effluent limitations in NPDES permits developed to achieve water quality standards must be consistent with the assumptions and requirements of any available wasteload allocation for the discharge.[153] In addition, the Porter-Cologne Act requires that waste discharge requirements implement any relevant water quality control plans,[154] including TMDL requirements that have been incorporated into the water quality control plans. The Los Angeles MS4 Order incorporates numeric WQBELs and other limitations that the Los Angeles Water Board found are consistent with the TMDL requirements applicable to the Permittees.

Permittee Petitioners argue that there is no requirement under federal law for incorporation of TMDL requirements into an MS4 permit and that the inclusion of the requirements in Part VI.E and in Attachments L-R was therefore at the discretion of the Los Angeles Water Board. They point out, as we acknowledged in section II.A, that MS4 discharges must meet a technology-based standard of prohibiting non-storm water discharges and reducing pollutants in the discharge to the MEP, but that requirements to strictly meet water quality standards are at the discretion of the permitting agency.[155] Because TMDL requirements are a path to achieving water quality standards, the Permittee Petitioners argue, the Los Angeles Water Board had the discretion not to include them in the Los Angeles MS4 Order.

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[151] *City of Arcadia v. EPA* (N.D. Cal. 2013) 265 F.Supp.2d 1142, 1144-1145.

[152] We note that we do not take up any arguments that challenge the terms of the TMDLs. Those arguments should have been made during the public process when the TMDLs were adopted. They are untimely now.

[153] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[154] Wat. Code, § 13263, subd. (a).

[155] 33 U.S.C. § 1342(p); *Defenders of Wildlife*, *supra*, 191 F.3d 1159.

Answering the question of whether the Los Angeles Water Board was required under federal law to strictly effectuate TMDL compliance through the Los Angeles MS4 Order is a largely irrelevant exercise because we have already reaffirmed in this order that we will continue to require water quality standards compliance in MS4 permits. Further, given the back-stop nature of TMDLs, and the fact that each set of dischargers must meet their share of the allocation to reach the total reductions set out, a regime in which municipal storm water dischargers were given a pass on TMDL obligations would render the promise of water quality standards achievement through TMDLs illusory. This is especially true in a large urbanized area where pollutants in storm water constitute a significant share of the impairment and where other dischargers would be disproportionately burdened if MS4s were not held to their allocations. Although not dispositive, we also note that USEPA has assumed in guidance (discussed in more detail below) issued on storm water and TMDL implementation that MS4 permits must incorporate effluent limitations consistent with the assumptions and requirements of relevant wasteload allocations.[156] To the extent the TMDL provisions of the Clean Water Act and the federal regulations could be read to preclude mandatory incorporation of wasteload allocations into an MS4 permit, effluent limitations consistent with those load allocations should nevertheless be required under Clean Water Act section 402, subsection (p)'s direction that the MS4 permit shall require "such other controls" as the permitting authority determines "appropriate for the control of such pollutants."[157] Finally, for TMDLs incorporated into water quality control plans, the implementation plan associated with the TMDL applies to all dischargers named, including MS4 permittees, and the MS4 permits must be consistent with the direction in the water quality control plan.[158]

Having found that the Los Angeles Water Board acted in a manner consistent with federal and state law when it developed WQBELs to address applicable TMDLs, we next turn to whether *numeric* WQBELs were appropriate. We find that the Los Angeles Water Board

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[156] USEPA, Memorandum, "Establishing Total Maximum Daily Load Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs," (Nov. 22, 2002) (2002 USEPA Memorandum); see also USEPA, Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,' " (Nov. 26, 2014) (2014 USEPA Memorandum). The 2014 USEPA Memorandum replaced a memorandum with the same title issued on November 12, 2010, which was subsequently opened to public comment. (USEPA Statement (March 17, 2011), available at <http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_tmdlwla_comments.pdf> (as of Nov. 18, 2014).)

[157] 33 U.S.C. § 1342(p)(3)(B)(iii). See, e.g., State Water Board Orders WQ 91-03, WQ 91-04, WQ 98-01, WQ 99-05, WQ 2001-15.

[158] Wat. Code, § 13263, subd. (a); see also *State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 (noting the obligation of the water boards to follow the program of implementation included in a water quality control plan).

acted within its legal authority when establishing numeric WQBELs, and further that its choice of numeric WQBELs was a reasonable exercise of its policy discretion.

In the context of MS4 discharges, effluent limitations in NPDES permits may be expressed in the form of either numeric limitations or best management practices (BMPs). The federal regulations specifically state that BMP-based effluent limitations may be used to control pollutants for storm water discharges.[159] USEPA has issued two memoranda, on November 22, 2002 (2002 USEPA Memorandum), and on November 26, 2014 (2014 USEPA Memorandum), providing guidance to the states on translating wasteload allocations for storm water into effluent limitations in NPDES Permits.[160] The 2002 USEPA Memorandum contemplated that "the NPDES permitting authority will review the information provided by the TMDL . . . and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit."[161] The 2002 USEPA Memorandum further stated that "EPA expects that most WQBELs for NPDES-regulated municipal . . . storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances."[162] The 2014 USEPA Memorandum, after noting the increased information available to the permitting agencies after more than a decade of experience with setting wasteload allocations and effluent limitations, explained that:

> Where the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this objective. This could take the form of a numeric limit, or of a measurable, objective BMP-based limit that is projected to achieve the WLA. . . . The permitting authority's decision as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs, with clear, specific, and measurable elements, should be based on an analysis of the specific facts and circumstances surrounding the permit, and/or the underlying

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[159] 40 C.F.R. § 122.44(k)(2); see also 33 U.S.C. § 1342(p)(3)(B)(iii). 40 Code of Federal Regulations section 122.44(k)(3) further contemplates that BMP-based effluent limitations are appropriate where it is infeasible to develop a numeric effluent limitation.

[160] 2002 USEPA Memorandum; 2014 USEPA Memorandum. In addition to the two memoranda, USEPA published guidance titled "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits" ((Sept. 1996) 61 Federal Register 57425), which recommended inclusion of BMPs in first-round permits, and expanded or better-tailored BMPs in subsequent permits. In 2005, the State Water Board assembled a blue ribbon panel to address the feasibility of including numeric effluent limits as part of NPDES municipal, industrial, and construction storm water permits. The panel issued a report dated June 19, 2006, which included recommendations as to the feasibility of including numeric limitations in storm water permits. The report concluded that it was not feasible, at that time, to set enforceable numeric effluent limitations for municipal storm water discharges.

[161] 2002 USEPA Memorandum, p. 5.

[162] *Id.*, p. 2.

WLA, including the nature of the stormwater discharge, available data, modeling results, and other relevant information.[163]

Both options – to choose BMP-based WQBELs or to choose numeric WQBELs – were legally available to the Los Angeles Water Board. In adopting numeric WQBELs, the Los Angeles Water Board analyzed the specific facts and circumstances surrounding storm water discharges in the region and reasonably concluded that numeric WQBELs were warranted because storm water discharges constituted a significant contributor to the water quality standards exceedances in the area and the exceedances had not been to date resolved through BMP-based requirements. Moreover, the Los Angeles Water Board concluded that it could feasibly develop numeric WQBELs following the extensive work already conducted to develop the TMDLs, which involved analyzing pollutant sources and allocating loads using empirical relationships or quantitative models. We will not second-guess the determination of the Los Angeles Water Board, given its extensive and unique role in developing the TMDLs and the permit to implement the TMDLs, that numeric WQBELs were appropriate for the Los Angeles MS4 Order.[164]

We emphasize, however, that we are not taking the position that numeric WQBELs are appropriate in all MS4 permits or even with respect to certain TMDLs within an MS4 permit. In a recent amendment to State Water Board Order 2011-0011-DWQ, NPDES Statewide Storm Water Permit for State of California Department of Transportation (Caltrans),[165] we found BMP-based TMDL requirements to be "consistent with the assumptions and requirements of the WLAs" of the TMDLs applicable to Caltrans. That determination was based on a number of factors including the fact that Caltrans, a single discharger, was named in over 80 TMDLs statewide, the fact that Caltrans had relatively little contribution to the exceedances in each of those TMDLs, and the consideration that there was significant efficiency to be gained by streamlining and standardizing control measure implementation throughout Caltrans' statewide storm water program. Similarly, regional water boards may find BMP-based requirements to be appropriate based on TMDL-specific, region-specific, or permittee-specific

[163] 2014 USEPA Memorandum, p. 6.

[164] The Los Angeles Water Board incorporated a discussion in the Fact Sheet of how the TMDL wasteload allocations were translated into numeric WQBELs in order to implement the TMDLs in the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att.F, Fact Sheet, pp. F-89-F-100). See 40 C.F.R. § 124.8. We are not independently reviewing the calculations and analyses underlying the specific numeric limitations arrived at by the Los Angeles Water Board; rather, our review has been limited to a determination of whether the choice of numeric rather than BMP-based limitations was reasonable. To the extent any petitioners asked us to independently review the issue in their petitions seeking review of the Order, the issue is dismissed. See fn. 11.

[165] State Water Board Order WQ 2014-0077-DWQ.

considerations. In many ways, the Los Angeles MS4 Order was uniquely positioned to incorporate numeric WQBELs because of the extensive TMDL development in the region in the past decade and the documented role of MS4 discharges in contributing to the impairments addressed by those TMDLs. Thus, while we decline to remove the numeric WQBELs from the Los Angeles MS4 Order, we also decline to urge the regional water boards to use numeric WQBELs in all MS4 permits.[166]

2. Requirement for Reasonable Potential Analysis

The federal regulations implementing NPDES permitting require the permitting authority to establish WQBELs for point source discharges when those discharges cause, have the "reasonable potential" to cause, or contribute to an excursion above water quality standards.[167] Permittee Petitioners argue that the Los Angeles Water Board did not conduct an appropriate reasonable potential analysis prior to imposing numeric WQBELs. The argument is misguided. The Los Angeles Water Board established that the MS4 discharges can cause or contribute to exceedances of water quality standards through the process of developing TMDLs and assigning wasteload allocations. At the permitting stage, the Los Angeles Water Board's legal obligation was to develop WQBELs "consistent with the assumptions and requirements of any wasteload allocation" in the TMDLs,[168] and not to reconsider reasonable potential.[169]

3. USEPA-Established TMDLs

USEPA has established seven TMDLs that include wasteload allocations for MS4 discharges covered by the Los Angeles MS4 Order. In contrast to state-adopted TMDLs, USEPA-established TMDLs do not contain an implementation plan or schedule for achievement of the wasteload allocations,[170] with the effect that Permittees must comply with wasteload allocations immediately. To avoid this result, the regional water board may either adopt a

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[166] Relying on the 2014 USEPA Memorandum, Permittee Petitioners also argue that the Los Angeles Water Board was required to disaggregate storm water sources within applicable TMDLs. The 2014 USEPA Memorandum only encourages permit writers to assign specific shares of the wasteload allocation to specific permittees during the permitting process, reasoning that permit writers may have more detailed information than the TMDL writers to assign reductions for specific sources. (2014 USEPA Memorandum, p.8.) In an MS4 system as complex and interconnected as that covered under the Los Angeles MS4 Order, we do not expect the permitting authority to be able to disaggregate wasteload allocations by discharger. Further, as discussed in section II.F. on joint responsibility, the Los Angeles MS4 Order has provided a means for Permittees with commingled discharges to demonstrate that they are not responsible for any given exceedance of a limitation.

[167] 40 C.F.R. § 122.44(d)(1)(iii).

[168] 40 C.F.R. § 122.44(d)(1)(vii)(B).

[169] See USEPA, NPDES Permit Writers Manual (updated September 2010), Chapter 6, section 6.3.3.

[170] See, e.g., *Am. Farm Bureau Fed'n v. U.S. E.P.A., supra,* 984 F. Supp. 2d at p. 314.

separate implementation plan as a water quality control plan amendment[171] or issue the Permittee a compliance order with a compliance schedule.[172] For the seven USEPA-established TMDLs applicable to the Permittees, the Los Angeles Water Board authorizes Permittees subject to a wasteload allocation in a USEPA-established TMDL to propose control measures that will be effective in meeting the wasteload allocation, and a schedule for their implementation that is as short as possible, as part of a WMP/EWMP.[173] Permittees that do not submit an adequate WMP/EWMP are required to demonstrate compliance with the wasteload allocations immediately.[174]

Permittee Petitioners argue that the Los Angeles Water Board has acted inconsistently in requiring BMP-based compliance with the USEPA-established TMDLs but requiring numeric WQBELs for the state-established TMDLs. We have already stated above in section C.1 that the permitting authority has discretion to choose between BMP-based and numeric effluent limitations depending on fact-specific considerations. The Los Angeles Water Board was not restricted to choosing one single uniform approach to implementing all 33 TMDLs in the Los Angeles MS4 Order. In fact, straight-jacketing NPDES permit writers to choose one approach to the exclusion of another, even within the confines of a single MS4 permit, would run afoul of USEPA's expectations in the 2014 USEPA Memorandum for a fact-specific, documented justification for the permit requirements included to implement a wasteload allocation.

The Environmental Petitioners argue that the provisions are contrary to law because they excuse Permittees from complying with final numeric wasteload allocations as long as they are implementing the BMPs proposed in the WMP/EWMP. The approach taken by the Los Angeles MS4 Order to compliance here is similar to the provisions for compliance with receiving water limitations that are not otherwise addressed by a TMDL: The Permittee proposes control measures and a timeline that is as short as possible and is considered in compliance with the final numeric limitations while implementing the control measures consistent with the schedule. We find that, given the absence of an implementation plan with final compliance deadlines specified in the Los Angeles Water Board's water quality control

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[171] Wat. Code, § 13242.

[172] *Id.*, See, e.g., § 13300.

[173] The Los Angeles MS4 Order's Fact Sheet states that the Los Angeles Water Board may choose to adopt implementation plans or issue enforcement orders in the future. (Los Angeles MS4 Order, Att. F, Fact Sheet, p. F-111.)

[174] Los Angeles MS4 Order, Part VI.E.3., pp. 145-146.

plan, this approach is consistent with the assumptions and requirements of the relevant wasteload allocations. We will not revise the provisions.

D. Non-Storm Water Discharge Provisions

Permittee Petitioners argue that the non-storm water discharge provisions of the Los Angeles MS4 Order are contrary to the Clean Water Act. Specifically, Permittee Petitioners assert that the Los Angeles MS4 Order improperly regulates non-storm water discharges from the MS4 to the receiving waters by imposing the prohibition of discharge "through the MS4 to the receiving waters" and by imposing WQBELs and other numeric limitations, rather than the MEP standard, on dry weather discharges.

The Los Angeles MS4 Order states that "[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters" with certain exceptions including discharges separately regulated under an NPDES permit and discharges conditionally exempt from the prohibition consistent with the federal regulations.[175] Permittee Petitioners take issue with the imposition of the prohibition "through the MS4 to receiving waters" because the language does not track the specific requirement of the Clean Water Act that the MS4 permit "include a requirement to effectively prohibit non-stormwater discharges *into the storm sewer.*" (Emphasis added.)[176]

We find the variation in language to be a distinction without a difference. Whether the Los Angeles MS4 Order prohibits non-storm water discharges *into* the MS4 or *through* the MS4 to receiving waters, the intent and effect of the prohibition is to prevent non-exempt non-storm water discharges from reaching the receiving waters.[177] The legal standard governing non-storm water – effective prohibition -- is not altered because the Los Angeles MS4 Order imposes the prohibition at the point of entry into the receiving water rather than the point of entry into the MS4 itself. Instructively, USEPA has used the terms "into," "from," and "through" interchangeably when describing the prohibition.[178]

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[175] *Id.*, Part III.A, pp 27-33.

[176] 33 U.S.C. § 1342(p)(3)(B)(ii).

[177] The Los Angeles Water Board notes that the language in the Los Angeles MS4 Order is not significantly changed from the version in the 2001 Los Angeles MS4 Order, which prohibited non-storm water discharges "into the MS4 and watercourses." The Board additionally asserts that phrasing the prohibition as "through the MS4 to receiving waters" provides Permittees with greater flexibility to use measures that control non-storm water after it enters the MS4, including regional solutions such as low-flow diversions and catch-basin inserts.

[178] See, e.g., 55 Fed. Reg. 47990, 47995-47996 ("Section 402(p)(B)(3) of the CWA requires that permits for discharges *from municipal separate storm sewer systems* require the municipality to 'effectively prohibit' non-storm water discharges *from the municipal separate storm sewer*...Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit. . . . *(Continued)*

Permittee Petitioners' objection to the phrasing of the prohibition in the Los Angeles MS4 Order appears to be based largely on the assumption that prohibiting non-storm water discharges at the point of entry into the receiving water rather than at the point of entry into the MS4 allows the Los Angeles Water Board to impose requirements on those discharges that would otherwise not be available under the Clean Water Act and federal regulations. We disagree.

As a preliminary matter, regardless of the phrasing of the non-storm water discharge prohibition, MEP is not the standard that governs non-storm water discharges. Permittee Petitioners have asserted that, for non-storm water discharges that enter the MS4, MEP is the governing standard just as it is for storm water discharges. This assertion misinterprets the statute. The Clean Water Act imposes two separate standards for regulation of non-storm water and storm water in an MS4 permit: The MS4 permit "shall include a requirement to effectively prohibit non-stormwater discharges" into the MS4, and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . . ."[179] Although the statute imposes the MEP standard to control of "pollutants" rather than specifically to "pollutants in storm water," any reading of section 402(p)(3)(B)(iii) to apply generally to both non-storm water and storm water would render the effective prohibition of non-storm water in section 402(p)(3)(B)(ii) meaningless. The federal regulations confirm the distinction between the treatment of storm water and non-storm water by establishing requirements to prevent illicit discharges from entering the MS4.[180] While the regulations have no definition for "non-storm water discharges," illicit discharges most closely represent the statutory term and are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit . . . and discharges resulting from firefighting activities."[181] Further, contrary to assertions by Permittee Petitioners, the definition of storm water in the federal regulations is not inclusive of dry weather discharges. The federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and

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The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit *through municipal separate storm sewers to waters of the United States.*" (Emphasis added.))

[179] 33 U.S.C. § 1342(p)(3)(b)(iii).

[180] 40 C.F.R. § 122.26(d)(2)(iv)(B).

[181] *Id.*, § 122.26(b)(2). The preamble to the regulations states: "Today's rule defines the term 'illicit discharge' to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit." (55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).)

drainage."[182] Surface runoff and drainage cannot be understood to refer to dry weather discharges where USEPA has specifically stated in the preamble to the relevant regulations that it would not expand the definition of storm water to include "a number of classes of discharges which are not in any way related to precipitation events."[183] Accordingly, dry weather discharges are not a component of storm water discharges subject to the MEP standard.[184]

Second, the Los Angeles Water Board's legal authority to impose TMDL-based WQBELs and other limitations on dry weather discharges is derived not from the phrasing of the discharge prohibition in the statute but from the TMDLs themselves, as well as the Clean Water Act direction to require "such other provisions" as the permitting authority "determines appropriate for the control of such pollutants." We have already found that the Los Angeles MS4 Order reasonably (and legally) incorporated numeric WQBELs and other limitations to implement the TMDLs. The Los Angeles Water Board's authority to impose the limitations for dry weather conditions is accordingly independent of the provisions establishing the non-storm water effective prohibition.

Permittee Petitioners also assert that requiring compliance with the non-storm water discharge prohibition through and from the MS4 would frustrate enforcement of the illicit connection and illicit discharge elimination programs of the Los Angeles MS4 Order, which continue to require the Permittee to prohibit illicit discharges and connections *to* the MS4.[185] On this point, we agree with the Los Angeles Water Board that the illicit connection and illicit discharge elimination program is a means to implement the non-storm water prohibition and independently implementable and enforceable. We are more sympathetic to the argument by Permittee Petitioners that, in the context of a complex MS4 system with commingled discharges, the prohibition of discharges through the MS4 to the receiving waters poses greater compliance challenges than a prohibition of discharges into the MS4; however, the Los Angeles MS4 Order's Monitoring and Reporting Program contains a procedure by which a Permittee will notify the Board and the upstream jurisdiction when non-exempted, non-storm water discharges pose an issue in commingled discharges.[186] Further, the Los Angeles Water Board states in its

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[182] 40 C.F.R. § 122.26(b)(13).

[183] 55 Fed. Reg. 47990, 47995 (Nov. 16, 1990).

[184] We disagree that the phrasing of the non-storm water discharge prohibition in the Los Angeles MS4 Order means that *any* dry weather discharges from the MS4 could be construed as a violation of the Clean Water Act for the same reasons articulated in footnote 133 of this order.

[185] Los Angeles MS4 Order, Parts VI.A.2.a.iii, p. 40, VI.D.4.d., p. 81-86, VI.D.10, p. 137-141.

[186] Los Angeles MS4 Order, Att. E, Monitoring and Reporting Program, Part IX.F.6, p. E-27.

October 15, 2013 Response that the upstream jurisdiction would then have the responsibility to further investigate and address the discharge.[187] The challenge of addressing compliance and enforcement in the context of interconnected MS4s and commingled discharges is a challenge pervasive in the MS4 regulatory structure and not unique to non-storm water discharges. We are not sufficiently persuaded by Permittee Petitioners' arguments regarding compliance to disturb the non-storm water prohibitions as currently established in the Los Angeles MS4 Order.

E. Monitoring Provisions

Relying on Water Code sections 13165, 13225, and 13267, Permittee Petitioners argue that the Los Angeles Water Board was required to conduct a cost-benefit analysis to support the monitoring and reporting requirements of the Los Angeles MS4 Order. Because the monitoring and reporting provisions of the Los Angeles MS4 Order are incorporated pursuant to federal law, the cited provisions are inapplicable here. The monitoring and reporting provisions of the Los Angeles MS4 Order were established under the Clean Water Act and USEPA's regulations.[188] Further, under state law, Water Code section 13383, rather than Water Code section 13267, controls monitoring and reporting requirements in the context of NPDES permitting, and that provision does not include a requirement to ensure that the burden, including costs of the report, bear a reasonable relationship to the need for the report.[189]

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[187] Los Angeles Water Board, October 15, 2013 Response, p. 33 & fn. 116.

[188] See 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. §§ 122.26(d)(2)(i)(F), 122.26(d)(2)(iii)D), 122.41(h), 122.41(j), 122.41(*l*), 122.42(c),122.44(i), 122.48.

[189] Permittee Petitioners argue that the cost considerations of Water Code sections 13225 and 13267 are relevant to the Los Angeles MS4 Order notwithstanding the fact that it was issued under federal authority because the requirements of those section are not inconsistent with the requirements of section 13383. (See Water Code, §13372, subd. (a) ("To the extent other provisions of this division are consistent with the requirements for state programs . . . those provisions apply . . . ").) This exact assertion was taken up by the trial court in litigation challenging the 2001 Los Angeles MS4 Order and decided in favor of the Los Angeles Water Board. The trial court stated: "As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: 'state law is still preempted. . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: 'an obstacle to the accomplishment of the full purposes and objectives of [the federal law].' (Ibid)." (*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase II Trial on Petitions for Writ of Mandate, at pp.19-20 (Administrative Record, section 10.II., RB-AR23197-23198.). Further, we note that Water Code section 13383, subdivision (c) specifically references subdivision (c) of section 13267 when establishing facility inspection requirements; in contrast, section 13383, subdivision (a) does not reference subdivision (b) of section 13267, which incorporates the requirement that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Water Code section 13383, subdivision (a), was therefore arguably intended to stand in place of the requirements in section 13267(b). Finally, even where authority to impose a monitoring and reporting requirement is clearly derived from Water Code section 13267, the provision requires consideration of the costs and benefits of monitoring and reporting, but not a full cost-benefit analysis. We therefore find that the Los Angeles Water Board did not fail to meet its legal obligations by not carrying out a full cost-benefit analysis specific to the monitoring and reporting requirements of the Los Angeles MS4 Order. However, in making this finding, in no way do we mean to disavow the significance of cost consideration in permitting actions, even where not specifically required by law. We note again that the Los Angeles Water Board carefully considered the costs of *(Continued)*

Moreover, the monitoring and reporting requirements of the Los Angeles MS4 Order do not exceed the requirements of the Clean Water Act and the federal regulations.[190] In particular, we find that the receiving water monitoring requirements of the Order are reasonable in light of the need to identify water quality exceedances and evaluate progress in compliance with water quality standards. The argument made by several Permittee Petitioners that the federal regulations allow only two types of monitoring – effluent and ambient – for compliance is without support in the relevant regulations. The relevant law is clear that the permitting authority is required to incorporate monitoring and reporting requirements sufficient to determine compliance with the permit conditions.[191] In contrast, nothing in the Clean Water Act or the regulations states that requiring wet weather receiving water monitoring is beyond the authority of the permitting agency.[192] Further, accepting such a constrained interpretation of the Clean Water Act's monitoring requirements would undermine storm water permitting assessment. Excluding wet weather receiving water monitoring would preclude storm water dischargers from assessing the impacts of their discharges on waters of the United States during the events for which they are primarily being permitted—storm events. We find nothing in the text or preamble of the federal regulations to support a narrow interpretation of monitoring to exclude wet weather receiving monitoring.

To the extent Permittee Petitioners are arguing that the MEP standard, applied at the outfall, constrains the permitting authority's discretion to require monitoring beyond the outfall, we also find no support in the law for that proposition. We have already stated that we will continue to require compliance with water quality standards in MS4 permits. Wet weather receiving water monitoring is fundamental to assessing the effects of storm water discharges on water quality and determining the trends in water quality as Permittees implement control

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compliance with the Los Angeles MS4 Order generally as summarized in the Fact Sheet. (See Los Angeles MS4 Order, Att. F, Fact Sheet, pp. F-144-F-149.) Further, the Los Angeles Water Board considered monitoring costs-related comments on earlier drafts of the Los Angeles MS4 Order, and, in a number of cases, where presented with an argument that a cost related to a particular monitoring requirement was not commensurate with the benefits to be received from that requirement, made revisions to the requirement. (See, e.g., Administrative Record, section 8, RB-AR19653-19654, RB-AR19666, RB-AR19674, RB-AR19681.)

[190] The Los Angeles Water Board provided its rationale for the receiving water monitoring requirements in the Fact Sheet of the Los Angeles MS4 Order. (Los Angeles MS4 Order, Att. F, Fact Sheet, F-113-F-137.)

[191] See 33 U.S.C. § 1318(a)(2); 40 C.F.R. § 122.26(d)(2)(i)(F). While we do not interpret these requirements to mean that each and every permit condition must have a corresponding monitoring and reporting requirement, neither do we see any constraints on the water boards' authority to establish monitoring and reporting requirements.

[192] Permittee Petitioners reference language in the federal regulations concerning "effluent and ambient monitoring" (40 C.F.R. § 122.44(d)(1)(vi)(C)(3)) and appear to be using the phrase as support for their argument. That section is inapposite as it applies to situations where a State has not established a water quality objective for a pollutant present in the effluent and instead establishes effluent limitations on an indicator parameter for the pollutant of concern.

measures. Compliance may be determined at the outfall – for example, where a permittee determines that the discharge does not exceed an applicable WQBEL or receiving water limitation – but outfall monitoring alone cannot provide the broader data related to trends in storm water discharge impacts on the receiving water. Accordingly, receiving water monitoring is a legal and reasonable component of the monitoring and reporting program. Further, because Permittees are responsible for impacts to the receiving waters resulting from their MS4 discharges, Permittees may be required to participate in monitoring not only in receiving waters within their jurisdiction but also in monitoring all receiving waters that their discharges impact.

We will make no revisions to the Monitoring and Reporting provisions of the Order.

F. Joint Responsibility

In the extensive and interconnected system regulated by the Los Angeles MS4 Order, discharges originating from one Permittee's MS4 frequently commingle with discharges from other Permittees' MS4s within or outside of the Permittee's jurisdiction. Permittee Petitioners argue that the Los Angeles MS4 Order improperly ascribes responsibility to all Permittees with commingled discharges where those commingled discharges exceed a WQBEL or cause or contribute to exceedances of receiving water limitations. Specifically, Permittee Petitioners take issue with the fact that the Los Angeles MS4 Order ascribes "joint responsibility"[193] to the co-Permittees without a showing that a particular Permittee has in fact discharged the pollutant causing or contributing to the exceedance.

The Los Angeles Water Board counters that the joint responsibility regime is consistent with the intent of the Clean Water Act and further that it does not compel a Permittee to clean up the discharge of another Permittee. The Los Angeles Water Board points to two provisions for this latter proposition. First, even with joint responsibility, Permittees that have commingled MS4 discharges need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.[194] Second, even where joint responsibility is presumed, a Permittee may subsequently counter the presumption of joint responsibility by

[193] "Joint responsibility" is the term used in the Los Angeles MS4 Order. (See Los Angeles MS4 Order, Part II.K.1, p. 23 ("'Joint responsibility' means that the Permitttees that have commingled MS4 discharges are responsible for implementing programs in their respective jurisdictions, or within the MS4 for which they are an owner and/or operator, to meet the water quality-based effluent limitations and/or receiving water limitations assigned to such commingled MS4 discharges.") As defined by the Los Angeles Water Board and as discussed below, this term does not have the same meaning and scope as the legal doctrine of "joint liability."

[194] Los Angeles MS4 Order, Parts II.K.1, pp. 23-24, VI.A.4.a., p. 41; 40 C.F.R. § 122.26(a)(3)(vi); see also, *id.*, Part VI.E.2.b.ii., p. 142 (stating in the context of TMDL requirements that, where discharges are commingled and assigned a joint WLA, "each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.")

affirmatively demonstrating that its MS4 discharge did not cause or contribute to the relevant exceedances.[195]

Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order and the challenges inherent in designing a monitoring program that could parse out responsibility for each individual Permittee, we find that a joint responsibility regime is a reasonable approach to assigning initial responsibility for an exceedance. The Los Angeles MS4 Order provisions addressing TMDLs also appropriately take a joint responsibility approach, given that the wasteload allocations from which the WQBELs and other TMDL-specific limitations are derived are most frequently expressed as joint allocations shared by all MS4 dischargers in the watershed. We further agree with the Los Angeles Water Board that the regime is one that is permissible under applicable law. The Clean Water Act contemplates that MS4 permits may be issued on a system-wide or jurisdiction-wide basis[196] and the federal regulations anticipate the need for inter-governmental cooperation.[197] Further, the United States Court of Appeal, Ninth Circuit, recently stated in *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194 that the permitting authority has wide discretion concerning the terms of a permit, including the manner in which permittees share liability.[198]

Yet, we also find that joint responsibility in an MS4 Order is only appropriate if the ultimate responsibility for addressing an exceedance rests with those permittees that actually cause or contribute to the exceedance in question. The re-issued Los Angeles MS4 Order contains additional specificity and monitoring, beyond that contained in the 2001 Los Angeles MS4 Order, to document compliance and the presence or absence of an individual municipality's contribution of pollutants to the storm water. For this reason, the general reasoning of the Ninth Circuit's 2013 *Natural Resources Defense Council v. County of Los Angeles* decision finding liability based solely on the presence of pollutants above water quality standards in the receiving waters is of limited forward-looking importance. Generally, in the context of MS4 permits, we do not sanction joint responsibility to the extent that that joint

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[195] *Id.*, Part VI.E.2., pp.141-42; see also id., Part II.K.1, pp. 23-24.

[196] 33 U.S.C. § 1342(p)(3)(B)(i).

[197] See 40 C.F.R. §§ 122.26(d)(2)(i)(D), 122.26(d)(2)(iv), 122.26(d)(2)(vii).

[198] *Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1205, fn. 16, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135. The Ninth Circuit went on to find that, based on the specific language of the 2001 Los Angeles MS4 Order, the Permittees were jointly liable for exceedances detected by mass emissions monitoring.

responsibility would require each Permittee to take full responsibility for addressing violations, regardless of whether, and to what extent, each permittee contributed to the violation.[199]

The Los Angeles MS4 Order does not impose such a joint responsibility regime where each Permittee must take full responsibility for addressing other Permittees' violations. In addition to clearly stating that permittees are responsible only for their contribution to the commingled discharges, the Los Angeles MS4 Order provides that Permittees may affirmatively show that their discharge did not cause or contribute to an exceedance. Joint responsibility, as applied by the Los Angeles MS4 Order, is thus consistent with our expectation that ultimate responsibility for addressing an exceedance rests with those Permittees that actually cause or contribute to the exceedance and consistent with the regulatory direction that co-permittees need only comply with permit conditions relating to discharges from the MS4 for which they are owners or operators.

While the result is that the burden rests on the Permittee to demonstrate that its commingled discharge is not the source of an exceedance, rather than on the Los Angeles Water Board to demonstrate that a Permittee's commingled discharge is causing or contributing to the exceedance, the result is not contrary to law. The Los Angeles Water Board has the initial burden to show that a violation of the Los Angeles MS4 Order has occurred,[200] but the Board can do so by establishing an exceedance of a limitation by jointly responsible Permittees and need not identify the exact source of the exceedance. This scheme represents a reasonable policy approach to a complicated compliance question where the Permittees are more closely familiar than the Los Angeles Water Board with their outfalls and their discharges in the extensive and interconnected MS4 network.

We are, however, concerned that the Los Angeles MS4 Order's treatment of the joint responsibility issue is too narrow. The Los Angeles Water Board addresses the issue of joint responsibility primarily in the context of compliance with the TMDL requirements of the Order. Commingled discharges pose the same questions of assigning responsibility where receiving water limitations are exceeded in water bodies receiving MS4 discharges from multiple jurisdictions, but where the pollutant is not addressed by a TMDL. A similar approach to

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[199] In a "joint and several liability" scheme, a plaintiff may collect his or her entire damages from any one defendant, and the defendants must then rely on principles of indemnity or contribution to apportion ultimate liability amongst themselves. (See *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 586-590.) Because the Los Angeles MS4 Order's joint responsibility scheme does not equate to joint liability, and because we do not find such liability appropriate from a policy perspective, we do not address Petitioners' legal arguments as to whether joint or joint and several liability in the storm water context would be consistent with applicable law.

[200] See e.g. *Sackett v. E.P.A.* (9th Cir. 2010) 622 F.3d 1139 rev'd on other grounds *Sackett v. E.P.A.* (2012) 132 S. Ct. 1367.

assigning responsibility for addressing the exceedances is appropriate there. We will add new language to the Los Angeles MS4 Order mirroring Part VI.E.2.b., but applying the principles more generally.

We also take this opportunity to emphasize that all MS4 permits should be drafted to avoid one potential, but likely unintended, result arising from *Natural Resources Defense Council v. County of Los Angeles*. The broadest reading of the Ninth Circuit's holding following remand from the U.S. Supreme Court would assign joint liability to all Permittees for any exceedance at a monitoring location designated for the purpose of compliance determination, even if the particular pollutant is not typically found in storm water and has a likely alternative source such as an industrial discharger or waste water treatment plan. Providing municipalities an opportunity to demonstrate that they did not contribute to a pollutant present in receiving waters above standards will prevent this outcome.

We shall amend Part VI.B. as follows:

B. Monitoring and Reporting Program (MRP) Requirements

1. Dischargers shall comply with the MRP 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.

2. **Compliance Determination for Commingled Discharges**

   a. **For commingled discharges addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part E as specified at Part E.2.b.**

   b. **For commingled discharges not addressed by a TMDL, a Permittee shall demonstrate compliance with the requirements of Part V.A as follows:**

      i. **Pursuant to 40 CFR section 122.26(a)(3)(vi), each Permittee is only responsible for discharges from the MS4 for which they are owners and/or operators.**

      ii. **Where Permittees have commingled discharges to the receiving water, or where Permittees' discharges commingle in the receiving water, compliance in the receiving water shall be determined for the group of Permittees as a whole unless an individual Permittee demonstrates that its discharge did not cause or contribute to the exceedance, pursuant to subpart iv. below.**

iii. **For purposes of compliance determination, each Permittee is responsible for demonstrating that its discharge did not cause or contribute to an exceedance of the receiving water limitation in the target receiving water.**

iv. **A Permittee may demonstrate that its discharge did not cause or contribute to an exceedance of a receiving water limitation in one of the following ways:**

(1) **Demonstrate that there was no discharge from the Permittee's MS4 into the applicable receiving water during the relevant time period;**

(2) **Demonstrate that the discharge from the Permittee's MS4 was controlled to a level that did not cause or contribute to the exceedance in the receiving water;**

(3) **Demonstrate that there is an alternative source of the pollutant that caused the exceedance, that the pollutant is not typically associated with MS4 discharges, and that the pollutant was not discharged from the Permittee's MS4; or**

(4) **Demonstrate that the Permittee is in compliance with the Watershed Management Programs provisions under VI.C.**

G. Separation of Functions in Advising the Los Angeles Water Board

Petitioners Cities of Duarte and Huntington Park (Duarte and Huntington Park) argue that their rights to due process of law were violated when the same attorneys advised both the Los Angeles Water Board staff and the Board itself in the course of the proceedings to adopt the Los Angeles MS4 Order. We disagree and reaffirm our position that permitting actions do not require the water boards to separate functions when assigning counsel to advise in development and adoption of a permit.

A water board proceeding to adopt a permit, including an NPDES permit, waste discharge requirements, or a waiver of waste discharge requirements, is an adjudicative proceeding subject to the Administrative Procedure Act's administrative adjudication statutes in Government Code section 11400 et seq.[201] Section 11425.10, part of the "Administrative Adjudication Bill of Rights," provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions with the agency . . . ."[202] In accordance with

[201] See Cal. Code Regs., tit. 23, § 648, subd. (b).

[202] Gov. Code, § 11425.10, subd. (a)(4). Subdivision (a)(4) references section 11425.30, which addresses disqualification of a presiding officer that has served as "investigator, prosecutor, or advocate" in the proceeding or its preadjudicative stage or is subject to "the authority, direction, or discretion" of a person who has served in such roles.

this directive, the water boards separate functions in all enforcement cases, assigning counsel and staff to prosecute the case, and separate counsel and staff to advise the board.

In a permitting action, water board counsel have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while both counsel and staff are expected to develop recommendations for their boards, the role of counsel and staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board. In the case of counsel, such consideration and advice includes not just legal evaluation of the substantive options for permitting but also of procedural issues such as admissibility of the evidence, conduct of the hearing, and avoidance of board member conflicts. Because counsel and staff are advisors to the board rather than advocates for a particular position, the same counsel may advise staff in the course of development of the permit and the board in the adoption proceedings.

A primary purpose of separation of functions in adjudicatory proceedings is the need to prevent improper ex parte communications.[203] The exceptions to the ex parte communications rules further support the position that counsel advising board staff may also advise the board itself. While section 11430.10 of the Government Code generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency that is a party,[204] one exception provides that a communication "for the purpose of assistance and advice to the presiding officer," in this case the board, "from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage" is permissible. Even if board counsel could be considered an advocate in the proceeding, another provision (specifically referencing the water boards) excepts the communication from the general ex parte communications rules. A communication is not an ex parte communication if:

> (c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is nonprosecutorial in character:

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[203] See *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 9-10.

[204] Government Code section 11430.10 prohibits communications between an employee that is a "party" to a pending proceeding and the presiding officer. We disagree that Los Angeles Water Board staff, as an advisor to the Board, was a "party" to the proceedings for adoption of the Los Angeles MS4 Order, but, even if staff could be considered a party, the cited exceptions to the ex parte communications rules would apply.

. . .

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.[205]

The fact that communications that would otherwise be considered prohibited ex parte communications are specifically permitted in non-prosecutorial adjudicative proceedings of the water boards further supports the position that the water boards are not obligated by law to separate functions in permitting actions.

We acknowledge that there may be some unique factual circumstances under which a permitting proceeding could violate due process or the Administrative Procedure Act because board counsel either acted or gave the appearance of acting as a prosecutor or advocate. Duarte and Huntington Park point to a writ of mandate issued by the Los Angeles Superior Court in 2010,[206] holding that a 2006 proceeding to incorporate provisions of the Santa Monica Bay Beaches TMDL into the 2001 Los Angeles MS4 Order was not fairly conducted because Los Angeles Water Board counsel had acted as an advocate for Board staff, directly examining Board staff witnesses, cross-examining witnesses called by permittees, objecting to questions asked by permittees, and making a closing argument on behalf of Board staff, while simultaneously advising the Board. The proceedings to adopt the Los Angeles MS4 Order did not follow the type of adversarial structure that led the Superior Court to find a violation of separation of functions in the 2006 proceedings.[207] Further, nothing in the conduct of the Los Angeles Water Board attorneys in the Los Angeles MS4 Order proceedings leads us to find that they acted as advocates for a particular position or party, rather than as advisors to the Board.

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[205] Gov. Code, § 11430.30. We note that the Law Revision Commission comments on section 11430.30, subdivision (c), state that "[s]ubdivision (c) applies to nonprosecutorial types of administrative adjudications, such as . . . proceedings . . . setting *water quality protection...requirements.*" (Emphasis added.) The notes further state that "[t]he provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of [ex parte communications], given limited staffing and personnel." (25 Cal.L.Rev.Comm. Reports 711 (1995).) We agree that the lengthy and complex nature of permitting proceedings, and the limited staffing resources of the water boards, caution against an expansive interpretation of separation of functions in non-prosecutorial adjudications.

[206] *County of Los Angeles v. State Water Resources Control Board* (Super. Ct., Los Angeles Co. (June 2, 2010, Minute Order) No. BS122724) (Administrative Record, section 10.II, RB-AR23665-23667.)

[207] We also note that, although the writ directed that petitioners were entitled to a new hearing "in which the same person does not act as both an advocate before the Board and an advisor to the Board," the writ had no direct bearing on the separate proceedings to adopt the Los Angeles MS4 Order. In any case, as discussed, Board attorneys did not act as advocates in the proceedings to adopt the Los Angeles MS4 Order.

The two specific cases pointed to by Duarte and Huntington Park – advice by Board counsel to Board member Mary Ann Lutz regarding recusal due to ex parte communications and advice to the Board generally on the lack of a cost-benefit analysis requirement in federal law – may be contrary to the legal position held by Duarte and Huntington Park, but there is nothing in the record to suggest that the advice was driven by biased advocacy for a Board staff position.[208] In the absence of such evidence, we find no reason to depart from the general rule that separation of functions is not required in a permitting proceeding[209] and find that Los Angeles Water Board counsel acted in accordance with applicable laws in advising Board staff and the Board itself.

H. Signal Hill's Inclusion in the Order

The City of Signal Hill (Signal Hill) argues that the Los Angeles Water Board acted contrary to relevant law when it issued the system-wide Los Angeles MS4 Order that included Signal Hill, even though Signal Hill had submitted an application for an individual permit.[210] We disagree.

Signal Hill points out that the federal regulations allow an operator of an MS4 to choose between submitting an application jointly with one or more other operators for a joint permit or individually for a distinct permit.[211] However, the choice of application does not necessarily dictate the type of permit that the permitting authority ultimately deems appropriate. The permitting authority in turn has discretion to determine if the permit should be issued on a

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[208] See Administrative Record, section 7, RB-AR18309-18316, RB-AR18397-18400 (Transcript of Proceedings on Oct. 4, 2012), section 7, RB-AR18892-18894 (Transcript of Proceedings on Oct. 5, 2012).

[209] Although *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 concerned an enforcement proceeding and therefore is not on point for our legal determination above, we take note of the direction by the California Supreme Court that separation of functions in an administrative tribunal should not be expanded beyond its appropriate scope: "In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular . . . [and where proper procedure is followed and in the absence of a specific demonstration of bias or unacceptable risk of bias] we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions." (*Morongo Band of Mission Indians, supra*, at pp. 741-742.)

[210] Signal Hill was one of several permittees under the 2001 Los Angeles MS4 Order that elected not to submit an application jointly with the other permittees for the renewed permit. The other parties have not challenged their inclusion under the Los Angeles MS4 Order. The Los Angeles Water Board rejected Signal Hill's application as incomplete; however, our determination that the Los Angeles Water Board had the discretion to issue the system-wide Los Angeles MS4 Order is not dependent on that fact.

[211] 40 C.F.R. § 122.26(a)(3)(iii). Signal Hill has also cited regulations applicable to Small MS4s at 40 Code of Federal Regulations sections 122.30 through 122.37. These regulations are not applicable here because the Los Angeles Water Board has designated the Greater Los Angeles County MS4, which includes the incorporated cities and the unincorporated areas of Los Angeles County within coastal watersheds, as a large MS4 pursuant to 40 Code of Federal Regulations section 122.26(b)(4).

jurisdictional or system-wide basis.[212] While the federal regulations do not specifically state that, in exercising that discretion, the permitting authority may override the permit applicant's preference for an individual permit, nothing in the regulations constrains its authority to do so. Section 122.26(a)(3)(iii) of 40 Code of Federal Regulations does not require the permitting authority to take any specific action in response to the submission of an individual application. And sections 122.26(a)(3)(ii) and 122.26(a)(3)(iv) provide that the permitting authority "may issue" system-wide or distinct permits. The preamble to the regulations similarly contemplates wide discretion for the permitting authority to choose system-wide permits, including a permit that would allow an entire system in a geographical region to be designated under one permit.[213] Particularly because the option of a system-wide permit would be significantly frustrated if MS4 operators were allowed to opt out at their discretion, the most reasonable reading of the regulations is that the permitting authority, not the applicant, makes the ultimate decision as to the scope of the permit that will be issued. Accordingly, we find that the Los Angeles Water Board had the discretion under the relevant law to issue the Los Angeles MS4 Order with Signal Hill as a permittee.

We also find that the Los Angeles Water Board's decision regarding Signal Hill was appropriately supported by findings in the Order and in the Fact Sheet.[214] Finding C of the Los Angeles MS4 Order, as well as discussion in the Fact Sheet,[215] establishes that the Los Angeles Water Board found a system-wide permit to be appropriate for a number of reasons, including that Permittees' MS4s comprise a large interconnected system with frequently commingled discharges, that the TMDLs to be implemented apply to the jurisdictional areas of multiple Permittees, that the passage of Assembly Bill 2554[216] in 2010 provided a potential means for funding collaborative water quality improvement plans among Permittees, and that the results of an online survey conducted by Los Angeles Water Board staff showed that the

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[212] 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(1)(v), (a)(3)(ii), (a)(3)(iv).

[213] See 55 Fed. Reg. 47990, 48039-48043 (preamble to the Phase I regulations noting that section 122.26(a)(3)(iv) would allow an entire system in a geographical region to be designated under one permit and further discussing that sections 122.26(a)(1)(v) and (a)(3)(ii) allow the permitting authority broad discretion in issuing system-wide permits).

[214] *Topanga Assn.*, *supra*, 11 Cal.3d at 515.

[215] Los Angeles MS4 Order, Part II.C., pp. 14-15; id., Att. F, Fact Sheet, pp. F-15-F-18.

[216] Assembly Bill No. 2554, Chapter 602, an act to amend sections 2 and 16 of the Los Angeles County Flood Control Act (Chapter 755 of the Statutes of 1915), relating to the Los Angeles County Flood Control District, Sept. 30, 2010 (Administrative Record, section 10.VI.C., RB-AR29172-29179). The Bill allows the Los Angeles County Flood Control District to assess a property-related fee or charge, subject to voter approval in accordance with proposition 218, for storm water and clean water programs.

majority of Permittees favored either a single MS4 permit for Los Angeles County or several watershed-based permits.

Signal Hill points out that the reasons enumerated by the Los Angeles Water Board as grounds for issuance of a system-wide permit did not preclude the Los Angeles Water Board from issuing an individual permit to the City of Long Beach (Long Beach).[217] The Los Angeles Water Board has provided the rationale for distinguishing Signal Hill and Long Beach in its October 15, 2013 Response. The Los Angeles Water Board explains that Long Beach has had an individual permit for more than a decade and that, unlike Signal Hill, it was not permitted under the 2001 Los Angeles MS4 Order. The Board's decision to issue a separate permit to Long Beach was originally the result of a settlement agreement that resolved litigation on the MS4 permit issued by the Los Angeles Water Board in 1996, and Long Beach has a proven track record in implementing the individual permit while cooperating with Permittees under the Los Angeles MS4 Order.[218] We find that the Los Angeles Water Board reasonably distinguished between Long Beach and the Permittees under the Los Angeles MS4 Order in making determinations as to individual permitting. We will not reverse its determination but we will add a brief statement reflecting that reasoning to the Fact Sheet.

We shall amend section III.D.1.a. at page F-18, Attachment F, Fact Sheet, as follows:

> The Regional Water Board determined that the cities of Signal Hill and Downey, the five upper San Gabriel River cities, and the LACFCD are included as Permittees in this Order. **In making that determination, the Regional Water Board distinguished between the permitting status of those cities and the permitting status of the City of Long Beach at this time because the City of Long Beach has a proven track record in implementing an individual permit and developing a robust monitoring program under that individual permit, as well as in cooperation with other MS4 dischargers on watershed based implementation. While all other incorporated cities with discharges within the coastal watersheds of Los Angeles County, as well as Los Angeles County and the Los Angeles County Flood Control District, are permitted under this Order,** ~~I~~individually tailored permittee requirements are provided in this Order, where appropriate.

[217] Signal Hill is located in the geographical middle of Long Beach and is entirely surrounded by that city.

[218] Los Angeles Water Board, October 15, 2013 Response, p. 25, fn. 78.

III. CONCLUSION

Based on the above discussion, we conclude as follows:

1. Although we are not bound by federal law or state law to require compliance with water quality standards in municipal storm water permits, we will not depart from our prior precedent regarding compliance with water quality standards. The regional water boards shall continue to require compliance with receiving water limitations in municipal storm water permits through incorporation of receiving water limitations provisions consistent with State Water Board Order WQ 99-05.

2. However, we find that municipal storm water dischargers may not be able to achieve water quality standards in the near term and therefore that it is appropriate for municipal storm water permits to incorporate a well-defined, transparent, and finite alternative path to permit compliance that allows MS4 dischargers that are willing to pursue significant undertakings beyond the iterative process to be deemed in compliance with the receiving water limitations.

3. We find that the WMP/EWMP provisions of the Los Angeles MS4 Order, with minor revisions that we incorporate herein, are an appropriate alternative to immediate compliance with receiving water limitations. The WMP/EWMP provisions are ambitious, yet achievable, and include clear and enforceable deadlines for the achievement of receiving water limitations and a rigorous and transparent process for development and implementation of the WMPs/EWMPs.

4. We find that the WMP/EWMP provisions do not violate anti-backsliding requirements.

5. We find that the WMP/EWMP provisions do not violate antidegradation requirements; however, we find that the antidegradation findings made by the Los Angeles Water Board are too cursory and revise those findings consistent with the federal and state antidegradation policies.

6. We find that issuance of time schedule orders is appropriate where a final receiving water limitations deadline set in the WMP/EWMP or a final TMDL-related deadline is not met; however we find that the WMP/EWMP compliance schedule need not otherwise be structured as an enforcement order.

7. We clarify the WMP/EWMP provisions to make it clear that final compliance with receiving water limitations and final WQBELs and other TMDL-specific limitations must be verified through monitoring.

8. We clarify the WMP/EWMP provisions to make it clear that Permittees may request extensions of deadlines incorporated into the WMPs/EWMPs except those final deadlines established in a TMDL. However, any deadline extensions must be approved by the Executive Officer after public review and comment.

9. In order to add greater rigor and accountability to the process of achieving receiving water limitations, we revise the WMP/EWMP provisions to add that the Permittees must comprehensively evaluate new data and information and revise the WMPs/EWMPs, including the supporting reasonable assurance analysis, by June 30, 2021, for approval by the Executive Officer.

10. We find that the storm water retention approach is a promising approach to achieving receiving water limitations, but also find that the Administrative Record does not support a finding that the approach will necessarily lead to achievement of water quality standards in all cases. We revise the WMP/EWMP provisions to clarify that, in the case of implementation of an EWMP with the storm water retention approach, if compliance with a final WQBEL or other TMDL-specific limitation is not in fact achieved in the drainage area, a Permittee will be considered in compliance with the relevant limitation only if the Permittee continues to adaptively manage the EWMP to achieve ultimate compliance with the WQBEL or other TMDL limitation.

11. We find reasonable the WMP/EWMP provisions that allow permittees to be deemed in compliance with receiving water limitations during the planning and development phase of the WMP/EWMP. We revise the WMP/EWMP provisions to state that, if a Permittee fails to meet one of the deadlines, the Permittee may still develop a WMP/EWMP for approval by the Los Angeles Water Board or its Executive Officer; however, the Permittee will not be deemed in compliance with receiving water limitations or WQBELs and other TMDL-specific limitations during the subsequent WMP/EWMP development period.

12. We recognize that the Los Angeles MS4 Order WMP/EWMP compliance path alternative may not be appropriate in all MS4 permits. In order to provide guidance to regional water boards preparing Phase I MS4 permits, we lay out several principles to be followed in drafting receiving water limitations compliance alternatives: Phase I MS4 permits should (1) continue to require compliance with water quality standards in accordance with our Order WQ 99-05; (2) allow compliance with TMDL requirements to constitute compliance with receiving water limitations; (3) provide for a compliance

alternative that allows permittees to achieve compliance with receiving water limitations over a period of time as described above; (4) encourage watershed-based approaches, address multiple contaminants, and incorporate TMDL requirements; (5) encourage the use of green infrastructure and the adoption of low impact development principles; (6) encourage the use of multi-benefit regional projects that capture, infiltrate, and reuse storm water; and (7) require rigor, accountability, and transparency in identification and prioritization of issues in the watershed, in proposal and implementation of control measures, in monitoring of water quality, and in adaptive management of the program. We expect the regional water boards to follow these principles unless the regional water board makes a specific showing that application of a given principle is not appropriate for region-specific or permit-specific reasons.

13. We recognize that the success of the WMP/EWMP approach depends in large part on the steps that follow adoption of the provisions, including the development and approval of rigorous WMPs/EWMPs and the implementation and appropriate enforcement of the programs once approved. We direct the Los Angeles Water Board to periodically report specific information to the State Water Board regarding implementation of the WMPs/EWMPs, including on-the-ground structural control measures completed, monitoring data evaluating the effectiveness of such measures, control measures proposed to be completed and proposed funding and schedule, trends in receiving water quality related to storm water discharges, and compliance and enforcement data.

14. We find that the Los Angeles Water Board acted in a manner consistent with the law when establishing numeric WQBELs. We further find that the development of numeric WQBELs was a reasonable exercise of the Los Angeles Water Board's policy discretion, given its experience in developing the relevant TMDLs and the significance of storm water impacts in the region. However, we find that numeric WQBELs are not necessarily appropriate in all MS4 permits or for all parameters in any single MS4 permit.

15. We find that the Los Angeles Water Board's choice of BMP-based WQBELs, to be proposed by the Permittee in the WMP/EWMP to address USEPA-established TMDLs was reasonable.

16. We find that the Los Angeles Water Board did not act contrary to federal law when it prohibited the discharge of non-storm water "through the MS4 to receiving water" instead of "into" the MS4. Regardless of the exact wording of the prohibition, the standard that applies to non-storm water is the requirement of "effective prohibition." However, the Los Angeles Water Board also has authority to regulate any dry weather discharges from the MS4s under the applicable TMDLs.

17. We find that the monitoring and reporting provisions of the Los Angeles MS4 Order are consistent with applicable law and reasonable.

18. We find that assigning joint responsibility for commingled discharges that cause exceedances is not contrary to applicable law. Given the size and complexity of the MS4s regulated under the Los Angeles MS4 Order, the joint responsibility regime also constitutes a reasonable policy choice. The Los Angeles MS4 Order specifically allows a permittee to avoid joint responsibility by demonstrating that its commingled discharge is not the source of an exceedance.

19. We find that representation of the Los Angeles Water Board and the Los Angeles Water Board staff by the same attorneys in the proceedings to adopt the Los Angeles MS4 Order was lawful and reasonable.

20. We find that the Los Angeles Water Board acted in a manner consistent with applicable law and reasonably when it issued a system-wide permit that included Signal Hill.

Addressing the water quality impacts of municipal storm water is a complex and difficult undertaking, requiring innovative approaches and significant investment of resources. We recognize and appreciate the commendable effort of the Los Angeles Water Board to come up with a workable and collaborative solution to the difficult technical, policy, and legal issues, as well as the demonstrated commitment of many of the area's MS4 dischargers and of the environmental community to work with the Los Angeles Water Board in the development and implementation of the proposed solution. We also recognize the extensive work that interested persons from across the state, including CASQA, have invested in assisting us in understanding how the watershed-based alternative compliance approach developed by the Los Angeles Water Board may inform statewide approaches to addressing achievement of water quality requirements. While storm water poses an immediate water quality problem, we believe that a rigorous and transparent watershed-based approach that emphasizes low impact development, green infrastructure, multi-benefit projects, and capture, infiltration, and reuse of storm water is

a promising long-term approach to addressing the complex issues involved. We must balance requirements for and enforcement of immediate, but often incomplete, solutions with allowing enough time and leeway for dischargers to invest in infrastructure that will provide for a more reliable trajectory away from storm water-caused pollution and degradation. We believe that the Los Angeles MS4 Order, with the revisions we have made, strikes that balance at this stage in our storm water programs, but expect that we will continue to revisit the question of the appropriate balance as the water boards' experience in implementing watershed-based solutions to storm water grows.

IV. ORDER

IT IS HEREBY ORDERED that the Los Angeles MS4 Order is amended as described above in this order. The Los Angeles Water Board is directed to prepare a complete version of the Los Angeles MS4 Order (including any necessary non-substantive conforming corrections), post the conformed Los Angeles MS4 Order on its website, and distribute it as appropriate.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held June 16, 2015.

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

Jeanine Townsend
Clerk to the Board

TAB 31

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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

STATEMENT OF DECISION

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

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

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

Summary of Findings

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

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

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

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

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

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

BACKGROUND

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

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

Municipal Stormwater

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

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

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

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

California Law

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

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

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

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

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

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

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

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

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

Federal Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General State-Wide Permits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] *Id.* at page 870.

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

Claimants' Position

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

I. Regional Requirements for Urban Runoff Management Programs

A. Copermittee collaboration

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

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

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

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

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

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

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

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

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

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

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

Part F.1 of the Permit provides:

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

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

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

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

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

C. Hydromodification[31]

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

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

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

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

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

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

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

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

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

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

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

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

(1) The HMP shall:

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

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

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

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

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

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

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

(e) Include a review of pertinent literature.

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

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

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

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

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

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

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

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

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

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

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

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

(4) HMP Reporting

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

(5) HMP Implementation

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

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

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

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

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

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

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

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

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

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

(7) Update of SUSMP BMP Requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Long Term Effectiveness Assessment

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

5. Long-term Effectiveness Assessment

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

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

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

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

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

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

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[46] See footnote 50, page 21.

II. Jurisdictional Urban Runoff Management Program

A. Street Sweeping

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

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

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

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

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

B. Conveyance System Cleaning

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

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

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

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

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

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

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

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

C. Program Effectiveness Assessment

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

1. Jurisdictional

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Watershed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Educational Surveys and Tests

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

5. Education Component

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

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

a. GENERAL REQUIREMENTS

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

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

Table 3. Education

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

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

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

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

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

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

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

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

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

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

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

(2) New Development and Construction Education

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

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

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

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

III. Watershed Urban Runoff Management Program

A. Copermittee Collaboration

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

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

f. Watershed Activities[57]

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

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

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

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

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

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

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

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

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

g. Copermittee Collaboration

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

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

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

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

State Agency Positions

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

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

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

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

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

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

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

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

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

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

Interested Party Comments

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

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

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

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

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

COMMISSION FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[71] Water Code section 13200 et seq.

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

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

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

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

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

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

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

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

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

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

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

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

[76] Water Code section 13376.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[79] 33 U.S.C. § 1342(p)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And the federal stormwater statute states that the permits:

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

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[88] *Id.* at 173.

[89] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[94] State Board comments submitted January 2010.

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

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

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

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

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

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

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

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

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

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

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

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

According to the State Board's comments submitted in October 2008 the requirement to develop and implement a HMP is necessary to meet the minimum federal MEP standard. The Board states that "broad federal legal authority is contained in CWA sections 402(p)(3)(B)(ii)-(iii), CWA section 402(a), and in 40 C.F.R. sections 122.26 (d)(2)(i)(B)-(C), (E), and (F), 131.12, and 122.26(d)(2)(iv)(A)(2), which states:

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will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands. (h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce. (i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles. (j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

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

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[101] of a discharge[102] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) *Part 2.* Part 2 of the application shall consist of: [¶]...[¶]

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

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[101] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2)

[102] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

> (*2*) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. ...

The State Board also cited the U.S. Supreme Court decision, *P.U.D. No. 1 v. Washington Department of Ecology* (1994) 511 U.S. 700, for the state's authority to regulate flow under the federal Clean Water Act in order to protect water quality standards.

In response, the claimants' February 2009 comments state that the permit's Fact Sheet did not cite any federal authorities to justify the HMP portion of the permit, and that none exists. Claimants also assert that no other jurisdiction in the United States that was surveyed for the claim has a permit that requires a HMP. Claimants call the HMP requirement a flood control measure that is not a requirement in any other permit outside of California, and that the HMP exceeds the federal requirements and constitutes a state mandate. Claimants also point to the language in section 122.26(d)(2)(iv)(A)(2) that they say is:

> [A]imed directly at controlling pollutant discharges from an MS4 that originate in areas of new development. [The regulation] does not mention the need to include controls to reduce the *volume* of storm water discharged from these areas. ... controls designed only to limit volume are not expressly required.

As to the *P.U.D. No. 1 v. Washington Department of Ecology* decision cited by the State Board, the claimants distinguish it as being decided under section 401 of the Clean Water Act, wherein the permit was issued under section 402. Claimants state that the *P.U.D.* case recognized state authority under the Clean Water Act rather than a federal mandate.

The Commission agrees with claimants about the applicability of the *P.U.D.* case, which determined whether the state of Washington's environmental agency properly conditioned a permit for a federal hydroelectric project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. The U.S. Supreme Court determined that Washington could do so, but the decision was based on section 401 of the Clean Water Act, which involves certifications and wetlands. Even if the decision could be applied to section 402 NPDES permits, it merely recognized state authority to regulate flows. The issue here is not whether the state has authority to regulate flows, but whether a federal mandate requires it. This was not addressed in the *P.U.D.* decision.

Overall, there is nothing in the federal regulations that requires a municipality to adopt or implement a hydromodification plan. Thus, the HMP requirement in the permit "exceed[s] the mandate in that federal law or regulation."[103] As in *Long Beach Unified School Dist. v. State of California*,[104] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[105] to

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[103] Government Code section 17556, subdivision (c).

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

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

impose these requirements. Thus, the Commission finds that part D.1.g. of the permit is not a federal mandate.

All of part D.1.g. of the permit requires the HMP to have specified contents except part D.1.g.(2), which states that the HMP "*may* include implementation of planning measures ..." as specified. As the plain language of this part does not require the implementation of planning measures, the Commission finds that part D.1.g.(2) of the permit is not a state mandate.

The Commission also finds that HMP is not a state mandate for municipal (city or county) projects that are priority development projects, such as a hospital, laboratory or other medical facility, recreational facility, airfield, parking lot, street, road, highway, and freeway, a project over an acre, and a project located in an environmentally sensitive area.[106] Although these projects would be subject to the compliance with HMP requirements, there is no legal requirement to build municipal projects.[107] Thus, municipal projects are built by cities or counties voluntarily, and their decision triggers the requirements to comply with the HMP. In *Kern High School Dist.*,[108] the California Supreme Court decided whether the state must reimburse the costs of school site councils and advisory committees complying with the Brown (Open Meetings) Act for schools who participate in various school-related education programs. The court determined that participation in the underlying school site council program was not legally compelled and so mandate reimbursement was not required for the downstream compliance with the Brown Act. The court said:

> Activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[109]

As with the voluntary programs in *Kern,* there is no requirement for municipalities to undertake any of the priority development projects described in the permit. Thus, the Commission finds that the costs of complying with the HMP in part D.1.g., is not a state mandate for priority development projects undertaken by a city or county.

Based on the mandatory language of the remainder of part D.1.g. of the permit (except part D.1.g.(2) and except for municipal projects), the Commission finds that it is a state mandate on the claimants to do the following:

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[106] The County of San Diego, in its January 2010 comments on the draft staff analysis, raises the issue of its fee authority for municipal projects. The League of California Cities, in its January 2010 comments on the draft staff analysis, also discusses municipal projects, citing examples "where a city or county constructs a Priority Development Project for which no third party is available to assess a fee against."

[107] California Constitution, article XI, section 7. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

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

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

Each Copermittee shall collaborate with the other Copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all Priority Development Projects, where such increased rates and durations are likely to cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. The HMP, once approved by the Regional Board, shall be incorporated into the local SUSMP [Standard Urban Storm Water Mitigation Plan] and implemented by each Copermittee so that post-project runoff discharge rates and durations shall not exceed estimated pre-project discharge rates and durations where the increased discharge rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the discharge rates and durations.

(1) The HMP shall:

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

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

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

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

(e) Include a review of pertinent literature.

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

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

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

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

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

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

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

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

[¶]...[¶]

(3) Section D.1.g.(1)(c) does not apply to Development Projects where the project discharges stormwater runoff into channels or storm drains where the preexisting channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses. Such situations may include discharges into channels that are concrete-lined or significantly hardened (e.g., with rip-rap, sackrete, etc.) downstream to their outfall in bays or the ocean; underground storm drains discharging to bays or the ocean; and construction of projects where the sub-watersheds below the projects' discharge points are highly impervious (e.g., >70%) and the potential for single-project and/or cumulative impacts is minimal. Specific criteria for identification of such situations shall be included as a part of the HMP. However, plans to restore a channel reach may reintroduce the applicability of HMP controls, and would need to be addressed in the HMP.

(4) HMP Reporting

The Copermittees shall collaborate to report on HMP development as required in section J.2.a of this Order.[110]

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

(5) HMP Implementation

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

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

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

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

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

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

As to whether part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service, the claimants, in their February 2009 comments, assert that it is.

> The 2001 Permit only included general statements regarding the need to control downstream erosion with post construction BMPs. The 2007 Permit increased these requirements by requiring the copermittees to, among other things, draft and implement interim and long-term hydromodification plans, and impose specific, strict post construction BMPs on new development projects within their jurisdiction.

The State Board, in its October 2008 comments, argues that part D.1 "expands upon and makes more specific the hydromodification requirements in the 2001 Permit."

Finance argues, in its February 2010 comments on the draft staff analysis, that the entire permit is not a new program or higher level of service because additional activities, beyond those

required by the 2001 permit, are necessary for the claimants to continue to comply with the federal Clean Water Act and reduce pollutants to the Maximum Extent Practicable.

The Commission disagrees with Finance. This analysis measures the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service. Under the standard urged by Finance, anything the state imposes under the permit would not be a new program or higher level of service. The Commission does not read the federal Clean Water Act so broadly. In *Building Industry Assoc. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, the court held that the Clean Water Act's "maximum extent practicable" standard did not prevent the water boards from including provisions in the permit that required municipalities to comply with state water quality standards.[111]

The Regional Board prepared a Fact Sheet/Technical Report[112] for the permit that lists the federal authority and reasons the permit provisions were adopted. Regarding part D.1.g. of the permit, the Fact Sheet/Technical Report does not expressly mention the 2001 permit, but states:

> This section of the Order expands the requirements for control of hydromodification caused by changes in runoff resulting from development and urbanization. Expansion of these requirements is needed due to the current lack of a clear standard for controlling hydromodification resulting from modification. While the Model SUSMP[113] [adopted in 2002] developed by the Copermittees requires project proponents to control hydromodification, it provides no standard or performance criteria for how this is to be achieved.

The Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) with respect to private priority development projects is a new program or higher level of service. The Fact Sheet/Technical Report describes the section as an "expansion" of hydromodification control requirements. The 2001 permit (in part F.1.b.(2)(j)) included only the following on hydromodification:

> Downstream Erosion – As part of the model SUSMP [Standard Urban Storm Water Mitigation Plan] and the local SUSMPs, the Copermittees shall develop criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat. At a minimum, criteria shall be developed to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat. Storm water discharge volumes and durations should also be considered.

The requirements in the 2007 permit, however, are much more expansive and detailed, requiring development and implementation of a hydromodification management plan (HMP) to be approved by the Regional Board. And while the 2001 permit contained a broad description of

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[111] *Building Industry Assoc. of San Diego County v. State Water Resources Control Board, supra,* 124 Cal.App.4th 866, 870.

[112] The Fact Sheet/Technical Report was attached to the test claim.

[113] According to the Fact Sheet/Technical Report, the Model SUSMP was completed and adopted in 2002.

the criteria required, part D.1.g. of the 2007 permit contains a detailed description of the contents of the HMP, including identifying standards for channel segments, using continuous simulation of the entire rainfall record to identify runoff flows, requiring priority development projects to implement hydrologic control measures, including other performance criteria for priority development projects to prevent urban runoff from the projects, and 9 other components to include in the HMP. Therefore, the Commission finds that part D.1.g. of the permit (except for D.1.g.(2)) is a new program or higher level of service over the 2001 permit.

In sum, the Commission finds that part D.1.(g) of the permit (except for D.1.g.(2)) is a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the HMP for municipal priority development projects.

B. Low Impact Development (LID) and Standard Urban Storm Water Mitigation Plan (part D.1.d.): Also under part D.1 "Development Planning" is part D.1.d, which requires the copermittees to review and update their SUSMPs (Standard Urban Storm Water Mitigation Plans)[114]and (in paragraphs 7 and 8) add low impact development (LID) and source control BMP requirements for each priority development project, and to implement the updated SUSMP, as specified on pages 17-19 above. The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces (*Id.*)

According to the State Board's comments submitted in October 2008, the requirement in part D.1.d. is necessary to meet the minimum federal MEP standard, and is supported by 40 C.F.R. section 122.26 (d)(2)(iv)(A)-(D), part of which is quoted in the discussion of hydromodification above. Part (d)(2)(iv)(A)(2) of the regulation requires part of the permit application to include:

> (2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed.

The State Board asserts that these regulations "require municipalities to implement controls to reduce pollutants in urban runoff from new development and significant redevelopment, construction, and commercial, residential, industrial and municipal land uses or activities." The Board cites a decision of the Washington Pollution Control Hearings Board that found that permit provisions to promote but not require low impact development "failed to satisfy the federal MEP standard and Washington state law because it ... did not require LID at the parcel and subdivision level."

In their February 2009 rebuttal comments, the claimants assert: "while federal regulations require the large MS4 permits to include programs to reduce the discharge of pollutants from the

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[114] The Permit defines the Standard Urban Storm Water Mitigation Plan as "A plan developed to mitigate the impacts of urban runoff from Priority Development Projects."

MS4 that originate in areas of new development, federal regulations do not require or even mention LID or LID principles." And "while requiring post-construction controls that limit pollutant discharges originating in areas of new development is clearly within the requirements of Section 122.26(d)(2)(iv)(A), the 2007 Permit's specific LID requirements are not." Claimants also address the Washington State Pollution Control Board decision by noting that the Board's decision "explicitly recognized that LID requirements are not federally mandated." The claimants also point out EPA-issued NPDES permits in Washington, D.C. and Albuquerque, New Mexico that make no reference to LID.

The Commission finds nothing in the federal regulation (40 C.F.R. § 122.26) that requires local agencies to collectively review and update the BMP requirements listed in their SUSMPs, or to develop, submit and implement "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the SUSMPs. Thus, the LID requirements in the permit "exceed the mandate in that federal law or regulation."[115] As in *Long Beach Unified School Dist. v. State of California*,[116] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[117] to impose these requirements. Thus, the Commission finds that part D.1.d. of the permit is not a federal mandate.

The Commission further finds that the LID requirements are not a state-mandated program for municipal projects for the same reason as discussed in the HMP discussion above: there is no requirement for cities or counties to build priority development projects, which would trigger the downstream requirement to comply with parts D.1.d.(7) and D.1.d.(8) of the permit, the LID portions of the permit.

As to non-municipal projects, however, because of the mandatory language on the face of the permit, the Commission finds that part D.1.d. of the permit is a state mandate for the claimants to do all of the following:

> (7) Update of SUSMP BMP Requirements
>
> The Copermittees shall collectively review and update the BMP requirements that are listed in their local SUSMPs. At a minimum, the update shall include removal of obsolete or ineffective BMPs, addition of LID and source control BMP requirements that meet or exceed the requirements of sections D.1.d.(4) and D.1.d.(5), and addition of LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, etc. The update shall also add appropriate LID BMPs to any tables or discussions in the local SUSMPs addressing pollutant removal efficiencies of treatment control BMPs. In addition, the update shall include review, and revision where necessary, of treatment control BMP pollutant removal efficiencies.

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[115] Government Code section 17556, subdivision (c).

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

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

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

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

i. Establishment of LID BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(4) above.[118]

ii. Establishment of source control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(5) above.[119]

iii. Establishment of treatment control BMP requirements that meet or exceed the minimum requirements listed in section D.1.d.(6) above.[120]

iv. Establishment of siting, design, and maintenance criteria for each LID and treatment control BMP listed in the Model SUSMP, so that implemented LID and treatment control BMPs are constructed correctly and are effective at pollutant removal and/or runoff control. LID techniques, such as soil amendments, shall be incorporated into the criteria for appropriate treatment control BMPs.

v. Establishment of criteria to aid in determining Priority Development Project conditions where implementation of each LID BMP listed in section D.1.d.(4)(b) is applicable and feasible.

vi. Establishment of a requirement for Priority Development Projects with low traffic areas and appropriate or amendable soil conditions to construct a portion of walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such a pervious concrete, porous asphalt, unit pavers, and granular materials.

vii. Establishment of restrictions on infiltration of runoff from Priority Development Project categories or Priority Development Project areas that generate high levels of pollutants, if necessary.

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

[119] Part D.1.d.(5) of the permit lists source control BMP requirements.

[120] Part D.1.d.(6) of the permit lists treatment control BMP requirements.

(b) The updated Model SUSMP shall be submitted within 18 months of adoption of this Order. If, within 60 days of submittal of the updated Model SUSMP, the Copermittees have not received in writing from the Regional Board either (1) a finding of adequacy of the updated Model SUSMP or (2) a modified schedule for its review and revision, the updated Model SUSMP shall be deemed adequate, and the Copermittees shall implement its provisions in accordance with section D.1.d.(8)(c) below.

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

i. A requirement that each Priority Development Project use the criteria established pursuant to section D.1.d.(8)(a)v to demonstrate applicability and feasibility, or lack thereof, of implementation of the LID BMPs listed in section D.1.d.(4)(b).

ii. A review process which verifies that all BMPs to be implemented will meet the designated siting, design, and maintenance criteria, and that each Priority Development Project is in compliance with all applicable SUSMP requirements.

The State Board, in its October 2008 comments on the test claim, argues that the requirements in part D.1.d.(7) of the permit are not a new program or higher level of service because they "merely add definition to the scope of the local SUSMP already required in the 2001 Permit (see Section F.1.b.(2))." As to part D.1.d.(8), the State Board asserts that it:

> [P]rovides a framework for the Copermittees to develop criteria to be used in the application of LID requirements to Priority Development Projects. The Copermittees must develop their LID programs through an update to the Model SUSMP, the document that guides (and guided the 2001 Permit cycle) post-construction BMP implementation at Priority Development Projects.

According to the State Board, these parts of the permit are not a new program or higher level of service because they merely add additional detail in implementing the same minimum federal MEP standard and add specificity to already existing BMPs.

The claimants, in their February 2009 comments, assert that by adding requirements and increasing the specificity of existing requirements, the 2007 LID permit requirements are a new program or higher level of service.

The Commission finds that part D.1.d.(7) is a new program or higher level of service because it calls for a collective review and update of BMP requirements listed in the claimants' SUSMPs (presumably those drafted under the 2001 permit) that was not required under the 2001 permit.

The Commission also finds that part D.1.d.(8) is a new program or higher level of service because it requires developing, submitting, and implementing "an updated Model SUSMP" that defines minimum LID and other BMP requirements for incorporation into the copermittees SUSMPs. Although the 2001 permit required adopting a Model SUSMP and local SUSMP, it

did not require developing and submitting an updated Model SUSMP with the specified LID BMP requirements.

In sum, the Commission finds that parts D.1.d.(7) and D.1.d.(8) of the 2007 permit constitute a state-mandated new program or higher level of service for private priority development projects. Reimbursement is not required for complying with the LID requirements for municipal priority development projects.

C. Street sweeping and reporting (parts D.3.a.(5) & J.3.a(3)x-xv): Part D.3 is entitled "Existing Development." Part D.3.a.(5) requires regular street sweeping based on the amount of trash generated on the road, street, highway, or parking facility. Those identified as generating the highest volumes of trash are to be swept at least two times per month, those generating moderate volumes of trash are to be swept at least monthly, and those generating low volumes of trash are to be swept as necessary, but not less than once per year. The copermittees determine what constitutes high, moderate, and low trash generation.

In addition, section J.3.a.(3)(c) x-xv requires the copermittees, as part of their annual reporting, to identify the total distance of curb-miles of improved roads in each priority category, the total distance of curb-miles swept, the number of municipal parking lots and the number swept, the frequency of sweeping, and the tons of material collected from street and parking lot sweeping.

The State Board, in its comments submitted in October 2008, states that requiring minimum sweeping frequencies for streets determined by the copermittees to have high volumes of trash or debris is necessary to meet the minimum federal MEP standard. The State Board cites C.F.R. section 122.26(d)(2)(i)(B)-(C), (E) and (F) and 40 C.F.R. section 122.26(d)(2)(iv), and more specifically, section 122.26(d)(2)(iv)(A)(1), which states that the proposed management program include "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." Also, section 122.26(d)(2)(iv)(A)(6) provides that the proposed management program include:

> [a] description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

The State Board also cites section 122.44(d)(1)(i), which states as follows regarding NPDES permits: "limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State Water quality standard, including narrative criteria for water quality." And section 122.26(d)(2)(iv)(A)(3) states that the proposed management program include "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities."

In their February 2009 rebuttal comments, the claimants point out that street sweeping as a BMP to control "floatables" is not required by federal law in that none of the federal regulations

specifically require street sweeping. The claimants quote the following from *Hayes v. Commission on State Mandates*:[121] "if the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate."

The Commission agrees with claimants. The permit requires activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[122] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[123]

Yet the more specific requirements in the permit include variable street sweeping schedules for areas impacted by different amounts of trash. They also require reporting on the amount of trash collected, which is not required by the federal regulations. These activities "exceed the mandate in that federal law or regulation."[124] As in *Long Beach Unified School Dist. v. State of California*,[125] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[126] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(5) and J.3.a.(3)(c)x-xv of the permit are not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission also finds part D.3.a(5) of the permit is a state mandate for the claimants to do all of the following:

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

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

[122] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[123] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[124] Government Code section 17556, subdivision (c).

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

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

And as stated in part J.3.a(3)(c)x-xv (on p. 68) of the permit, the claimants report annually on:

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

The State Board, in its October 2008 comments, argues that requiring minimum street sweeping frequencies does not result in a new program or higher level of service. According to the State Board:

> The 2001 Permit required Copermittees to perform street sweeping, but did not specify minimum frequencies. While the minimum frequencies may exceed some Copermittees' existing programs, the Claimants acknowledge than many Copermittees meet or exceed the mandatory requirements on a voluntary basis. To the extent the frequencies are already being met and the Permit imposes the same MEP standard as its predecessor … the 2007 Permit does not impose a higher level of service.

In their February 2009 rebuttal comments, the claimants cite Government Code section 17565 to argue that whether or not they were sweeping streets at frequencies equal or more than the permit requires is not relevant. Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate." The claimants also state that the 2001 permit did not in fact require street sweeping, "[a]t best it only included general statements regarding the need to control pollutants in streets and other impervious areas and, in any event, minimum frequencies were not required."

The Regional Board's Fact Sheet/Technical Report on part D.3.a.(5) of the 2007 permit states that street sweeping "has been added to ensure that the Copermittees are implementing this effective BMP at all appropriate areas."

The Commission finds that the street sweeping provision (part D.3.a.(5)) in the permit is a new program or higher level of service. The Commission agrees that Government Code section 17565 makes it irrelevant (for purposes of mandate reimbursement) whether or not claimants

were performing the activity prior to the permit, since voluntary activities do not affect reimbursement of an activity that is subsequently mandated by the state.

The 2001 permit, in part F.3.a.(3) and (4) stated:

> (a) To establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2. above by threat to water quality and update annually. Each municipal area and activity shall be classified as high, medium, or low threat to water quality. In evaluating threat to water quality, each Copermittee shall consider (1) type of municipal area or activity; (2) materials used (3) wastes generated; (4) pollutant discharge potential; (5) non-storm water discharges; (6) size of facility or area; (7) proximity to receiving water bodies; (8) sensitivity of receiving water bodies; and (9) any other relevant factors.
>
> (b) At a minimum, the high priority municipal areas and activities shall include the following:
>
> (i) Roads, Streets, Highways, and Parking Facilities. [¶]...[¶]
>
> F.3.a.(4) BMP Implementation (Municipal)
>
> (a) Each Copermittee shall designate a set of minimum BMPs for high, medium, and low threat to water quality municipal areas and activities (as determined under section F.3.a.(3)).The designated minimum BMPs for high threat to water quality municipal areas and activities shall be area or activity specific as appropriate.

Street sweeping is not expressly required in this 2001 permit provision, nor does it specify any frequencies or required reporting. Thus, the Commission finds that part D.3.a.(5) of the 2007 permit that requires street sweeping, as specified, is a new program or higher level of service, as well as part J.3.a(3)x-xv that requires reporting on street-sweeping activities.

D. Conveyance system cleaning and reporting (parts D.3.a.(3) & J.3.a.(3)(c)(iv)-(viii)): Also under part D.3 "Existing Development," part D.3.a.(3) requires conveyance system cleaning, including the following:

- Verifying proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from the MS4s and related drainage structures.
- Cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Cleaning open channels of observed anthropogenic litter in a timely manner.

In J.3.a.(3)(c)(iv)-(viii), as part of the annual reporting requirements, copermittees shall provide a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned. In addition, copermittees must report by category tons of waste and litter removed from the facilities.

The State Board, in its comments submitted in October 2008, disagrees that the requirements exceed federal law, saying that "the same broad authorities applicable to the street sweeping requirement also apply to the conveyance system cleaning requirements." According to the State Board, specificity in inspection and cleaning requirements is consistent with and supported by U.S. EPA guidance. Also, to the extent that permit requirements are more specific than the federal regulations, the State Board asserts that the requirements are an appropriate exercise of the San Diego Water Board's discretion to define the MEP standard.

The claimants, in their February 2009 comments, state that "the requirements to inspect and perform maintenance to insure compliance with these standards is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards." Also, claimants note that the content and detail in the reporting is more than required by the 2001 permit. As to the MEP standard required by the federal regulations, claimants assert that the U.S. EPA documents cited by the State Board provide guidance, not mandates, and the permit Fact Sheet does not specifically set forth mandatory annual inspection and maintenance requirements. According to the claimants, the only mandatory requirement is that a maintenance program exist, and that the applicant provide an inspection schedule if maintenance depends on the results of inspections or occurs infrequently. Yet the 2007 permit includes "very specific requirements that go beyond the U.S. EPA guidance and are not included within the federal regulations." Finally, claimants note that the State Board has acknowledged that the 2007 permit requirements are more specific than federal regulations, and cites the *Long Beach Unified School District* case to conclude that the specificity makes the requirements state mandates.

The Commission agrees with claimants. Like street sweeping, the permit requires conveyance system cleaning activities that fall within the federal regulations to include: "[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers."[127] And they also require: "A description for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[128]

Yet the permit requirements are more specific. Part D.3.a.(3) requires verifying proper operation of all municipal structural treatment controls, cleaning any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner, cleaning any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately, and cleaning open channels of observed anthropogenic litter in a timely manner. In addition, the reporting in part J requires a detailed accounting of the numbers of MS4 facilities in inventory, and the numbers of facilities inspected, exceeding cleaning criteria, and cleaned, and reporting by category tons of waste and litter removed from the facilities. These activities, "exceed[s] the mandate in that federal law or regulation."[129] As in *Long Beach*

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[127] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(1).

[128] 40 Code of Federal Regulations, section 122.26(d)(2)(iv)(A)(3).

[129] Government Code section 17556, subdivision (c).

Unified School Dist. v. State of California,[130] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[131] to impose these requirements. Therefore, the Commission finds that parts D.3.a.(3) and J.3.a.(3)(c)iv-viii of the permit are not a federal mandate.

Rather, the Commission finds that part D.3.a.(3) of the 2007 permit is a state mandate on the claimants to do the following:

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

The Commission also finds that part J.3.a.(3)(c) iv-viii is a state mandate to report the following information in the JURMP annual report:

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

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

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

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

As to whether these provisions are a new program or higher level of service, the State Board, in its October 2008 comments, states that the 2001 permit contained "*more* frequent inspection and removal requirements than required in the 2007 Permit. It also contained record keeping requirements to document the facilities cleaned and the quantities of waste removed." [Emphasis in original.]

Claimants, in their February 2009 comments, argue that the 2001 permit, in part F.3.a.(5) required each copermittee to 'implement a schedule of maintenance activities at all structural controls designed to reduce pollutant discharges. By contrast, the 2007 permit requires each copermittee to 'implement a schedule of **inspection and** maintenance' and to '**verify proper operation of all municipal** structural controls...." [Emphasis in original.] Claimants also point out that the 2007 permit requires copermittees to:

- Clean any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of the design capacity in a timely manner.
- Clean any MS4 facility that is designed to be self cleaning of any accumulated trash and debris immediately.
- Clean open channels of observed anthropogenic litter in a timely manner.

According to claimants, these requirements were not included in the 2001 permit. Claimants also state that the requirement to inspect and perform maintenance "is not limited by the 'regular schedule of maintenance' obligation but rather must be done as frequently as is necessary to comply with these specific standards."

As to reporting, claimants state that the language in part D.3.a.(3)(b)(iv),(v) and (vi) of the 2007 permit and part F.3.a.(5)(c)(iii), (iv) and (v) of the 2001 permit track each other, but part J.3.a.(3)(c) iv through viii detail the information that the reports must now contain that was not in the 2001 permit, such as identifying the number of catch basins and inlets, the number inspected, the number found with accumulated waste exceeding the cleaning criteria, the distance of the MS4 cleaned, and other detail.

In analyzing whether parts D.3.a.(3) and J.3.a.(3)(c)(iv) – (viii) are a new program or higher level of service, we compare those provisions to the prior permit and look at the Regional Board's Fact Sheet/Technical Report, which states why Part D.3.a.(3) was added:

> **Section D.3.a.(3)** ... requires the Copermittees to inspect and remove waste from their MS4s prior to the rainy season. Additional wording has been added to clarify the intent of the requirements. The Copermittees will be required to inspect all storm drain inlets and catch basins. This change will assist the Copermittees in determining which basins/inlets need to be cleaned and at what

priority. Removal of trash has been identified by the copermittees as a priority issue in their long-term effectiveness assessment. To address this issue, wording has been added to require the Copermittees, at a minimum, inspect [sic] and remove trash from all their open channels at least once a year.

The 2001 permit contained the following in part F.3.a.(5)(b) and (c):

> (b) Each Copermittee shall implement a schedule of maintenance activities for the municipal separate storm sewer system.
> (c) The maintenance activities must, at a minimum, include:
> i. Inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year;
> ii. Additional cleaning as necessary between October 1 and April 30 of each year;
> iii. Record keeping of cleaning and the overall quantity of waste removed;
> iv. Proper disposal of waste removed pursuant to applicable laws;
> v. Measures to eliminate waste discharges during MS4 maintenance and cleaning activities.

The Commission finds that some provisions in the 2007 permit are the same as in the 2001 permit. Specifically, part D.3.a(3)(a) is not a new program or higher level of service because the 2001 permit also required maintenance and inspection in part F.3.a.(5)(b) and (c). The Commission also finds that part D.3.a.(3)(b)(i),(iv)- (vi) of the 2007 permit is the same as part F.3.a.(5)(c)(i)(iii) - (v) in the 2001 permit, both of which require:

- Annual inspection of MS4 facilities (D.3.a(3)(b)(i));
- Record keeping of the maintenance and cleaning activities including the overall quantity of waste removed (D.3.a(3)(b)(iv));
- Proper disposal of waste removed pursuant to applicable laws (D.3.a(3)(b)(v)); and
- Measures to eliminate waste discharges during MS4 maintenance and cleaning activities (D.3.a(3)(b)(vi)).

Therefore, the Commission finds that these provisions are not a new program or higher level of service.

The Commission also finds that part D.3.a.(3)(b)(ii) is not a new program or higher level of service. It gives the claimants the flexibility, after two years of inspections, to inspect MS4 facilities that require inspection and cleaning less than annually, but not less than every other year. Part F.3.a.(5)(c)(i) of the 2001 permit stated: "The maintenance activities must, at a minimum, include: i. inspection and removal of accumulated waste (e.g., sediment, trash, debris and other pollutants) between May 1 and September 30 of each year." Potentially less frequent inspections under the 2007 permit is not a new program or higher level of service.

The Commission finds that part D.3.a.(3)(b)(iii) of the 2007 permit is a new program or higher level of service on claimants to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely

manner." This part contains specificity, e.g., a standard of accumulation greater than 33% of design capacity, which was not in the 2001 permit.

Further, the Commission finds that the reporting in part J.3.a.(3)(c) (iv) – (viii) is a new program or higher level of service. The 2001 permit did not require this information in the content of the annual reports.

E. Educational component (part D.5): Part D.5 requires the copermittees to perform the activities on pages 25-28 above, which can be summarized as:

- Implement an educational program so that copermittees' planning and development review staffs (and planning board/elected officials, if applicable) understand certain laws and regulations related to water quality.
- Implement an educational program that includes annual training before the rainy season so that the copermittees' construction, building, code enforcement, and grading review staffs, inspectors, and others will understand certain specified topics.
- At least annually, train staff responsible for conducting stormwater compliance inspections and enforcement of industrial and commercial facilities on specified topics.
- Implement an education program so that municipal personnel and contractors performing activities that generate pollutants understand the activity specific BMPs for each activity to be performed.
- Implement a program to educate project applicants, developers, contractors, property owners, community planning groups, and others relating to specified topics.

The State Board, in its October 2008 comments on the test claim, states that federal regulations authorize the inclusion of an education component, in that the proposed management program must "include a description of appropriate educational and training measures for construction site operations" (40 C.F.R. § 122.26(d)(2)(iv)(D)(4)) and a "description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications, and other measures for commercial applicators and distributors…(40 C.F.R. § 122.26(d)(2)(iv)(A)(6)). The federal regulations also require a "description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers" (40 C.F.R. § 122.26(d)(2)(iv)(B)(5)) and a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials." (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)). The State Board also says that according to the U.S. EPA's Phase II stormwater regulations, the MEP standard requires the copermittees to implement public education programs. According to the State Board, the regulations apply to copermittees with less developed storm water programs, and require the programs to include a public education and outreach program (40 C.F.R. § 122.34(b)(1)) and a public involvement/participation program (40 C.F.R. § 122.26(b)(2)). To the extent the permit requirements are more specific than federal law, the State Board calls them an appropriate use of the Regional Board's discretion "to require more specificity in establishing the MEP standard."

Claimants, in their February 2009 comments, characterize the federal regulations as only requiring them "to describe educational, public information, and other appropriate activities associated with their jurisdictional, watershed or stormwater management programs." By contrast, under the permit claimants argue that they are required to "implement specific educational and training programs that achieve measurable increases in specific target community knowledge and to ensure a measurable change in the behavior of such target communities rather than simply report on the ... educational programs on an annual basis." Claimants state that they are required to perform testing and surveys and "new program elements to secure the measureable changes in knowledge and behavior."

The Commission agrees with claimants. As quoted in the State Board's comments, the federal regulations require nonspecific descriptions of educational programs, for example, requiring the permit application to "include appropriate educational and training measures for construction site operations" and "controls such as educational activities." The permit, on the other hand, requires implementation of an educational program with target communities and specified topics. These requirements "exceed the mandate in that federal law or regulation."[132] As in *Long Beach Unified School Dist. v. State of California,*[133] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[134] to impose these requirements. Thus, the Commission finds that part D.5 of the permit is not federally mandated.

Based on the mandatory language on the face of the permit, the Commission finds that part D.5 of the permit constitutes a state mandate on the copermittees to do all of the following:

> Each Copermittee shall implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:
>
> · Municipal Departments and Personnel
> · Construction Site Owners and Developers
> · Industrial Owners and Operators
> · Commercial Owners and Operators
> · Residential Community, General Public, and School Children
>
> a. GENERAL REQUIREMENTS
>
> (1) Each Copermittee shall educate each target community on the following topics where appropriate:

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[132] Government Code section 17556, subdivision (c).

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

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

Table 3. Education

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

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

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

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

i. Federal, state, and local water quality laws and regulations applicable to Development Projects;
ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization);
iii. How to integrate LID BMP requirements into the local regulatory program(s) and requirements; and
iv. Methods of minimizing impacts to receiving water quality resulting from development, including:
[1] Storm water management plan development and review;
[2] Methods to control downstream erosion impacts;
[3] Identification of pollutants of concern;
[4] LID BMP techniques;
[5] Source control BMPs; and
[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

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

i. Federal, state, and local water quality laws and regulations applicable to construction and grading[135] activities.
ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment).
iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

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

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

(2) New Development and Construction Education

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

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

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

The State Board, in its October 2008 comments, states that the education requirement in part D.5. does not amount to a new program or higher level of service because the 2007 permit "includes education topics from the 2001 permit with minor wording and formatting changes. Additionally, the requirements were adopted to implement the same federal MEP standard as established in the CWA and in the 2001 Permit."

In their February 2009 comments, the claimants state that the 2001 permit did not require:

- Implementation of an education program so that the copermittee's planning and development review staff (and Planning Boards and Elected Officials, if applicable) understand certain specified laws and regulations related to water quality. (D.5.b.(1)(a).)
- Implementation of an education program that includes annual training prior to the rainy season so that the copermittee's construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of certain specified topics. (D.5.b.(1)(b).)
- Training of staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year relating to certain specified topics (D.5.b.(1)(c).)

- Implementation of an education program so that municipal personnel and contractors performing activities which generate pollutants have an understanding of the activity specific BMPs for each activity to be performed. (D.5.b.(1)(d).)
- Implementation of a program to educate project applicants, developers, contractors, property owners, community planning groups, and other responsible parties relating to certain specified topics. (D.5.b.(2).)

This analysis of whether the permit is a new program or higher level of service is in the order presented in the permit. The Commission finds that nearly all of the educational topics in part D.5.a. are the same as those in the 2001 permit (part F.4). Both the 2001 and 2007 permits require the claimants to "educate" each specified target community on the following topics (Table 3 in the 2007 permit):

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

Because the requirement to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so, as required by part D.5.a(1), table 3, is not a new program or higher level of service.

Under the 2007 permit, the copermittees are required to "educate each target community" on the following educational topics that were not in the 2001 permit: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID [low-impact development], source control, and treatment control. Thus, the Commission finds that the part D.5.a.(1) is a new program or higher level of service to educate each target community on only the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control.

Part D.5.a.(2) states: "(2) Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources." This provision was not in the 2001 permit, so the Commission finds that part D.5.a.(2) is a new program or higher level of service.

In part D.5.b.(1)(a) (Municipal Development Planning) the permit requires implementing an education program for "municipal planning and development review staffs (and Planning Board and Elected Officials, if applicable)" on specified topics. The 2001 permit required implementing an educational program for "Municipal Departments and Personnel" that would include planning and development review staffs, but not planning boards and elected officials. So the Commission finds that part D.5.b.(1)(a)(i) and (ii) is a new program or higher level of service for planning boards and elected officials.

Certain topics in part D.5.b.(1)(a) are a new program or higher level of service for both planning and development review staffs as well as planning boards and elected officials. Under both part F.4.a. of the 2001 permit, and D.5.b.(1)(a) of the 2007 permit, the copermittees are required to implement an educational program on the following topics:

> i. Federal, state, and local water quality laws and regulations applicable to Development Projects; [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land development and urbanization); [The 2001 permit, in F.4.a (p. 35) calls this "Waters Quality Impacts associated with land development."]

Thus the Commission finds that implementing an educational program on these topics is not a new program or higher level of service for municipal departments, but is for planning boards and elected officials.

The following topics were not listed in the 2001 permit, so the Commission finds that part D.5.b.(1)(a) is a new program or higher level of service to implement these in an educational program for all target communities:

> (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements;
>
> (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and

[6] Selection of the most effective treatment control BMPs for the pollutants of concern.

Part D.5.b.(1)(b) (Municipal Construction Activities) of the permit requires implementing an educational program for municipal "construction, building, code enforcement, and grading review staffs." Again, this is not a new program or higher level of service for those topics in which the 2001 permit also required an education program for "Municipal Departments and Personnel," such as:

> i. Federal, state, and local water quality laws and regulations applicable to construction and grading activities. [The 2001 permit, in F.4.a. (p. 35) says: "Federal, state and local water quality regulations that affect development projects."]
>
> ii. The connection between construction activities and water quality impacts (i.e., impacts from land development and urbanization and impacts from construction material such as sediment. [The 2001 permit, in F.4.a (p. 35) calls this "Water Quality Impacts associated with land development."]

The timing of the educational program specified in D.5.b.(1)(b) requires it to be implemented "prior to the rainy season." There is no evidence in the record, however, that this timing requirement is a new program or higher level of service compared with the 2001 permit. Thus the Commission finds that part D.5.b.(1)(b)(i) and (ii) are not a new program or higher level of service.

Municipal construction activity education topics were added to the 2007 permit, however, that were not in the 2001 permit, in paragraphs (iii) to (vi) as follows:

> (b) Municipal Construction Activities – Each Copermittee shall implement an education program that includes annual training prior to the rainy season so that its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: [¶]…[¶] iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
> v. Current advancements in BMP technologies.
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

Thus, the Commission finds that part D.5.b.(1)(b)(iii) - (vi) of the 2007 permit is a new program or higher level of service.

Part D.5.b.(1)(c) of the 2007 permit (Municipal Industrial/Commercial Activities) requires the following:

> (c) Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at

least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

The 2001 permit included (in F.4.b.) the topic "How to conduct a stormwater inspection" but did not specify that the training was to be annual, and did not require the training to cover inspection and enforcement procedures, BMP Implementation, or reviewing monitoring data. Thus, the Commission finds that part D.5.(b)(1)(c) is a new program or higher level of service.

Part D.5.b.(1)(d) of the 2007 permit requires the following:

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

Regarding part D.5.b.(1)(d), the 2007 Fact Sheet/Technical Report states:

> A new requirement has also been added for education of activity specific BMPs for municipal personnel and contractors performing activities that generate pollutants. Education is required at all levels of municipal staff and contractors. Education is especially important for the staff in the field performing activities which might result in discharges of pollutants if proper BMPs are not used.

Because part D.5.b.(1)(d) was not in the 2001 permit, and because the Regional Board called it a "new requirement" the Commission finds that part D.5.(b)(1)(d) of the 2007 permit is a new program or higher level of service.

Part D.5.(b)(2) of the 2007 permit requires an education program for "project applicants, developers, contractors, property owners, community planning groups, and other responsible parties." Parts F.4.a and F4.b. of the 2001 permit required a similar education program for "construction site owners and developers." The Fact Sheet/Technical Report for the 2007 permit states:

> Different levels of training will be needed for planning groups, owners, developers, contractors, and construction workers, but everyone should get a general education of stormwater requirements. Education of all construction workers can prevent unintentional discharges, such as discharges by workers who are not aware that they are not allowed to wash things down the storm drains. Training for BMP installation workers is imperative because the BMPs will not fail if not properly installed and maintained. Training for field level workers can be formal or informal tail-gate format.

Thus, the Commission finds that part D.5.(b)(2) of the 2007 permit is a new program or higher level of service for project applicants, contractors, or community planning groups who are not developers or construction site owners.

The final part of the education programs in the 2007 permit is D.5.(b)(3) regarding "Residential, General Public, and School Children."

> Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers,

door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

The 2001 permit (part F.4.c.) stated the following:

> In addition to the topics listed in F.4.a. above, the Residential, General Public, and School Children communities shall be educated on the following topics where applicable:
>
> - Public reporting information resources
> - Residential and charity car-washing
> - Community activities (e.g., "Adopt a Storm Drain, Watershed, or Highway" Programs, citizen monitoring, creek/beach cleanups, environmental protection organization activities, etc..

The 2001 permit did not require claimants to "collaboratively conduct or participate in development ... of a plan to educate residential, general public, and school children target communities." The 2001 permit also did not require the plan to "evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods." Thus, the Commission finds that part D.5.(b)(3) of the 2007 permit is a new program or higher level of service.

In sum, as to part D.5 of the 2007 permit that requires implementing educational programs, the Commission finds that the following subparts are new programs or higher levels of service:

- D.5.a.(1): Each copermittee shall educate each target community, as specified, on the following topics: erosion prevention, nonstorm waters discharge prohibitions, and BMP types: facility or activity specific, LID, source control, and treatment control.
- D.5.a.(2): Copermittee educational programs shall emphasize underserved target audiences, high-risk behaviors, and "allowable" behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources.
- D.5.b.(1)(a): Implement an education program so that planning boards and elected officials, if applicable, have an understanding of: (i) Federal, state, and local water quality laws and regulations applicable to Development Projects; (ii) The connection between land use decisions and short and long-term water quality impacts (i.e., impacts from land developments and urbanization).
- D.5.b.(1)(a): Implement an education program so that planning and development review staffs as well as planning boards and elected officials have an understanding of: (iii) How to integrate LID BMP requirements into the local regulatory program(s) and requirements; (iv) Methods of minimizing impacts to receiving water quality resulting from development, including: [1] Storm water management plan development and review; [2] Methods to control downstream erosion impacts; [3] Identification of pollutants of concern; [4] LID BMP techniques; [5] Source control BMPs; and [6] Selection of the most effective treatment control BMPs for the pollutants of concern."
- D.5.b.(1)(b)(iii) - (vi): Implement an education program that includes annual training prior to the rainy season for its construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an

understanding of the topics in parts D.5.b.(1)(b)(iii), (iv), (v), and (vi) of the permit, as follows:

> iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
>
> iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
>
> v. Current advancements in BMP technologies.
>
> vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

- D.5.(b)(1)(c) and (d) as follows:

  > Each Copermittee shall train staff responsible for conducting storm water compliance inspections and enforcement of industrial and commercial facilities at least once a year. Training shall cover inspection and enforcement procedures, BMP implementation, and reviewing monitoring data.

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

- D.5.(b)(2), As early in the planning and development process as possible and all through the permitting and construction process, to implement a program to educate project applicants, contractors, property owners, community planning groups, and other responsible parties. The education program shall provide an understanding of the topics listed in Sections D.5.b.(1)(a) [Municipal Development Planning] and D.5.b.(1)(b) [Municipal construction Activities] above, as appropriate for the audience being educated. The education program shall also educate project applicants, contractors, property owners, and other responsible parties on the importance of educating all construction workers in the field about stormwater issues and BMPs through formal or informal training.

- D.5.(b)(3), Each Copermittee shall collaboratively conduct or participate in development and implementation of a plan to educate residential, general public, and school children target communities. The plan shall evaluate use of mass media, mailers, door hangers, booths at public events, classroom education, field trips, hands-on experiences, or other educational methods.

II. Watershed Urban Runoff Management Program (Part E)

Part E of the permit is the Watershed Urban Runoff Management Program (WURMP). The permit (Table 4) divides the copermittees into nine watershed management areas (WMAs) by "major receiving water bodies." The 2001 permit also had a WURMP component (in part J).

A. Watershed Urban Runoff Management Program copermittee collaboration (parts E.2.f & E.2.g): These provisions require the copermittees to do the activities on pages 28-29 above, including the following:

- Collaborating with other copermittees within their watershed management areas (WMAs) to develop and implement an updated Watershed Urban Runoff Management Program for each watershed that prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards which at a minimum includes:
    - Identifying and implementing watershed activities that address the high priority water quality problems in the watershed management areas that include both watershed water quality activities[136] and watershed education activities.[137]
    - Creating a watershed activities list that includes certain specified information to be submitted with each updated Watershed Urban Runoff Management Plan (WURMP) and updated annually thereafter.
    - Implementing identified watershed activities within established schedules.
    - Collaborating to develop and implement the Watershed Urban Runoff Management Program, including frequent regularly scheduled meetings.[138]

In its October 2008 comments, the State Board asserts that the Watershed Urban Runoff Management Program activities are necessary to meet the minimum federal MEP standard. The State Board quotes the following federal regulations: "The Director may … issue distinct permits for appropriate categories of discharges … including, but not limited to … all discharges within a system that discharge to the same watershed…" (40 C.F.R. 122.26(a)(3)(ii).) The State Board also quotes more specific federal regulations:

> Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system. (40 C.F.R. § 122.26 (a)(3)(v).)
>
> The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, a

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[136] Watershed Water Quality Activities are activities other than education that address the high priority water quality problems in the WMA. A Watershed Water Quality Activity implemented on a jurisdictional basis must be organized and implemented to target a watershed's high priority water quality problems or must exceed the baseline jurisdictional requirements of section D of the permit (Part E.2.f).

[137] Watershed Education Activities are outreach and training activities that address high priority water quality problems in the WMA (Part E.2.f).

[138] In their February 2009 comments, the claimants also list the following activities: (1) Annual review of WURMPs to identify needed modifications and improvements (part E.2.i); (2) Develop and periodically update watershed maps (part E.2.b); (3) Develop and implement a program for encouraging collaborative watershed-based land-use planning (part E.2.d); (4) Develop and implement a collective watershed strategy (part E.2.e). These parts of the permit, however, were not pled in the test claim so the Commission makes no findings on them.

> jurisdiction-wide basis, watershed basis, or other appropriate basis;" (40 C.F.R. § 122.26 (a)(5).)
>
> Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. (40 C.F.R. § 122.26 (d)(2)(iv).)

The State Board argues that the regional board "determined that the inclusion of the requirement to formalize the Watershed Water Qualities Activities List was appropriate to further the goal of the WURMPS in achieving compliance with federal law." Based on some reports it received, the Regional Board determined that "many of the watershed water quality activities had no clear connection to the high priority water quality problems in the area of implementation." The Board determined it was therefore necessary and appropriate to require development of an implementation strategy to maximize WURMP effectiveness.

Claimants, in their February 2009 comments, point out that while cooperative agreements may be required by 40 C.F.R. § 122.26(d)(2)(i)(D), "each copermittee is only responsible for their own systems." Claimants quote another federal regulation: "Copermittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate." (40 C.F.R. § 122.26(a)(3)(vi).) Claimants argue that the 2007 permit:

> [R]equires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year.

Claimants also state that the permit "mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order." (part E.2.f.(1)(a).) According to what the claimants call these "dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work."

The Commission finds that the permit requirements in sections E.2.f and E.2.g. are not federal mandates. As with the other requirements in the permit, the federal regulations authorize but do not require the specificity regarding whether collaboration occurs on a jurisdictional, watershed or other basis. These requirements "exceed the mandate in that federal law or regulation."[139] As in *Long Beach Unified School Dist. v. State of California*,[140] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[141] to impose these requirements.

Based on the mandatory language in the permit, the Commission finds that the following in part E are a state mandate on the copermittees:

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[139] Government Code section 17556, subdivision (c).

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

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

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

f. Watershed Activities[142]

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

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

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

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

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

(a) A description of the activity;
(b) A time schedule for implementation of the activity, including key milestones;
(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;
(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

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

(e) A description of how the activity is consistent with the collective watershed strategy;
(f) A description of the expected benefits of implementing the activity; and
(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

g. Copermittee Collaboration

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

As to the issue of new program or higher level of service, the State Board, in its October 2008 comments, states:

> Although Section E.2.f. requires development and implementation of a list of Watershed Water Qualities Activities for potential implementation that was not specifically required in the 2001 Permit, the Copermittees were previously required to identify priority water quality issues and identify recommended activities to address the priority water quality problems (See 2001 Permit, section J.1 and J.2.d.)

The State Board asserts that Copermittees were already required to collaborate with other Copermittees, and that "Section E.2.g. merely adds effectiveness strategies to the collaboration requirements." ... Other requirements challenged by the Claimants exist in the 2001 Permit, but with minor wording changes (e.g., the requirement to update watershed maps, which exists in both permits).

Claimants, in their February 2009 comments, assert that parts E.2.f. and E.2.g do impose a new program or higher level of service. According to the claimants:

> Under the 2001 Permit the watershed requirements were essentially limited to mapping, assessment and identification of short and long term issues. Collaboration included mapping (J.2.a.), assessment of receiving waters (J.2.b); identification and prioritization of water quality problems (J.2.c); implementation of time schedules (J.2.d) and identification of copermittee responsibilities for each recommended activity including a time schedule.
>
> [¶]...[¶]

> The 2007 Permit imposes standards far beyond those listed in ... the 2001 Permit .... The 2007 Permit now requires the copermittees to engage in specific programmatic activities that are duplicative of the activities that were not required under the 2001 Permit and that are already required of them on a jurisdictional basis within the boundaries of the same watershed. These new requirements include no less than two watershed water quality activities and two watershed education activities per year. The two-activity watershed requirement is a condition of all copermittees regardless of whether the activity is within their jurisdictional authority or not.
>
> In addition, while the 2007 Permit states that activities can be implemented at a regional, watershed or jurisdictional level, it mandates that watershed quality activities implemented on a jurisdictional basis must exceed the baseline jurisdictional requirements under Section D of the Order. By reason of the dual baseline standards, jurisdictional and watershed, the copermittees are required to perform more and duplicative work.

The Commission finds that E.2.f. and E.2.g of the permit are a new program or higher level of service.

As to watershed education in part E.2.f, the 2001 permit (in part J.2.g.) stated that the WURMP shall contain "A watershed based education program." The 2007 permit states that the WURMP shall include "watershed education activities" defined as "outreach and training activities that address high priority water quality problems in the WMA [Watershed Management Area(s)]." Moreover, in part E.f.(4), the 2007 permit states: "A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences." Because of this increased requirement for implementation of watershed education, the Commission finds that watershed education activities, as defined in part E.2.f, is a new program or higher level of service.

Additionally, the Commission finds that the rest of part E.2.f. is a new program or higher level of service because it includes elements not in the 2001 permit, such as:

- A definition of watershed water quality activities (part E.2.f.(1)(a)).
- Submission of a watershed activities list, with specified contents (part E.2.f.(2)).
- A detailed description of each activity on the watershed activities list, with seven specific components (part E.2.f.(3)).
- Implementation of watershed activities pursuant to established schedules, including definitions of when activities are in an active implementation phase (part E.2.f.(4)).

As to part E.2.g., although the 2001 (in parts J.1. & J.2.) and 2007 permits both require copermittee collaboration in developing and implementing the Watershed Urban Runoff Management Plan, copermittee collaboration is a new program or higher level of service because the WURMP is greatly expanded over the 2001 permit in part E.2.f as discussed above. This means that new collaboration is required to develop and implement the watershed activities in part E.2.f.

The 2007 permit (in part E.2.g) also states that "Watershed Copermittee collaboration shall include frequent regularly scheduled meetings." This requirement for meetings was not in the 2001 permit. The Fact Sheet/Technical Report states:

> The requirement for regularly scheduled meetings has been added based on Regional Board findings that watershed groups which hold regularly scheduled meetings (such as for San Diego Bay) typically produced better programs and work products than watershed groups that went for extended periods of time without scheduled meetings.[143]

Therefore, the Commission finds that part E.2.g. of the 2007 permit is a new program or higher level of service.

Regarding watershed water quality activities in part E.2.f, the Fact Sheet/Technical Report the Regional Board stated:

> This requirement developed over time while working with the Copermittees on their WURMP implementation under Order No. 2001-01. In October 2004 letters, the Regional Board recommended the Copermittees develop a list of Watershed Water Quality Activities for potential implementation. Following receipt of the Regional Board letters, the Copermittees created the Watershed Water Quality Activity lists. Although the Copermittees' lists needed improvement, the Regional Board found the lists to be useful planning tools that can be evaluated to identify effective and efficient Watershed Water Quality Activities. Because the lists are useful and have become a part of the WURMP implementation process, a requirement for their development has been written into the Order.

Thus, the Commission finds that part E.2.f. of the permit is a new program or higher level of service, in that it requires the following not required in the 2001 permit:

- Identification and implementation of watershed activities that address the high priority water quality problems in the WMA (Watershed Management Area), as specified (part E.2.f.(1)).
- Submission of a watershed activities list with each updated WURMP and updated annually thereafter, as specified (part E.2.f.(2)-(3)).
- Implementation of watershed activities pursuant to established schedules: no less than two watershed water quality activities and two watershed education activities in active implementation phase, as defined, per permit year (part E.2.f.(4)).

III. Regional Urban Runoff Management Program (Part F)

Part F of the permit describes the Regional Urban Runoff Management Program (RURMP). It was included because "some aspects of urban runoff management can be effectively addressed at a regional level. … However, significant flexibility has been provided to the Copermittees for new regional requirements."[144]

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[143] For an inexplicable reason, the Fact Sheet/Technical Report lists this collaboration activity under Section E.2.m of the permit rather than E.2.g.. The permit at issue has no section E.2.m.

[144] San Diego Regional Water Quality Control Board, "Fact Sheet/Technical Report for Order No. R9-2007-0001."

A. Copermittee collaboration – Regional Residential Education Program Development and Implementation (part F.1): Part F.1 requires the copermittees to develop and implement a Regional Residential Education Program, with specified contents (see p. 12 above). In the test claim the claimants discuss hiring a consultant to develop the educational program that "will generally educate residents on: 1) the difference between stormwater conveyance systems and sanitary sewer systems; 2) the connection of storm drains to local waterways; and 3) common residential sources of urban run-off." Claimants allege activities to comply with section F.1 of the permit that include, but are not limited to: "development of materials/branding, a regional website, regional outreach events, regional advertising and mass media, partnership development, and the development of marketing and research tools, including regional surveys to be conducted in FY 2008-09 and again in FY 2011-12."

In comments submitted in October 2008, the State Board asserts that the permit condition in section F.1. is necessary to meet the minimum federal MEP standard and that the requirement is supported by the Clean Water Act statutes and regulations. The State Board cites the following federal regulations:

> (v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.[145] [¶]...[¶]
>
> (5) The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.[146] [¶]...[¶]
>
> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[147]
>
> (iv) Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. ...[148]

In response, the claimants' February 2009 comments state that the Regional Residential Education Program is not necessary to meet the minimum federal MEP standard. The regional nature of the education program, according to the claimants, is duplicative because it imposes the

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[145] 40 Code of Federal Regulations section 122.26 (a)(3(v).

[146] 40 Code of Federal Regulations section 122.26 (a)(5).

[147] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[148] 40 Code of Federal Regulations section 122.26 (d)(iv).

education requirements at the regional and jurisdictional levels concurrently, and it exceeds federal law.

The Commission finds that the requirements in part F.1 of the permit do not constitute a federal mandate. There is no federal requirement to provide a regional educational program, so the education program, "exceed[s] the mandate in that federal law or regulation."[149] As in *Long Beach Unified School Dist. v. State of California*, the permit "requires specific actions ... [that are] required acts."[150] In adopting part F.1, the state has freely chosen[151] to impose these requirements. Thus, the Commission finds that part F.1. of the permit does not constitute a federal mandate.

Based on the mandatory language on the face of the permit, the Commission finds that the permit constitutes a state mandate on the claimants to do all the following in part F.1 of the permit:

> The Regional Urban Runoff Management Program shall, at a minimum:
>
> 1. Develop and implement a Regional Residential Education Program. The program shall include:
>
> a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.
> b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a (p. 50.)

As to whether this is a new program or higher level of service, the State Board, in its October 2008 comments, states that it is not because the claimants were already implementing a residential education program at a regional level before the permit was adopted.

In claimants' February 2009 rebuttal comments, they assert that it is irrelevant whether or not the copermittees voluntarily met or exceeded the now mandatory requirements imposed by the 2007 permit because Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate."

The Commission finds that part F.1 of the permit is a new program or higher level of service. The 2001 permit required an educational component as part of the Jurisdictional Urban Runoff Management Program (part F.4) that contained a residential component, but not a Regional Residential Education Program, so the activities in this program are new. Also, the Commission agrees that whether or not claimants were engaged in an educational program is not relevant due to Government Code section 17565. The Regional Board, in requiring the regional educational program, leaves the local agencies with no choice but to comply.

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[149] Government Code section 17556, subdivision (c).

[150] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

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

B. Copermittee collaboration (parts F.2 & F.3): Parts F.2 and F.3 (quoted on p. 11 above) require the copermittees to collaborate to develop, implement, and update as necessary a Regional Urban Runoff Management Program, to include developing the standardized fiscal analysis method required in permit part G (part F.2) and facilitating the assessment of the effectiveness of jurisdictional, watershed, and regional programs (part F.3).

In comments submitted in October 2008, the State Board asserts that the permit conditions in sections F.2 and F.3 are necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[152]

The State Board also quotes section 122.26 (a)(3)(v) of the federal regulations as follows:

> (v) Permits for all or a portion of all discharges from large[153] or medium[154] municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different

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[152] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[153] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(4).]

[154] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." [40 CFR § 122.26 (b)(7).]

management programs for different drainage areas which contribute storm water to the system.

The State Board also asserts:

> To the extent the Clean Water Act and federal regulations do not identify all of the specificity required in Sections F.2, F.3 ..., the San Diego Water Board properly exercised its discretion under federal law to include specificity so that the federal MEP standard can be achieved. The San Diego Water Board exercised this duty under federal law and therefore the provisions of the 2007 Permit were adopted as federal requirements.

In the claimants' rebuttal comments submitted in February 2009, they state that "all of the authorities cited by the State merely acknowledge the State's authority to go beyond the federal regulations."

The Commission finds that the requirements in parts F.2 and F.3. of the permit do not constitute a federal mandate. There is no federal requirement to collaborate on, develop, or implement a Regional Urban Runoff Management Program (RURMP). The Commission finds that these RURMP activities "exceed the mandate in that federal law or regulation."[155] As in *Long Beach Unified School Dist. v. State of California*,[156] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[157] to impose these requirements. Thus, the Commission finds that parts F.2 and F.3 of the permit do not constitute federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts F.2 and F.3 of the permit constitutes a state mandate on the claimants to do all the following:

> Collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]
>
> (2) Develop the standardized fiscal analysis method required in section G of the permit, and,
>
> (3) Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

As to whether these activities are a new program or higher level of service, the claimants state in the test claim:

> "[W]hile the 2001 Permit required the copermittees to collaborate to address common issues and promote consistency among JURMPs and WURMPs and to

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[155] Government Code section 17556, subdivision (c).

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

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

establish a management structure for this purpose, it lacked the detail, specificity and level of effort now mandated by the 2007 Permit."

In their February 2009 rebuttal comments, claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

The State Board, in its October 2008 comments, states that the 2001 permit required that "the Copermittees enter into a formal agreement to provide, at a minimum, a management structure for designating joint responsibilities, decision making, watershed management, information management of data and reports" and other collaborative arrangements to comply with the permit.

According to the State Board, parts F.2 and F.3 are not a new program or higher level of service because the copermittees "were already conducting multiple efforts on a regional level under the 2001 permit. The inclusion of the RURMP is designed to organize these efforts into one framework to improve Copermittee and Regional Board tracking of regional efforts." The State Board also asserts that the requirements were intended to reduce redundant reporting and improve efficiency and streamline regional program implementation. The State Board describes the 2007 permit as merely elaborating on and refining the 2001 requirements.

The permit itself states: "This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards." [Emphasis added.] The permit also describes the Regional Urban Runoff Management Plan as new.

While the 2001 permit contained requirements for a fiscal analysis (part F.8) and an assessment of effectiveness (part F.7), it did so only as components of a Jurisdictional Urban Runoff Management Program. The Regional Urban Runoff Management Program, required in part F.2 of the 2007 permit, is new. The fiscal analysis in part G is incorporated by reference into part F.2, and the effectiveness assessment is incorporated into part F.3. Thus, the Commission finds that the requirements in parts F.2 and F.3 are a new program or higher level of service.

IV. Program Effectiveness Assessment (Part I)

Part I of the permit is called "Program Effectiveness Assessment" and includes subparts for Jurisdictional (I.1), Watershed (I.2) and Regional (I.3) assessment, in addition to a Long Term Effectiveness Assessment (I.5). Of these, claimants pled subparts I.1, I.2 and I.5.

A. Jurisdictional and Watershed Program effectiveness assessment (parts I.1 & I.2): As more specifically stated on pages 22-24 above, the permit requires the copermittees to do the following:

- Annually assess the effectiveness of the Jurisdictional Urban Runoff Management Program (JURMP) that includes specifically assessing the effectiveness of specified components of the JURMP and the effectiveness of the JURMP as a whole.
- Identify measureable targeted outcomes, assessment measures, and assessment methods for each jurisdictional activity/BMP implemented, each major JURMP component, and the JURMP as a whole.

- Development and implement a plan and schedule to address the identified modifications and improvements.
- Annually report on the effectiveness assessment as implemented under each of the specified requirements.
- As a watershed group of copermittees, annually assess the effectiveness of the Watershed Urban Runoff Management Program (WURMP) implementation, including each water quality activity and watershed education activity, and the program as a whole.
- Determine source load reductions resulting from WURMP implementation and utilize water quality monitoring results and data to determine whether implementation is resulting in changes to water quality.
- As with the JURMP, annually review WURMP jurisdictional activities or BMPs to identify modifications and improvements needed to maximize the program's effectiveness, develop and implement a plan and schedule to address the identified modifications and improvements to the programs, and annually report on the program's effectiveness assessment as implemented under each of the requirements.

Regarding parts I.1.a. and I.2.a. of the permit, the Fact Sheet/Technical Report states: "The section requires both specific activities and broader programs to be assessed since the effectiveness of jurisdictional [or watershed] efforts may be evident only when considered at different scales."[158]

The State Board, in its comments submitted in October 2008, cites section 402(p)(3(B)(ii)-(iii) of the Clean Water Act, as well as 40 C.F.R. sections 122.26(d)(2)(i)(B)-(C), (E) and (F) and subdivision (d)(2)(iv) of the same section to show the "broad federal authorities relied upon by the San Diego Water Board to support Section I ... [that] ... support inclusion of the JURMP and WURMP effectiveness assessments under federal law." The State Board also quotes section 122.26(d)(2)(v) that the copermittees must include in part 2 of their application for a permit:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

The State Board also says that "under 40 C.F.R. section 122.42(c), applicants must provide annual reports on the progress of their storm water management programs. The federal law behind the JURMP and WURMP effectiveness assessment requirements were discussed at great length in the 2001 Permit Fact Sheet."[159] The State Board quotes a lengthy portion of the 2001

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[158] Fact Sheet/Technical Report for Order No. R9-2007-0001, Parts I.1.a. and I.2.a.. Two identical paragraphs describe the JURMP on page 319 and the WURMP on page 320.

[159] 40 C.F.R. section 122.42(c) states:

> *Municipal separate storm sewer systems.* The operator of a large or medium municipal separate storm sewer system or a municipal separate storm sewer that has been designated by the Director under §122.26(a)(1)(v) of this part must

Fact Sheet, which states that the U.S. EPA requires applicants to submit estimated reductions in pollutant loads expected to result from implemented controls and describe known impacts of storm water controls on groundwater. The 2001 Fact Sheet also includes "Throughout the permit term, the municipality must submit refinements to its assessment or additional direct measurements of program effectiveness in its annual report." It also lists a number of U.S. EPA suggestions, recommendations, and encouraged actions.

The State Board also quotes at length from the 2007 Permit Fact Sheet/Technical Report regarding why the effectiveness assessments are required under the permit, including the need for them and the benefits of including them. According to the State Board, the federal authorities support including the effectiveness assessments, and the Regional Board appropriately exercised discretion under federal law to include them, finding them necessary to implement the MEP standard. Thus, the State Board asserts that sections I.1 and I.2 do not exceed federal law.

The claimants, in their February 2009 comments, state that neither the broad nor the specific legal authority cited in the permit Fact Sheet "contains the above-referenced mandates required under the 2007 Permit." Claimants characterize the federal regulations as only requiring "program descriptions, estimated reductions, known impacts, and an annual report on progress. Federal law does not mandate the specific activities mandated by the 2007 Permit." Claimants also argue that the permit requirements are not necessary to meet the federal MEP standard, and point out that the 2001 Permit Fact Sheet cited by the State Board describes actions recommended or encouraged by the U.S. EPA, but not required. As claimant says: "they simply authorize applicants to go beyond minimum federal requirements." Claimants also quote the State Board's comment on "the need for and benefits of assessment requirements," noting that needs and benefits "constitute an insufficient basis for the imposition of a mandated requirement without subvention."

Although the federal regulations require assessment of controls and annual reports, they do not require the detailed assessment in the 2007 permit. The regulations do not require, for example, assessments of the effectiveness of each significant jurisdictional activity/BMP or watershed

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submit an annual report by the anniversary of the date of the issuance of the permit for such system. The report shall include:

(1) The status of implementing the components of the storm water management program that are established as permit conditions;
(2) Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with §122.26(d)(2)(iii) of this part; and
(3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application under §122.26(d)(2)(iv) and (d)(2)(v) of this part;
(4) A summary of data, including monitoring data, that is accumulated throughout the reporting year;
(5) Annual expenditures and budget for year following each annual report;
(6) A summary describing the number and nature of enforcement actions, inspections, and public education programs;
(7) Identification of water quality improvements or degradation.

quality activity, or of the implementation of each major component of the JURMP or WURMP, or identification of modifications and improvements to maximize the JURMP or WURMP effectiveness. These requirements, "exceed the mandate in that federal law or regulation."[160] As in *Long Beach Unified School Dist. v. State of California*,[161] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[162] to impose these requirements. Thus, the Commission finds that parts I.1 and I.2 of the permit are not federal mandates.

Based on the mandatory language on the face of the permit, the Commission finds that parts I.1 and I.2 of the permit are a state mandate on the copermittees to do all of the following:

> 1. Jurisdictional
>
> a. As part of its Jurisdictional Urban Runoff Management Program, each Copermittee shall annually assess the effectiveness of its Jurisdictional Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:
>
> (1) Specifically assess the effectiveness of each of the following:
>
> (a) Each significant jurisdictional activity/BMP or type of jurisdictional activity/BMP implemented;
> (b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[163] Detection and Elimination, and Education); and
> (c) Implementation of the Jurisdictional Urban Runoff Management Program as a whole.
>
> (2) Identify and utilize measurable targeted outcomes, assessment measures, and assessment methods for each of the items listed in section I.1.a.(1) above.
>
> (3) Utilize outcome levels 1-6[164] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (4) Utilize monitoring data and analysis from the Receiving Waters Monitoring Program to assess the effectiveness each of the items listed in section I.1.a.(1) above, where applicable and feasible.
>
> (5) Utilize Implementation Assessment,[165] Water Quality Assessment,[166] and Integrated Assessment,[167] where applicable and feasible.

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[160] Government Code section 17556, subdivision (c).

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

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

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

[164] See footnote 50, page 21.

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

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[168] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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

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

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

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

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

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

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

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

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

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

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

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

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[169] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

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

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

The State Board, in its October 2008 comments, states that the program effectiveness assessment is not a new program or higher level of service because the 2001 permit included a JURMP (in part F.7) and WURMP (in part J) effectiveness assessment requirements.

The claimants, in their February 2009 comments, state as follows:

> The 2001 Permit only required the copermittees to develop a long term strategy for assessing the effectiveness of their individual JURMP using specific and indirect measurements to track the long term progress of their individual JURMPs towards achieving water quality. [part F.7.a. of the 2001 permit.] The 2001 Permit also only mandated that the long term strategy developed by the copermittees include an assessment of the effectiveness of their JURMP in an annual report using the direct and indirect assessment measurements and methods developed in the long-term strategy. [part F.7. of the 2001 permit.]

Part F.7 of the 2001 permit required developing the following on the topic of "Assessment of Jurisdictional URMP Effectiveness Component."

> a. As part of its individual Jurisdictional URMP, each Copermittee shall develop a long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that each Copermittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.
>
> b. As part of its individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy.

The 2007 permit requires more detail in its assessments than the 2001 permit. The 2007 permit requires annual assessments and using outcome levels, among other things, to assess the effectiveness of (a) each significant jurisdictional activity/BMP, (b) implementation of each major component of the JURMP, and (c) implementation of the JURMP as a whole. The 2001 permit did not require assessments at these three levels. And for example, outcome level 4 in the 2007 permit is required for measuring load reductions.[170] This is a higher level of service than "pollutant loading estimations" to be used as an effectiveness strategy in the 2001 permit.[171] Therefore, the Commission finds that section I.1 of the permit (Jurisdictional URMP effectiveness assessment) is a new program or higher level of service.

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[170] There are six Effectiveness Assessments incorporated into part I.1.a.(3) of the permit and are defined in Attachment C. One of them is "Effectiveness Assessment Level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed."

[171] See Fact Sheet/Technical Report for Order No. R9-2007-0001.

The assessment provisions of the Watershed Urban Runoff Management Program are in part J.2 of the 2001 permit, which requires each copermittee to develop and implement a Watershed URMP that contains, among other things:

> b. An assessment of the water quality of all receiving waters in the watershed based upon (1) existing water quality data; and (2) annual watershed water quality monitoring that satisfies the watershed monitoring requirements of Attachment B.
>
> [¶]...[¶]
>
> i. Long-term strategy for assessing the effectiveness of the Watershed URMP. The long-term assessment strategy shall identify specific direct and indirect measurements that will track the long-term progress of the Watershed URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

As with the JURMP, the 2001 permit required a "long-term strategy for assessing the effectiveness of the Watershed URMP" whereas the 2007 permit requires the annual assessment of more specific criteria: (a) each Watershed Water Quality Activity implemented; (b) Each Watershed Education Activity implemented; and (c) Implementation of the Watershed Urban Runoff Management program as a whole. And the 2007 permit requires assessing these activities using the same six effectiveness outcome levels as for the JURMP (defined in Attachment C), that were not in the 2001 permit.[172]

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[172] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

Therefore, the Commission finds that section I.2. of the permit (the Watershed URMP effectiveness assessment) is a new program or higher level of service.

B. Long Term Effectiveness Assessment (part I.5): As stated on pages 19-20 above, part I.5 requires the copermittees to collaborate to develop a Long Term Effectiveness Assessment (LTEA) that evaluates the copermittee programs on a jurisdictional, watershed, and regional level, and that emphasizes watershed assessment. The LTEA must build on the results of the August 2005 Baseline LTEA, and must be submitted to the Regional Board no later than 210 days before the permit expires. The LTEA must address the Regional objectives listed in part I.3 of the permit, as well as assess the effectiveness of the Receiving Waters Monitoring Program, and address outcome levels 1-6 as specified in attachment C of the permit.

In its October 2008 comments on the test claim, the State Board says that the LTEA requirement was imposed "so that the San Diego Water Board could properly evaluate the Copermittees' storm water program during the reapplication process." The State Board asserts that the LTEA provision is a federal mandate, citing 40 C.F.R. section 122.26, subdivisions (d)(2)(iv) and (v), in which (v) states that a permit application must include:

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

According to the State Board, "Even if the requirements to develop an LTEA are not specifically required by the federal regulations, the general discussion of the federal MEP standard is applicable here and supports the San Diego Water Board's determination that the region-wide LTEAs are necessary to meet the federal MEP standard."

In their February 2009 rebuttal comments, the claimants state:

> The program effectiveness component of the 2007 Permit mandates Jurisdictional (I.1), Watershed (I.2), Regional (I.3), Total Maximum Daily Loads ("TMDL") and BMP Implementation (I.4) and Long-term Effectiveness Assessment (I.5) requirements. This Section mandates multiple layers of program assessment, review and reporting. Such duplicative and collaborative efforts were not required under the 2001 Permit and are not required by federal law.

Claimants assert that there is no federal authority that states that the regional, jurisdictional and watershed program effectiveness training requirements are required to meet the minimum federal MEP standards. Claimants also state that permits in other jurisdictions do not have LTEA requirements. According to the claimants, "while portions of the federal regulations cited by the State permit region-wide or watershed-wide cooperation, there is no mandatory requirement for multiple layers of program effectiveness assessment."

Although the federal regulations require assessment of controls, they do not require the detailed assessment in the 2007 permit. They do not require, for example, collaboration with other copermittees, addressing specified objectives or outcome levels, or addressing jurisdictional, watershed, and regional programs. These requirements "exceed the mandate in that federal law

or regulation."[173] As in *Long Beach Unified School Dist. v. State of California*,[174] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[175] to impose these requirements. Thus, the Commission finds that part I.5 of the permit is not a federal mandate.

Because of the mandatory language on the face of the permit, the Commission finds that part I.5 of the permit is a state mandate for the claimants to do all of the following:

> 5. Long-term Effectiveness Assessment
>
> a. Each Copermittee shall collaborate with the other Copermittees to develop a Longterm Effectiveness Assessment (LTEA), which shall build on the results of the Copermittees' August 2005 Baseline LTEA. The LTEA shall be submitted by the Principal Permittee to the Regional Board no later than 210 days in advance of the expiration of this Order.
>
> b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[176] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.
>
> c. The LTEA shall address outcome levels 1-6, and shall specifically include an evaluation of program implementation to changes in water quality (outcome levels 5 and 6).
>
> d. The LTEA shall assess the effectiveness of the Receiving Waters Monitoring Program in meeting its objectives and its ability to answer the five core management questions. This shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods. The power analysis shall identify the frequency and intensity of sampling needed to identify a 10% reduction in the concentration of

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[173] Government Code section 17556, subdivision (c).

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

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

[176] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

constituents causing the high priority water quality problems within each watershed over the next permit term with 80% confidence.

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

The next issue is whether the LTEA (part I.5) is a new program or higher level of service. The State Board, in its October 2008 comments, state as follows:

> The LTEA does not impose a new program or higher level of service. Rather, it requires the Copermittees to conduct a long term effectiveness assessment prior to submitting an application for reissuance of the Order in the next permit term and is necessary to support proposed changes to the Copermittees' programs."

The claimants, in their February 2009 comments, argue that the LTEA requirement in part I.5 does impose a new program or higher level of service. According to the claimants:

> Section F.7 of the 2001 Permit only required individual copermittees to develop long term effectiveness assessments for their Jurisdictional Urban Runoff Management Plan ("JURMP"). ... The 2001 Permit did not require the copermittees to collaborate to develop an overarching LTEA for regional, jurisdictional and watershed programs, and did not require the submission of a LTEA by a date certain in advance of the Permit expiration.

The Commission finds that the LTEA is a new program or higher level of service. The 2001 permit required JURMP assessment (in part F.7) and WURMP (in part J.2) as quoted above in the discussion on parts I.1 and I.2., but not an LTEA. The Fact Sheet/Technical Report for the 2007 permit states:

> Section I.5 (Long-Term Effectiveness Assessment) requires the Copermittees to conduct a Long-Term Effectiveness Assessment prior to their submittal of an application for reissuance of the Order. The Long-Term Effectiveness Assessment is necessary to provide support for the Copermittees' proposed changes to their programs in their ROWD. It can also serve as the basis for changes to the Order's requirements.

The Commission finds that the LTEA (part I.5) is a new program or higher level of service for three reasons. First, the scope of the assessment in the 2001 permit addresses only the JURMP and WURMP rather than "jurisdictional, watershed, and regional programs, with an emphasis on watershed assessment" as in the 2007 permit (see the analysis of I.1 and I.2 above). Second, the 2001 permit did not require collaborating with all other copermittees on assessment. Third, the 2001 permit contains much less detail on what to include in the assessment, such as, for example, the eight regional objectives listed in I.3.a.(6), incorporated by reference in part I.5. Also, the LTEA must assess the "effectiveness of the Receiving Waters Monitoring Program ... [and] shall include assessment of the frequency of monitoring conducted through the use of power analysis and other pertinent statistical methods." These methods were not required under the 2001 permit.

V. All Copermittee Collaboration (Part L)

Part L, labeled "All Permittee Collaboration," requires the copermittees to collaborate to address common issues and plan and coordinate activities, including developing a Memorandum of

Understanding (MOU), as specified. The Copermittees entered into an MOU effective in January 2008, which is attached to the test claim. The Copermittees allege activities involved with working body support and working body participation.

In comments submitted in October 2008, the State Board asserts that the permit condition in part L is necessary to meet the minimum MEP standard, quoting the following federal regulation regarding municipal stormwater permits:

> (2) *Part 2.* Part 2 of the application shall consist of:
>
> (i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [¶]...[¶]
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;[177]

The Commission finds that there is no federal mandate to develop a management structure (memorandum of understanding, or MOU) as required in part L of the 2007 permit. The federal regulation most on point requires an applicant (claimant) to demonstrate adequate legal authority "which authorizes or enables the applicant at a minimum to: [¶]...[¶] (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;"[178] All the federal regulations address is authority to establish an interagency agreement or memorandum of understanding, but do not require it to be implemented or specify its contents beyond "controlling ... the contribution of pollutants from one portion of the municipal system to another portion of the municipal system."

By contrast, part L of the permit requires the copermittees to collaborate, promote consistency among JURMP and WURMP and plan and coordinate activities required under the permit. It also requires joint execution and submission to the Regional Board an MOU with a minimum of seven specified requirements.

Thus, this permit activity "exceed[s] the mandate in that federal law or regulation."[179] As in *Long Beach Unified School Dist. v. State of California*,[180] the permit requires specific actions, i.e., required acts that go beyond the requirements of federal law. In adopting these permit provisions, the state has freely chosen[181] to impose these requirements. Thus, the Commission finds that part L of the permit does not impose a federal mandate.

Based on the mandatory language in the permit, the Commission finds that part L of the permit is a state mandate on the claimants to do the following:

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[177] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[178] 40 Code of Federal Regulations section 122.26 (d)(2)(i)(D).

[179] Government Code section 17556, subdivision (c).

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

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

1. Collaborate with all other Copermittees regulated under this Order to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

(a) Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum:

(1) Identifies and defines the responsibilities of the Principal Permittee[182] and Lead Watershed Permittees;[183]

(2) Identifies Copermittees and defines their individual and joint responsibilities, including watershed responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decisions-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement;

(7) Includes any and all other collaborative arrangements for compliance with this order.

The State Board, in its October 2008 comments, asserts that the management structure framework in part L of the 2007 permit is not a new program or higher level of service because:

> The 2001 permit required significant collaboration to address common issues and promote consistency across management programs [and] development of a management structure through execution of a formal agreement, meeting minimum specifications. It also required standardized reporting, including fiscal analysis.

The State Board also argues there is "minimal substantive difference" between the 2001 and 2007 permits in their requirements to establish "a formal cooperative arrangement and to implement regional urban runoff management activities. The 2007 Permit merely elaborates on and refines the 2001 requirements."

In its February 2009 rebuttal comments, the claimants assert that the 2001 and 2007 permits contain major substantive differences in their requirements for fiscal analyses of their jurisdictional programs.

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

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

Part L.1 of the 2007 permit, the first paragraph in L requiring collaboration, is identical to part N of the 2001 permit. The Commission finds, however, that the collaboration is a new program or higher level of service because it now applies to all the activities that are found to be a new program or higher level of service in the analysis above (i.e, not in the 2001 permit) including the Regional Urban Runoff Management Program.

Part L.1.a, regarding the MOU or formal agreement, is similar but not identical to part N of the 2001 permit. Both permits require adoption of a "Memorandum of Understanding [MOU], Joint Powers Authority, or other instrument of formal agreement." The 2001 permit, in part N.1.a, required the MOU to provide a management structure with the following contents: "designation of joint responsibilities, decision making, watershed activities, information management of data and reports, including the requirements under this Order; and any and all other collaborative arrangements for compliance with this Order."

By contrast, the 2007 permit, requires the MOU to be submitted to the Regional Board within 180 days after adoption of the permit and requires that the MOU, at a minimum:

(1) Identifies and defines the responsibilities of the principal Permittee and Lead Watershed Permittees;

(2) Identifies Copermittees and defines their individual and joint responsibilities;

(3) Establishes a management structure to promote consistency and develop and implement regional activities;

(4) Establishes standards for conducting meetings, decision-making, and cost-sharing;

(5) Provides guidelines for committee and workgroup structure and responsibilities;

(6) Lays out a process for addressing Copermittee non-compliance with the formal agreement; and

(7) Includes any and all other collaborative arrangements for compliance with this order.

The contents of the MOU specified in the 2001 permit, although stated with less specificity, are the same as those in the 2007 permit for numbers (1)-(2) and (7) above. Both permits require the MOU to contain "designation of joint responsibilities" and "collaborative arrangements for compliance with this order." Thus, the Commission finds that jointly executing and submitting those parts of the MOU to the Regional Board is not a new program or higher level of service.

The Commission finds that part L.1.a of the permit is a new program or higher level of service for all copermittees to do the following:

- Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement which at a minimum: (3) Establishes a management structure to promote consistency and develop and implement regional activities; (4) Establishes standards for conducting meetings, decision-making, and cost-sharing; (5) Provides guidelines for

committee and workgroup structure and responsibilities; and (6) Lays out a process for addressing copermittee non-compliance with the formal agreement.

Summary of Issue 1: The Commission finds that the following parts of the 2007 permit are a state-mandated, new program or higher level of service.

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

- Collaborate with other copermittees to develop and implement a hydromodification management plan, as specified (D.1.g.), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Develop and submit an updated Model SUSMP that defines minimum Low-impact Development and other BMPs as specified (D.1.d.(7)-(8)), for private priority development projects. Reimbursement is not required for this activity for municipal priority development projects.
- Street sweeping (D.3.a.(5)) and reporting on street sweeping (J.3.a(3)x-xv);
- Conveyance system cleaning (D.3.a.(3)(b)(iii)) and reporting on conveyance system cleaning (J.3.a.(3)(c)(iv)-(viii));
- Educational component (D.5).
    - Educate each specified target community on the following topics: (1) Erosion prevention, (2) Non storm water discharge prohibitions, and (3) BMP types: facility or activity specific, LID, source control, and treatment control (D.5.a.(1));
    - Educational programs shall emphasize underserved target audiences, high-risk behaviors, and 'allowable' behaviors and discharges, including various ethnic and socioeconomic groups and mobile sources (D.5.a.(2));
    - Implement an education program that includes annual training only for planning boards and elected officials, if applicable, to have an understanding of the topics in (i) and (ii) (D.5.b.(1)(a)(i) & (ii));
    - Implement an education program so that its planning and development review staffs (and Planning Boards and Election Officials, if applicable) have an understanding of the topics in (iii) and (iv) as specified (D.5.b.(1)(a)(iii) & (iv));
    - Implement an education program that includes annual training prior to the rainy season so that [the Copermittee's] construction, building, code enforcement, and grading review staffs, inspectors, and other responsible construction staff have, at a minimum, an understanding of the following topics, as appropriate for the target audience: the topics in (iii) to (vi), as specified (D.5.b.(1)(b)(iii) & (iv));
        - Municipal Industrial/Commercial Activities (D.5.b.(1)(c));
        - Municipal Other Activities (D.5.b.(1)(d));
        - New Development and Construction Education (D.5.(b)(2));
        - Residential, General Public, and School Children Education (D.5.(b)(3)).

II. Watershed Urban Runoff Management Program (Parts E.2.f & E.2.g.)

- Identify and implement the Watershed activities as specified (E.2.f.).
- Collaborate to develop and implement the Watershed Urban Runoff Management Programs. Watershed Copermittee collaboration shall include frequent regularly scheduled meetings. (E.2.g.)

III. Regional Urban Runoff Management Program (Parts F.1, F.2 & F.3)

- Include developing and implementing a Regional Residential Education Program development and implementation in the RURMP, as specified (F.1.).
- Include developing the standardized fiscal analysis method required in permit part G in the RURMP (F.2.).
- Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs in the RURMP (F.3.).

IV. Program Effectiveness Assessment (Parts I.1, I.2 & I.5)

- Annually assess the effectiveness of each copermittee's JURMP, as specified (I.1.).
- Annually assess the effectiveness of each watershed group's WURMP (I.2.).
- Collaborate with the other copermittees to develop a Long-term Effectiveness Assessment, as specified, and submit it to the Regional Board as specified (I.5.).

V. All Permittee Collaboration (Part L)

- Collaborate with all other copermittees to address common issues, promote consistency among the JURMP and WURMP, and to plan and coordinate activities required under the permit.
- Jointly execute and submit to the Regional Board, no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement as specified (L.1.a. (3)-(5)).

Any further reference to the test claim activities is limited to these parts of the permit found to be a new program or higher level of service.

Issue 2: Do the test claim activities impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether the permit provisions impose costs mandated by the state,[184] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

[184] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement. In the test claim, the County of San Diego itemized the costs of complying with the permit conditions as follows:

Activity	Cost FY 2007-08
Regional Urban Runoff Management Program -Copermittee collaboration (F.2, F.3, L)	$260,031.09
Copermittee collaboration, Regional Residential Education, Program Development and Implementation (F.1)	$131,250.00
Jurisdictional Urban Runoff Management Program (JURMP) -hydromodification (D.1.g)	$630,000.00
JURMP Standard Urban Storm Water Mitigation Plans -low impact development (D.1.d)	$52,200.00
Long Term Effectiveness Assessment (I.5)	$210,000.00
Street Sweeping (D.3.a.(5) Equipment, Staffing, Contract	$3,477,190.00
Conveyance System Cleaning (D.3.a.(3)) and Reporting (J.2.a.(3)(c) iv – vii.	$3,456,087.00
Program Effectiveness Assessment (I.1 & I.2)	$392,363.00
Educational Surveys and Tests (D.5)	$62,617.00
Watershed Urban Runoff Management Program -Copermittee collaboration (E.2.f., E.2.g)	$1,632,893.00
Total	$10,304,631.09

Claimants submitted documentation in February 2010 that show the 2008-2009 cost for the permit activities is $18,014,213. These figures, along with those in the test-claim narrative and declarations submitted by the San Diego County and 18 cities,[185] illustrate that the costs to comply with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Claimants did not request the test claim activities within the meaning of Government Code section 17556, subdivision (a).

The first issue is whether the claimants requested or proposed the activities in the permit. The Department of Finance and the State Board both assert that claimants did so in their Report of

[185] The County and city declarations are attached to the test claim.

Waste Discharge. As discussed above, the claimants were required to submit a ROWD and Stormwater Quality Management Plan before the permit was issued.[186]

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Claimants have fee authority under Government Code section 17556, subdivision (d), for the test claim activities that do not require voter approval under Proposition 218

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[187] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly

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[186] Water Code section 13376; 40 Code of Federal Regulations, section 122.21 (a). The Federal regulation applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state-program provision) by reference. Also see the 2007 permit, page 2, part A.

[187] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

> declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[188]

In another case about subdivision (d) of section 17556, *Connell v. Superior Court,*[189] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[190]

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[188] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487. Emphasis in original.

[189] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

[190] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

1. **Claimants' have regulatory fee authority (within the meaning of Gov. Code, § 17556, subd. (d)) under the police power sufficient to pay for the mandated activities that do not require voter approval under Proposition 218: the hydromodification plan and low-impact development.**

In its October 2008 comments, the State Board asserted that the claimants have fee authority to pay for the permit activities. Although the Board recognizes "limitations on assessing fees and surcharges under California law … [concerning] the percentage of voters who must approve the assessment" the Board points to examples of local agencies (Cities of Los Angeles, San Clemente, and Palo Alto) that have successfully adopted an assessment. The State Board also argues that the cities' trash collection responsibilities may also include street sweeping and conveyance system cleaning for which the city could charge fees, and that developer fees could be charged for hydromodification and low impact development.

Claimants, in comments submitted in February 2009, state that they cannot unilaterally impose a fee to recover the cost to comply with the 2007 permit on water or sewer bills sent to residents because of *Howard Jarvis Taxpayer Assoc. v. City of Salinas,*[191] in which the court invalidated a stormwater management utility fee imposed by the city on all owners of developed parcels in the city. The court held that article XIII D (Proposition 218) of the California Constitution "required the city to subject the proposed storm drainage fee to a vote of the property owners or the voting residents of the affected area."[192] As to the argument that claimants can put the fee to a vote in their jurisdictions, claimants state as follows:

> Articles XIII C and XIII D, which were added to the Constitution by Proposition 218, regulate the imposition of general and special taxes as well as the imposition of special assessments and property related fees. In each of these cases the question of whether to impose a tax, special assessment or a property related fee must be submitted to and approved by the voters. And, in the case of a special tax, and in certain instances the imposition of a fee or charge, the tax or fee must be approved by a two-thirds vote of the resident voters. The State fails to cite any authority that requires the copermittees to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. Such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The issue of local fee authority for municipal stormwater permit activities in this permit cannot be answered without discussing regulatory fee authority under the police power and the limitations on that authority via the voter-approval requirement in article XIII D of the California Constitution (Proposition 218).

Case law has recognized three general categories of local agency fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.[193] The regulatory and development fees are discussed below in the context of

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[191] *Howard Jarvis Taxpayers Assoc. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[192] *Id.* at page 1358-1359.

[193] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.

XIII D (Proposition 218) that would allow the claimants to impose fees for the activities in the test claim related to development.

Regulatory fee authority under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Article XI, section 7, includes the authority to impose fees, and courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[194]

Water pollution prevention is also a valid exercise of government police power.[195]

In *Sinclair Paint v. State Board of Equalization*,[196] the California Supreme Court upheld a fee on manufacturers of paint that funded a child lead-poisoning program that provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The program was entirely supported by fees assessed on manufacturers or other persons contributing to environmental lead contamination. In upholding the fee, the court ruled that it was a regulatory fee imposed under the police power and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution. The court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[197] [Emphasis added.]

Regulatory fees also help to prevent or mitigate pollution, as the Court said: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[198] The court also recognized that regulatory fees do not depend on government-conferred benefits or privileges.[199]

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[194] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662, in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors.

[195] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[196] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[197] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[198] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 875-877.

[199] *Id.* at page 875.

Although the holding in *Sinclair Paint* applied to a state-wide fee, the court's language (treating "ordinances" the same as "statutes") recognizes that local agencies also have police power to impose regulatory fees, and it relied on local government police power cases in its analysis.[200]

Other cases have defined a regulatory fee as an imposition that funds a regulatory program[201] or that distributes the collective cost of a regulation"[202] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[203] Courts will uphold regulatory fees if they do not exceed the reasonable cost of providing services necessary to the activity on which the fee is based and are not levied for an unrelated revenue purpose.

In upholding regulatory fees for environmental review by the California Department of Fish and Game, the court of appeal summarized the following rules on regulatory fees:

> A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. [Citations omitted.] Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. [Citations omitted.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted.] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee.[204] [Emphasis added.]

In *Tahoe Keys Property Owner's Assoc. v. State Water Resources Control Board*,[205] the court refused to issue a preliminary injunction against collecting a pollution mitigation fee of $4000 for each lot developed in the Tahoe Keys subdivision of Lake Tahoe. The fees were to be used for mitigation projects designed to achieve a net reduction in nutrients generated by the Tahoe Keys development. The court said: "on the face of the regulation, there appears to be a sufficient

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[200] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

[201] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[202] *Id.* at 952.

[203] *Ibid.*

[204] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[205] *Tahoe Keys Property Owner's Assn. v. State Water Resources Control Board* (1993) 23 Cal.App.4th 1459.

nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme [mitigation of pollution in Lake Tahoe]."[206]

A variety of local agency regulatory fees have been upheld for various programs, including: processing subdivision, zoning, and other land-use applications,[207] art in public places,[208] remedying substandard housing,[209] recycling,[210] administrative hearings under a rent-control ordinance,[211] signage,[212] air pollution mitigation,[213] and replacing converted residential hotel units.[214] Fees on developers for environmental mitigation under the California Environmental Quality Act have also been upheld.[215]

Given the variety of examples where regulatory fees have been upheld, and the broad range of costs to which they may be applied (including those for 'administration'), the claimants have fee authority under the police power to impose fees for the permit activities that are a state-mandated new program or higher level of service. But a determination as to whether the claimants' fee authority is sufficient, within the meaning of Government Code section 17556, subdivision (d), to pay for the mandated activities and deny the test claim, cannot be made without analysis of the limitations on the fee authority imposed by Proposition 218.

Regulatory fee authority is limited by voter approval under Proposition 218: With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, "special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (art. XIII D, § 6, subd. (c)). Assessments must also be approved by owners of the affected parcels (art. XIII D, § 4, subd.(d)). Expressly exempt from voter

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[206] *Id.* at page 1480.

[207] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

[208] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886.

[209] *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830.

[210] *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.

[211] *Pennell v. City of San Jose* (1986) 42 Cal.3d 365.

[212] *United Business Communications v. City of San Diego* (1979) 91 Cal.App.3d 156.

[213] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120.

[214] *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

[215] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

approval, however, are property-related fees for sewer, water, or refuse collection services (art. XIII D, § 6, subd. (c)).

In 2002, an appellate court in *Howard Jarvis Taxpayers Association v. City of Salinas, supra,* 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to charge stormwater fees if they are imposed "as an incident of property ownership."

The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556, subdivision (d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) is one of first impression for the Commission.

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

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[216]

In its January 2010 comments on the draft staff analysis, the State Board disagrees that "the requirement to subject new or increased fees to these voting or protest requirements strips the claimants of 'fee authority' within the meaning of Government Code section 17556, subdivision (d)." The State Board cites *Connell v. Superior Court,*[217] in which the water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[218] The State Board equates the Proposition 218 voting requirement with the economic impracticability faced by the water districts in *Connell.*

The claimants disagree, citing a lack of authority that requires them to first submit the question of whether to impose a tax or fee to the voters and have them reject the proposition. According

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[216] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[217] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[218] *Id.* at page 401.

to the claimants, such a requirement would render all mandate claims moot, without first submitting the question of whether to impose a tax or assessment to a vote of the electorate.

The Commission disagrees with the State Board. The Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[219]

In fact, the fee at issue in the *Connell* case (Wat. Code, § 35470) was amended by the Legislature in 2007 to conform to Proposition 218. Specifically, the Water Code statute now requires compliance with "the "notice, protest, and hearing procedures in Section 53753 of the Government Code."[220] This Government Code statute implements Proposition 218.

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d) to deny the test claim for those activities that would condition the fee or assessment on voter or property-owner approval under Proposition 218 (article XIII D). The Commission finds that Proposition 218 applies to all the activities in this test claim (except for the hydromodification and LID activities that are related to priority development projects discussed below) so that they impose "costs mandated by the state" (within the meaning of Gov. Code, § 17556, subd. (d)). To the extent that property-owner or voter-approved fees or assessments are imposed to pay for any of the permit activities found above to be a state-mandated new program or higher level of service, the fee or assessment would be identified as offsetting revenue in the parameters and guidelines to offset the claimant's costs in performing those activities.

Fees imposed for two of the test-claim activities, however, i.e., for the hydromodification management plan and low-impact development, would not be subject to voter approval under Proposition 218, as discussed below.

Fees as a condition of property development are not subject to Proposition 218: Proposition 218 does not apply to development fees, including those imposed on activities in part D of the permit. Article XIII D expressly states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[221]

Moreover, the California Supreme Court has ruled that fees imposed "as an incident to property ownership" are subject to Proposition 218, but fees that result from the owner's voluntary

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[219] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[220] Water Code section 35470, as amended by Statutes 2007, chapter 27. Section 53753 of the Government Code requires compliance with "the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution" for assessments.

[221] California Constitution, article XIII D, section 1, subdivision (b).

decision to seek a government benefit are not.[222] Thus, fees imposed as a result of the owner's voluntary decision to undertake a development project are not subject to Proposition 218, because they are not merely incident to property ownership.[223]

The final issue, therefore, is whether claimants may impose fees that are sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the activities in the permit related to development: the hydromodification management plan (part D.1.g), and low-impact development (part D.1.d.(7)&(8)). The Commission finds claimants have fee authority that is sufficient within the meaning of Government Code section 17556, subdivision (d), and that these activities do not impose costs mandated by the state and are not reimbursable.

Hydromodification management plan: Part D.1 of the permit describes the development planning component of the JURMP. Part D.1.g. requires each copermittee to collaborate with other copermittees to develop and implement and report on developing a hydromodification management plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, as specified. As discussed above, the HMP is a state-mandated new program or higher level of service for only private priority development projects. The purpose of the HMP is:

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

According to the permit, priority development projects are:

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

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[222] In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, the court held that water service fees were subject to Proposition 218, but that water connection fees were not. In *Apartment Assoc. of Los Angeles County v. City of Los Angeles, supra,* 24 Cal.4th 830, 839-840, the court held that apartment inspection fees were not subject to Proposition 218 because they were not imposed on property owners as such, but in their capacity as landlords.

[223] A recent report by the Office of the Legislative Analyst concurs with this conclusion: "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners. Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56. [Emphasis added.] See: <http://www.lao.ca.gov/2008/rsrc/water_primer/ water_primer_102208.pdf> as of October 22, 2008.

The priority development project categories listed in part D.1.d.(2) are:

(a) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(b) Commercial developments greater than one acre. [as specified]

(c) Developments of heavy industry greater than one acre. This category includes, but is not limited to, manufacturing plants, food processing plants, metal working facilities, printing plants, and fleet storage areas (bus, truck, etc.).

(d) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

(e) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except ... hydromodification requirement D.1.g.

(f) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

(g) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

(h) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

(i) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

(j) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

The Commission finds that claimants have authority to impose fees for complying with the HMP activities in permit part D.1.g. for priority development projects, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that the fee would not be subject to Proposition 218 voter approval. These activities involve collaborating with other copermittees to develop and implement a hydromodification management plan, and reporting on it. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on these priority development projects to pay for the costs of HMP, the Commission finds that permit part D.1.g. does not impose costs mandated by the state.

Low impact development: Low impact development is defined in Attachment C of the permit as a "storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." The purpose of LID is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects." LID best management practices include draining a portion of impervious areas into pervious areas prior to discharge into the storm drain, and constructing portions of priority development projects with permeable surfaces.

Part D.1.d.(7) requires updating the Standard Urban Storm Water Mitigation Plans (SUSMP) to include low impact development requirements, as specified, including BMP requirements that meet or exceed the requirements of sections D.1.d.(4)[224] and D.1.d.(5).[225] Both D.1.d.(4) and D.1.d.(5) are the LID requirement implemented at priority development projects.

Part D.1.d.(8) requires permittees to develop and submit an updated model SUSMP that defines minimum low impact development and other BMP requirements to incorporate into the permittees local SUSMPs for application to priority development projects.

The Commission finds that claimants have authority to impose fees for complying with the LID activities in parts D.1.d.(7) and D.1.d.(8) of the permit, and their authority is sufficient within the meaning of Government Code section 17556, subdivision (d), in that they are not subject to Proposition 218 voter approval. Because regulatory fees, pursuant to article XI, section 7 of the California Constitution, could be imposed on the priority development projects to pay for the costs associated with LID, the Commission finds that permit parts D.1.d.(7) and D.1.d.(8) do not impose costs mandated by the state.

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

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

2. Claimants also have fee authority regulated by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d)) to pay for the hydromodification and low-impact development permit activities.

Development fees are also an exercise of the local police power under article XI, section 7 of the California Constitution.[226] A fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer.[227] Development fees are not restricted by Proposition 218 as discussed above.

Fees on developers as conditions of permit approval are governed by the Mitigation Fee Act (Gov. Code, §§ 66000-66025) which defines a "fee" as:

> [A] monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include ... fees for processing applications for governmental regulatory actions or approvals ...."[228] [Emphasis added.]

Public facilities are defined in the Act as "public improvements, public services, and community amenities."[229]

When a local agency imposes or increases a fee as a condition of development approval, it must do all of the following: (1) Identify the purpose of the fee; (2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and, (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project upon which the fee is imposed. (Gov. Code, § 66001, subd. (a),)

The city or county must also determine whether there is a reasonable relationship between the specific amount of the fee and the costs of building, expanding, or upgrading public facilities. These determinations, known as nexus studies, are in writing and must be updated whenever new fees are imposed or existing fees are increased.[230] A fee imposed "as a condition of approval of

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[226] *California Building Industry Assoc. v. Governing Board* (1988) 206 Cal.App.3d 212, 234.

[227] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[228] Government Code section 66000, subdivision (b).

[229] Government Code section 66000, subdivision (d).

[230] Government Code section 66001, subdivision (b). The Act also requires cities to segregate fee revenues from other municipal funds and to refund them if they are not spent within five years. Any person may request an audit to determine whether any fee or charge levied by the city or county exceeds the amount reasonably necessary to cover the cost of the service provided (Gov. Code, §66006, subd. (d)). Under Government Code section 66014, fees charged for zoning changes, use permits, building permits, and similar processing fees are subject to the same nexus requirements as development fees. Lastly, under California Government Code

a proposed development or development project" is limited to the estimated reasonable cost of providing the service or facility.[231] This is in contrast to regulatory fees, which do not depend on government-conferred benefits or privileges.[232]

The Mitigation Fee Act defines a "development project" as "any project undertaken for the purpose of development ... includ[ing] a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate." (Gov. Code, § 66000, subd. (a).)

A fee does not become a development fee simply because it is made in connection with a development project. Approval of the development must be conditioned on the payment of the fee. The Mitigation Fee Act is limited to situations where the fee or exaction is imposed as a condition of approval of a development project.[233]

Because local agencies may make development of priority development projects conditional on the payment of a fee, the Commission finds that the claimants have fee authority, governed by the Mitigation Fee Act, that is sufficient within the meaning of Government Code section 17556, subdivision (d), to pay for the hydromodification management plan and low-impact development activities. As discussed below, HMP and LID are "public facilities," which the Mitigation Fee Act defines as "public improvements, public services, and community amenities."[234]

The County of San Diego, in its January 2010 comments on the draft staff analysis, disagrees that it can impose a fee for the hydromodification plan (HMP) activities in the permit, stating that development and implementation of the HMP does not constitute a "public facility."

The Commission disagrees. The purpose of the permit is to prevent or abate pollution in waterways and beaches in San Diego County. More specifically, the purpose of the HMP is:

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

All these stated purposes of the HMP provide public services or improvements, or community amenities within the meaning of the Act.[235] Moreover, the California Supreme Court stated that the Act "concerns itself with development fees; that is, fees imposed on development projects in

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section 66020, agencies collecting fees must provide project applicants with a statement of the amounts and purposes of all fees at the time of fee imposition or project approval.

[231] Government Code section 66005, subdivision (a).

[232] *Sinclair Paint, supra,* 15 Cal.4th at page 875.

[233] *California Building Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th, 130, 131.

[234] Government Code section 66000, subdivision (d).

[235] Government Code section 66000, subdivision (d).

order to finance public improvements or programs that bear a 'reasonable relationship' to the development at issue."[236] The HMP is such a program.

Similarly, the purposes of LID are to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff from priority development projects. These activities are public services or improvements that fall within the Act's definition of public facility.

The County also argues that under the Mitigation Fee Act, the local agency must determine that there is "a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." The County argues that there is no reasonable relationship between the costs incurred by claimants to develop and implement the HMP and a particular development project on which the fee might be imposed.

Again, the Commission disagrees. Every time a developer proposes a project that falls within one of the "priority development project" categories listed above, and the developer has "not yet begun grading or construction activities at the time any updated SUSMP or hydromodification requirement commences," the local agency may impose a fee subject to the Mitigation Fee Act. The fee would be for the costs of developing and implementing the HMP to "manage increases in runoff discharge rates and durations from all Priority Development Projects [that] cause ... impacts to beneficial uses and stream habitat due to increased erosive force." The local agency may also impose a fee on priority development projects to comply with LID, the purpose of which is to "collectively minimize directly connected impervious areas and promote infiltration at Priority Development Projects" and to reduce stormwater runoff.

Finally, the County argues that assessing fees on a private developer who submits a project for approval to recover the costs of reviewing and approving a particular project is "specifically excluded from the definition of 'fee' under the Act." The definition of fee in the Act states that it "does not include ... fees for processing applications for governmental regulatory actions or approvals ...." (Gov. Code, § 66000, subd. (b).)

The Commission disagrees that an HMP fee would be for "processing applications for governmental regulatory actions or approvals." Rather, it would be for permit approval of priority development projects, and used to implement the HMP and LID requirements. In *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 698, the California Supreme Court distinguished between regulatory fees that implement state and local building safety standards under the Health and Safety Code and developer fees subject to the Mitigation Fee Act by stating: "These regulatory fees fund a program that supervises how, not whether, a developer may build." Thus, the Commission finds that the developer fees may be imposed for permit approval for priority development projects if the permit is conditional on payment of the fee, and the fee is used for HMP and LID compliance.

In sum, the Commission finds that the claimants have fee authority governed by the Mitigation Fee Act that is sufficient (within the meaning of Gov. Code, § 17556, subd. (d), to pay for the following parts of the permit that are related to development: the hydromodification management plan (part D.1.g) and updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (part D.1.d.(7)&(8)).

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[236] *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191.

3. Claimants' fee authority under Public Resources Code section 40059, or via benefit assessments, is not sufficient to pay for street sweeping, and Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping.

Street sweeping is one test claim activity that is typically funded by local agency fees or assessments. Fees and assessments are both governed by Proposition 218.

The permit (in part D.3.a.5) requires a program to sweep "improved (possessing a curb and gutter) municipal roads, streets, highways, and paring facilities" at intervals depending on whether they are identified as consistently generating the highest volumes, moderate volumes, or low volumes of trash and/or debris. Reporting on street sweeping, such as curb-miles swept and tons of material collected, is also required (part J.3.a.(3)(c)x-xv).

Some local agencies collect fees for street sweeping for their refuse fund, such as the City of Pasadena.[237] Other local agencies, e.g., the County of Fresno[238] and the City of La Quinta,[239] collect an assessment for street sweeping as a street maintenance activity. Both approaches are discussed below in light of the procedural requirements under Proposition 218.

Fees for street sweeping as refuse collection/solid waste handling: Article XI, section 7 of the California Constitution states: "A county or city may make and enforce within its limits all local, police, sanitary or other ordinances and regulations not in conflict with general laws." Local agency fees for refuse collection are authorized by Public Resources Code section 40059, which states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services. [Emphasis added.]

"Solid waste" is defined in Public Resources Code section 40191 as:

> [A]ll putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge

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[237] City of Pasadena, Agenda Report, Resolution Nos. 8942 and 8943, April 27, 2009, "Public Hearing: Amendment to the General Fee Schedule to Increase the Residential Refuse Collection Fees and Solid Waste Franchise Fees." One of the findings in the resolution is: "Whereas, street sweeping is a refuse collection service involving solely the collection, removal and disposal of solid waste from public rights of way, and is, therefore, properly allocated to the Refuse Fund."

[238] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[239] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes and other discarded solid and semisolid wastes.[240]

"Solid waste handling" is defined in Public Resources Code section 40195 as "the collection, transportation, storage, transfer, or processing of solid wastes." Given the nature of material swept from city streets, street sweeping falls under the rubric of 'solid waste handling.'

Under Proposition 218, "refuse collection" is expressly exempted from the voter-approval requirement (article XIII D, § 6, subd. (c).). Although "refuse collection" has no definition in article XIII D, the plain meaning of refuse[241] collection is the same as solid waste handling, as the dictionary definition of "refuse" and the statutory definition of "solid waste" both refer to rubbish and trash as synonyms. Refuse is collected via solid waste handling.

To impose or increase refuse collection fees, the local agency must provide mailed written notice to each parcel owner on which the fee will be imposed, and conduct a public hearing not less than 45 days after mailing the notice. If written protests against the proposed fee are presented by a majority of the parcel owners, the local agency may not impose or increase the fee (article XIII D, § 6, subd. (a)(2)). In addition, revenues are: (1) not to exceed the funds required to provide the service, (2) shall not be used for any other purpose than to provide the property-related service, and the amount of the fee on a parcel shall not exceed the proportional cost of the service attributable to the parcel. And the service must be actually used by or immediately available to the property owner (article XIII D, § 6, subd. (b)).

Government Code, section 17556, subdivision (d), does not apply to street sweeping because the fee is contingent on the outcome of a written protest by a majority of the parcel owners. The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee if it is protested by a majority of parcel owners.

Additionally, it is possible that a majority of land owners in the local agency may never allow the proposed fee, but the local agency would still be required to comply with the state mandate. This would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[242]

Thus, the Commission finds that fee authority under Public Resources Code section 40059 is not sufficient to pay for the mandated program or increased level of service in permit parts D.3.a.5 (street sweeping). Therefore, the Commission finds that street sweeping imposes costs mandated by the state and is reimbursable.

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[240] This definition also excludes hazardous waste, radioactive waste and medical waste, as defined.

[241] "Refuse" is defined as " Items or material discarded or rejected as useless or worthless; trash or rubbish." <http://dictionary.reference.com/browse/refuse> as of November 23, 2009.

[242] *County of San Diego, supra,* 15 Cal.4th 68, 81.

Any proposed fees that are not blocked by a majority of parcel owners for street sweeping must be identified as offsetting revenue in the parameters and guidelines.

Fees for street sweeping reports: Proposition 218 does not contain an express exemption on voter approval for reporting on street sweeping, only for "refuse collection." Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the street sweeping reports be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on street sweeping, so that part J.3.a.(3)(c)x-xv of the permit imposes costs mandated by the state and is reimbursable.

Assessments for street operation and maintenance: As mentioned above, some local agencies collect an assessment for street sweeping, e.g., the County of Fresno[243] and the City of La Quinta.[244] Assessments are defined as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (article XIII D, § 2, subd. (b).) The terms "maintenance and operation" of "streets" and "drainage systems," although used in article XIII D, are not defined in it. The plain meaning of maintenance of streets and drainage systems, however, would include street sweeping because "maintenance" means "the work of keeping something in proper condition; upkeep."[245] Clean streets are used not only for transportation, but for conveying storm water to storm drains.

The Supreme Court defined special assessments as follows:

> A special assessment is a "'compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein....' " [Citation.]' [Citation.] In this regard, a special assessment is 'levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.' [Citation.] 'The rationale of special assessment[s] is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.[246]

The Supreme Court summarized the constitutional procedures for creating an assessment district.

> Under Proposition 218's procedures, local agencies must give the record owners of all assessed parcels written notice of the proposed assessment, a voting ballot, and a statement disclosing that a majority protest will prevent the assessment's

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[243] County of Fresno, Resolution Nos. 8942 and 8943, adopted January 15, 2008.

[244] City of La Quinta, Resolution No. 2009-035, adopted May 5, 2009.

[245] <http://dictionary.reference.com/browse/maintenance> as of December 7, 2009.

[246] *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 442.

> passage. (Art. XIII D, § 4, subds. (c), (d).) The proposed assessment must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).) At a noticed public hearing, the agencies must consider all protests, and they "shall not impose an assessment if there is a majority protest." (Art. XIII D, § 4, subd. (e).) Voting must be weighted "according to the proportional financial obligation of the affected property." (*Ibid.*)[247]

Proposition 218 dictated that as of July 1, 1997, existing assessments were to comply with its procedural requirements, but an exception was created for "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control." (art. XIII D, § 5, subd. (a), emphasis added.) This means that the procedural requirements of Proposition 218 apply only to increases in assessments for street sweeping that were imposed after Proposition 218 was enacted.[248]

Absent any evidence in the record that assessments imposed before July 1, 1997 for street sweeping are sufficient to pay for the street sweeping specified in part D.3.a. of the permit, the Commission cannot find that assessments imposed before that date would pay for the costs mandated by the state for street sweeping within the meaning of Government Code section 17556, subdivision (d).

Should a local agency determine that its existing assessments are not sufficient to pay for the mandated street sweeping, it can raise assessments by following the article XIII D (Proposition 218) procedures detailed above. Those procedures, however, include an election and a protest, both of which were found above to extinguish local fee authority sufficient to pay for the mandate and to block the application of Government Code section 17556, subdivision (d).

Thus, to the extent that the claimants impose or increase assessments to pay for the street sweeping, they would be identified as offsetting revenue in the parameters and guidelines.

4. Claimants' fee or assessment authority under Health and Safety Code section 5471 is not sufficient to pay for conveyance-system cleaning, and Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning

Conveyance-system cleaning for operation and maintenance of the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc.) is required in the permit (part D.3.a.(3)). Specifically, claimants are required to clean in a timely manner "Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity.... Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner." Claimants are also required to report on the number of catch basins and inlets inspected and cleaned (J.3.a.(3)(c)iv-viii).

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[247] *Silicon Valley Taxpayers Ass'n v. Santa Clara Open Space Authority, supra,* 44 Cal.4th 431, 438.

[248] See also *Howard Jarvis Taxpayers Ass'n. v. City of Riverside* (1999) 73 Cal.App.4th, 679, holding that a preexisting streetlighting assessment is 'exempt under Proposition 218.'

Local agencies have fee authority under Health and Safety Code section 5471 to charge fees for storm drainage maintenance and operation as follows:

> [A]ny entity[249] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities .... [Emphasis added.]

This plain meaning of this statutory fee for storm drain operation and maintenance would include conveyance-system cleaning as required in the permit (part D.3.a.(3)(iii)), which the permit specifies as cleaning "catch basins or storm drain inlets." This cleaning is within the operation and maintenance of the storm drains.

The statutory fee, adopted in 1953, is now subject to the procedural requirements of Proposition 218. As it states in subdivision (d) of Health and Safety Code section 5471:

> If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in Section 53753 of the Government Code [the codification of the Proposition 218 procedural requirements].

Proposition 218 does not exempt from voting requirements fees for storm drain maintenance like it does for "water, sewer, and refuse collection" in section 6 (c) of article XIII D. In fact, in *Howard Jarvis Taxpayers Ass'n. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the court invalidated a local storm drain fee and held that the exemption from an election for sewer fees does not include storm drainage fees. As to new or increased assessments imposed for storm drainage operation and maintenance, they would be subject to the same election requirement of Proposition 218 (art. XIII D, § 4, subd. (e)) as for other assessments.

Therefore, the Commission finds that local agencies do not have sufficient authority under section 5471 of the Health and Safety Code to impose fees or assessments (under Gov. Code § 17556, subd. (d)) for conveyance system cleaning as required by part D.3.a.(3)(iii) of the permit or reporting as required by part J.3.a.(3)(c)iv-viii of the permit.

Fees or assessments for conveyance-system reports: The Commission also finds that local agencies do not have fee or assessment authority for reporting on conveyance-system (in part J.3.a.(3)(c)iv-viii) on the number of catch basins and inlets inspected and cleaned. Fees or

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[249] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

assessments imposed for this reporting would be subject to a vote of parcel owners. Moreover, Proposition 218 (art. XIII D, § 6, subd. (b)(4)) states: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." The permit does not require the reports on conveyance- system cleaning be available to property owners, only that the reports be submitted to the Regional Board. For these reasons, the Commission finds that Government Code section 17556, subdivision (d), does not apply to reporting on conveyance-system cleaning, and that part J.3.a.(3)(c)iv-viii of the permit imposes costs mandated by the state within the meaning of Government Code section 17556, subdivision (d), and is reimbursable.

Any revenue from existing assessments, or assessments obtained after voter approval, for conveyance system cleaning would be included in the parameters and guidelines as offsets to reimbursement.

C. Claimants have potential fee authority and offsetting revenue if they comply with the requirements of Senate Bill 310 (Stats. 2009, ch. 577)

Effective January 2010, Senate Bill 310 (Stats. 2009, ch. 577) was enacted to add Water Code provisions authorizing local agencies to adopt watershed improvement plans.

SB 310 is intended to establish multiple watershed-based pilot programs.[250] The bill creates the California Watershed Improvement Act of 2009 (commencing with Wat. Code, § 16000). Pursuant to Water Code section 16101, each county, city, or special district that is a copermittee under a NPDES permit ***may*** develop either individually or jointly a watershed improvement plan. The process for developing a watershed improvement plan is to be conducted consistent with all applicable open meeting laws. Each county, city, or special district, or combination thereof, is to notify the appropriate Regional Board of its intention to develop a watershed improvement plan.

The watershed improvement plan is voluntary – it is not necessarily the same watershed activities required by the permit in the test claim.

SB 310 includes the following local agency fee authority:

> 16103. (a) In addition to making use of other financing mechanisms that are available to local agencies to fund watershed improvement plans and plan measures and facilities, a county, city, special district, or combination thereof may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:
>
> (1) The Regional Board has approved the watershed improvement plan.
>
> (2) The entity or entities that develop the watershed improvement plan make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the feepayer. "Activities," for the purposes of this paragraph,

[250] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 310 (2009-2010 Reg. Sess.) as amended August 31, 2009, page 4.

means the operations and existing structures and improvements subject to regulation under an NPDES permit for municipal separate storm sewer systems.

(3) The fee is not imposed solely as an incident of property ownership.

(b) A county, city, special district, or combination thereof may plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality, including controls and facilities related to the infiltration, retention and reuse, diversion, interception, filtration, or collection of surface runoff, including urban runoff, stormwater, and other forms of runoff, the treatment of pollutants in runoff or other waters subject to water quality regulatory requirements, the return of diverted and treated waters to receiving water bodies, the enhance-ment of beneficial uses of waters of the state, or the beneficial use or reuse of diverted waters.

(c) The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter.

However, Water Code section 16102, subdivision (d), states: "A regional board may, if it deems appropriate, utilize provisions of the approved watershed improvement plan (approved under this new act) to promote compliance with one of more of the regional board's regulatory plans or programs." Subdivision (e) states "Unless a regional board incorporates the provisions of the watershed improvement plan into waste discharge requirements issued to a permittee, the implementation of a watershed improvement plan by a permittee shall not be deemed to be in compliance with those waste discharge requirements."

Therefore, the Commission finds that Water Code section 16103 may only provide offsetting revenue for this test claim to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

D. The holding in *San Diego Unified School Dist. v. Commission on State Mandates* does not apply to the test claim activities.

The State Board's January 2010 comments on the draft staff analysis cite *San Diego Unified v. Commission on States Mandates,*[251] arguing that the permit in this test claim, like the pupil expulsion hearings, are intended to implement a federal law, and has costs that are, in context, de minimis. In *San Diego Unified School District,* the California Supreme Court held costs for hearing procedures and notice are not reimbursable for pupil expulsions that are discretionary under state law. The court found that these hearing procedures are incidental to federal due process requirements and the costs are de minimis, and thus not reimbursable.

The Commission disagrees. The permit in this case does not meet the criteria in the *San Diego Unified School District* case. Unlike the discretionary expulsions in *San Diego Unified School District,* the permit imposes state-mandated activities. And although the permit is intended to implement the federal Clean Water Act, there is no evidence or indication that its costs are de minimis. Claimants submitted declarations of costs totaling over $10 million for fiscal year

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

2007-2008 alone.[252] Claimants further submitted documentation of 2008-2009 costs of over $18 million. The State Board offers no evidence or argument to refute these cost declarations, so the Commission finds that permit activities (except for LID and HMP discussed above) impose costs mandated by the state that are not de minimis.

Summary: To recap fee authority under issue 2, the Commission finds that, due to the fee authority under the police power generally, and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

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

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

[252] The County and city declarations are attached to the test claim.

CONCLUSION

For the reasons discussed above, the Commission finds that parts of 2007 permit issued by the California Regional Quality Control Board, San Diego Region (Order No. R9-2007-001, NPDES No. CAS0108758), are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the claimants to perform the following activities.

The term of the permit is from January 24, 2007 – January 23, 2012.[253] The permit terms and conditions are automatically continued, however, pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits are complied with.[254]

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

Street sweeping (part D.3.a.(5)): Sweeping of Municipal Areas

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

Street sweeping reporting (J.3.a.(3)(c)x-xv): Report annually on the following:

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[253] According to attachment B of the permit: "*Effective Date.* This Order shall become effective on the date of its adoption provided the USEPA has no objection...." "(q) *Expiration.* This Order expires five years after adoption."

[254] According to attachment B of the permit: "(r) *Continuation of Expired Order* [23 CCR 2235.4]. After this Order expires, the terms and conditions of this Order are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on the continuation of expired permits (40 CFR 122.6) are complied with."

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

Conveyance system cleaning (D.3.a.(3)):

(a) Implement a schedule of inspection and maintenance activities to verify proper operation of all municipal structural treatment controls designed to reduce pollutant discharges to or from its MS4s and related drainage structures.

(b) Implement a schedule of maintenance activities for the MS4 and MS4 facilities (catch basins, storm drain inlets, open channels, etc). The maintenance activities shall, at a minimum, include: [¶]...[¶]

iii. Any catch basin or storm drain inlet that has accumulated trash and debris greater than 33% of design capacity shall be cleaned in a timely manner. Any MS4 facility that is designed to be self cleaning shall be cleaned of any accumulated trash and debris immediately. Open channels shall be cleaned of observed anthropogenic litter in a timely manner.

Conveyance system cleaning reporting (J.3.a.(3)(c)(iv)-(viii)): Update and revise the copermittees' JURMPs to contain:

iv. Identification of the total number of catch basins and inlets, the number of catch basins and inlets inspected, the number of catch basins and inlets found with accumulated waste exceeding cleaning criteria, and the number of catch basins and inlets cleaned.

v. Identification of the total distance (miles) of the MS4, the distance of the MS4 inspected, the distance of the MS4 found with accumulated waste exceeding cleaning criteria, and the distance of the MS4 cleaned.

vi. Identification of the total distance (miles) of open channels, the distance of the open channels inspected, the distance of the open channels found with anthropogenic litter, and the distance of open channels cleaned.

vii. Amount of waste and litter (tons) removed from catch basins, inlets, the MS4, and open channels, by category.

viii. Identification of any MS4 facility found to require inspection less than annually following two years of inspection, including justification for the finding.

Educational component (part D.5): To implement an education program using all media as appropriate to (1) measurably increase the knowledge of the target communities regarding MS4s, impacts of urban runoff on receiving waters, and potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s and the environment. At a minimum, the education program shall meet the requirements of this section and address the following target communities:

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

a.(1) Each Copermittee shall educate each target community on the following topics where appropriate: (i) Erosion prevention, (ii) Non storm water discharge prohibitions, and (iii) BMP types: facility or activity specific, LID,-source control, and treatment control.

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

b. SPECIFIC REQUIREMENTS

(1) Municipal Departments and Personnel Education

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

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

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

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

iii. Proper implementation of erosion and sediment control and other BMPs to minimize the impacts to receiving water quality resulting from construction activities.
iv. The Copermittee's inspection, plan review, and enforcement policies and procedures to verify consistent application.
v. Current advancements in BMP technologies.
vi. SUSMP Requirements including treatment options, LID BMPs, source control, and applicable tracking mechanisms.

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

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

(2) New Development and Construction Education

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

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

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

II. Watershed Urban Runoff Management Program (parts E.2.f & E.2.g.)

Each Copermittee shall collaborate with other Copermittees within its WMA(s) [Watershed Management Area] as in Table 4 [of the permit] to develop and

implement an updated Watershed Urban Runoff Management Program for each watershed. Each updated Watershed Urban Runoff Management Program shall meet the requirements of section E of this Order, reduce the discharge of pollutants from the MS4 to the MEP, and prevent urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. At a minimum, each Watershed Urban Runoff Management Program shall include the elements described below: [¶]...[¶]

[Paragraphs (a) through (e) were not part of the test claim.]

f. Watershed Activities

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

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

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

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

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

(a) A description of the activity;

(b) A time schedule for implementation of the activity, including key milestones;

(c) An identification of the specific responsibilities of Watershed Copermittees in completing the activity;

(d) A description of how the activity will address the identified high priority water quality problem(s) of the watershed;

(e) A description of how the activity is consistent with the collective watershed strategy;

(f) A description of the expected benefits of implementing the activity; and

(g) A description of how implementation effectiveness will be measured.

(4) Each Watershed Copermittee shall implement identified Watershed Activities pursuant to established schedules. For each Permit year, no less than two Watershed Water Quality Activities and two Watershed Education Activities shall be in an active implementation phase. A Watershed Water Quality Activity is in an active implementation phase when significant pollutant load reductions, source abatement, or other quantifiable benefits to discharge or receiving water quality can reasonably be established in relation to the watershed's high priority water quality problem(s). Watershed Water Quality Activities that are capital projects are in active implementation for the first year of implementation only. A Watershed Education Activity is in an active implementation phase when changes in attitudes, knowledge, awareness, or behavior can reasonably be established in target audiences.

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

III. Regional Urban Runoff Management Program (parts F.1, F.2 & F.3)

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

Each copermittee shall collaborate with the other Copermittees to develop, implement, and update as necessary a Regional Urban Runoff Management Program that meets the requirements of section F of the permit, reduces the discharge of pollutants from the MS4 to the MEP, and prevents urban runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. The Regional Urban Runoff Management Program shall, at a minimum: [¶]...[¶]

1. Develop and implement a Regional Residential Education Program. The program shall include:

a. Pollutant specific education which focuses educational efforts on bacteria, nutrients, sediment, pesticides, and trash. If a different pollutant is determined to be more critical for the education program, the pollutant can be substituted for one of these pollutants.

b. Education efforts focused on the specific residential sources of the pollutants listed in section F.1.a.

2. Develop the standardized fiscal analysis method required in section G of the permit, and,

3. Facilitate the assessment of the effectiveness of jurisdictional, watershed, and regional programs.

IV. Program Effectiveness Assessment (parts I.1 & I.2)

1. Jurisdictional

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

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

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

(b) Implementation of each major component of the Jurisdictional Urban Runoff Management Program (Development Planning, Construction, Municipal, Industrial/Commercial, Residential, Illicit Discharge[255] Detection and Elimination, and Education); and

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

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

(3) Utilize outcome levels 1-6[256] to assess the effectiveness of each of the items listed in section I.1.a.(1) above, where applicable and feasible.

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

[256] Effectiveness assessment outcome levels are defined in Attachment C of the permit as follows: Effectiveness assessment outcome level 1 – Compliance with Activity-based Permit Requirements – Level 1 outcomes are those directly related to the implementation of specific activities prescribed by this Order or established pursuant to it. Effectiveness assessment outcome level 2 – Changes in Attitudes, Knowledge, and Awareness – Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, business, and municipal employees. Effectiveness assessment outcome level 3 – Behavioral Changes and BMP Implementation – Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation. Effectiveness assessment outcome level 4 – Load Reductions – Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed. Effectiveness assessment outcome level 5 – Changes in Urban Runoff and Discharge Quality – Level 5 outcomes are measured as changes in one or more specific constituents or stressors in discharges into or from MS4s. Effectiveness assessment outcome level 6 – Changes in Receiving Water Quality – Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity [i.e., ecosystem health], or beneficial use attainment.

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

(5) Utilize Implementation Assessment,[257] Water Quality Assessment,[258] and Integrated Assessment,[259] where applicable and feasible.

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

c. As part of its Jurisdictional Urban Runoff Management Program Annual Reports, each Copermittee shall report on its Jurisdictional Urban Runoff Management Program effectiveness assessment as implemented under each of the requirements of sections I.1.a and I.1.b above.

2. Watershed

a. As part of its Watershed Urban Runoff Management Program, each watershed group of Copermittees (as identified in Table 4)[260] shall annually assess the effectiveness of its Watershed Urban Runoff Management Program implementation. At a minimum, the annual effectiveness assessment shall:

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

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

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

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

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

(a) Each Watershed Water Quality Activity implemented;

(b) Each Watershed Education Activity implemented; and

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

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

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

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

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

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

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

b. Based on the results of the effectiveness assessment, the watershed Copermittees shall annually review their Watershed Water Quality Activities, Watershed Education Activities, and other aspects of the Watershed Urban Runoff Management Program to identify modifications and improvements needed to maximize Watershed Urban Runoff Management Program effectiveness, as necessary to achieve compliance with section A of this Order.[261] The Copermittees shall develop and implement a plan and schedule to address the identified modifications and improvements. Watershed Water Quality Activities/Watershed Education Activities that are ineffective or less effective than other comparable Watershed Water Quality Activities/Watershed Education Activities shall be replaced or improved upon by implementation of more effective Watershed Water Quality Activities/Watershed Education Activities. Where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, Watershed Water Quality Activities and Watershed Education Activities applicable to the water quality problems shall be modified and improved to correct the water quality problems.

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

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

Long Term Effectiveness Assessment (I.5):

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

b. The LTEA shall be designed to address each of the objectives listed in section I.3.a.(6)[262] of this Order, and to serve as a basis for the Copermittees' Report of Waste Discharge for the next permit cycle.

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

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

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

1. Collaborate with all other Copermittees regulated under the permit to address common issues, promote consistency among Jurisdictional Urban Runoff

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[262] Part I.3.a.(6) of the permit states: At a minimum, the annual effectiveness assessment shall: (6) Include evaluation of whether the Copermittees' jurisdictional, watershed, and regional effectiveness assessments are meeting the following objectives: (a) Assessment of watershed health and identification of water quality issues and concerns. (b) Evaluation of the degree to which existing source management priorities are properly targeted to, and effective in addressing, water quality issues and concerns. (c) Evaluation of the need to address additional pollutant sources not already included in Copermittee programs. (d) Assessment of progress in implementing Copermittee programs and activities. (e) Assessment of the effectiveness of Copermittee activities in addressing priority constituents and sources. (f) Assessment of changes in discharge and receiving water quality. (g) Assessment of the relationship of program implementation to changes in pollutant loading, discharge quality, and receiving water quality. (h) Identification of changes necessary to improve Copermittee programs, activities, and effectiveness assessment methods and strategies.

Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under this Order.

V. All Copermittee Collaboration (part L)

(a) Collaborate with all other Copermittees to address common issues, promote consistency among Jurisdictional Urban Runoff Management Programs and Watershed Urban Runoff Management Programs, and to plan and coordinate activities required under the permit.

Jointly execute and submit to the Regional Board no later than 180 days after adoption of the permit, a Memorandum of Understanding, Joint Powers Authority, or other instrument of formal agreement that at a minimum: [¶]...[¶]

3. Establishes a management structure to promote consistency and develop and implement regional activities;
4. Establishes standards for conducting meetings, decisions-making, and cost-sharing.
5. Provides guidelines for committee and workgroup structure and responsibilities;
6. Lays out a process for addressing Copermittee non-compliance with the formal agreement.

The Commission finds that due to the fee authority under the police power (Cal. Const. art. XI, § 7) and as governed by the Mitigation Fee Act, there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556 for the following parts of the permit that have a reasonable relationship to property development:

- Hydromodification Management Plan (part D.1.g);
- Updating the Standard Urban Storm Water Mitigation Plans to include Low Impact Development requirements (parts D.1.d.(7) & D.1.d.(8));

The Commission also finds that the claimants' fee or assessment authority is not sufficient within the meaning of Government Code section 17556, subdivision (d), and that there are costs mandated by the state within the meaning of Government Code section 17514 for all the activities in the permit, including:

- The fee authority in Public Resources Code section 40059 for the permit activities in parts D.3.a.5 (street sweeping) and J.3.a.(3)(c)x-xv (reporting on street sweeping);
- The fee authority in Health and Safety Code section 5471, for the permit activities in part D.3.a.(3)(iii) (conveyance system cleaning) or part J.3.a.(3)(c)iv-viii (reporting on conveyance system cleaning) of the permit.

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

- Any fees or assessments approved by the voters or property owners for any activities in the permit, including those authorized by Public Resources Code section 40059 for street sweeping or reporting on street sweeping, and those authorize by Health and Safety Code

section 5471, for conveyance-system cleaning, or reporting on conveyance-system cleaning;

- Any proposed fees that are not subject to a written protest by a majority of parcel owners and that are imposed for street sweeping.
- Fees imposed pursuant to Water Code section 16103 only to the extent that a local agency voluntarily complies with Water Code section 16101, the Regional Board approves the plan and incorporates it into the test claim permit to satisfy the requirements of the permit.

TAB 32

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Los Angeles Regional Quality Control Board Order No. 01-182 Permit CAS004001 Parts 4C2a., 4C2b, 4E & 4F5c3 Filed September 2, 2003, (03-TC-04) September 26, 2003 (03-TC-19) by the County of Los Angeles, Claimant Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants	Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21 *Municipal Stormwater and Urban Runoff Discharges* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted July 31, 2009)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

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

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

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

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

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[4] Government Code section 17557, subdivision (e).

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

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

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

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

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

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
>
> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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

[9] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

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

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra,* 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

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

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

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not " *less stringent* " than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

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[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

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

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

than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

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

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

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

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

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

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

The permit application must propose management programs that the permitting authority will consider in adopting the permit. The management programs must include the following:

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. ... Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

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

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

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,* 143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra,* 143 Cal.App.4th 985, 994.

regional board; "uncontaminated ground water infiltrations" ... and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]...[¶]
>
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: ...

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program ... [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

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

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

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

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

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

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

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

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

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

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

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

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

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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

[52] Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

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

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a

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

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

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

complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260 ..."[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

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

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes ... by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

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

In *Long Beach Unified School Dist. v. State of California*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

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

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

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

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

[66] *Id.* at page 173.

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

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

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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[67] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[68] 33 U.S.C. § 1370.

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

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

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

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

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

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

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

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

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

provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he ... analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes*. ...The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]...[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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

[79] State Board comments submitted June 2009, page 4.

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

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways ... [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law ... and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]
>
> (2) Part 2 of the application shall consist of: [¶]...[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

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

[86] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]...[¶]

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

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

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

[91] Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California,*[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* ...[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems..."[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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

[93] *Id.* at page 173.

[94] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]...[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

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

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, <u>including inspections</u>, to implement and enforce an ordinance, orders or similar means <u>to prevent illicit discharges to the municipal separate storm sewer system</u>; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]...[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures <u>for inspections</u> and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above, [101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified ..." Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

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

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

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

(c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. ... Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

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

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills ...; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III ...;* Restaurants; *Wholesale trade (scrap, auto dismantling)...;* Automotive service facilities; *Fabricated metal products ...; Motor freight ...; Chemical/allied products ...;* Automotive Dealers/Gas Stations ...; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary...; Air Transportation ...; Rubbers/Miscellaneous Plastics ...; Local/Suburban Transit ...; Railroad Transportation ...; Oil & Gas Extraction ...; Lumber/Wood Products...; Machinery Manufacturing ...; Transportation Equipment ...; Stone, Clay, Glass, Concrete ...; Leather/Leather Products...; Miscellaneous Manufacturing ...; Food and kindred Products...; Mining of Nonmetallic Minerals ...; Printing and Publishing ...; Electric/Electronics ...; Paper and Allied Products ...; Furniture and Fixtures ...;* Laundries ...; *Instruments...; Textile Mills Products ...; Apparel ...*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. ... The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]...[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
  - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
  - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
    - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
    - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
    - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

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[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. ... Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]...[¶]

(2) Part 2 of the application shall consist of: [¶]...[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]...[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. ..." (40 CFR § 122.26 (b)(7).)

[117] "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." (40 CFR § 122.2.)

> from construction sites to the municipal storm sewer system, which shall include: [¶]…[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and … [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

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

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

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: ..."

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

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

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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

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

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency ... at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency ... for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

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

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

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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[127] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency ... that requested legislative authority for that local agency ... to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency ... that requests authorization for that local agency ... to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ... if, after a hearing, the commission finds any one of the following: [¶]...[¶] (d) The local agency ... has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

[128] *County of Fresno v. State of California , supra,* 53 Cal.3d 482.

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[130] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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[131] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

[135] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization*, [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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[136] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

[138] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[139] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[140] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 877.

[141] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. ...the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." [Citations omitted] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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[142] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[143] *Ibid.*

[144] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[145] City of Covina, Resolution No. 05-6455.

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. ... Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ....

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it ... holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

[149] *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra,* 79 Cal.App.4th, 935, 945.

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. ...[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]...[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> ...California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra,* 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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[163] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 402.

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]

[¶]...[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

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[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification

Tab 32

TAB 33

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2001- 15

In the Matter of the Petitions of

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
AND
WESTERN STATES PETROLEUM ASSOCIATION

For Review Of Waste Discharge Requirements Order No. 2001-01
for Urban Runoff from San Diego County
[NPDES No. CAS0108758]
Issued by the
California Water Quality Control Board,
San Diego Region

SWRCB/OCC FILES A-1362, A-1362(a)

BY THE BOARD:

On February 21, 2001, the San Diego Regional Water Quality Control Board (Regional Water Board) issued a revised national pollutant discharge elimination system (NPDES) permit in Order No. 2001-01 (permit) to the County of San Diego (County), the 18 incorporated cities within the County, and the San Diego Unified Port District. The permit covers storm water discharges from municipal separate storm sewer systems (MS4) throughout the County. The permit is the second MS4 permit issued for the County, although the first permit was issued more than ten years earlier.[1]

[1] NPDES permits generally expire after five years, but can be extended administratively where the Regional Water Board is unable to issue a new permit prior to the expiration date. As the record in this matter amply demonstrates, the Regional Water Board engaged in an extensive process of issuing draft permits, accepting comments, and holding workshops and hearings since at least 1995.

The permit includes various programmatic and planning requirements for the permittees, including construction and development controls, controls on municipal activities, controls on runoff from industrial, commercial, and residential sources, and public education. The types of controls and requirements included in the permit are similar to those in other MS4 permits, but also reflect the expansion of the storm water program since the first MS4 permit was adopted for San Diego County 11 years ago.[2]

On March 23, 2001, the State Water Resources Control Board (State Water Board or Board) received petitions for review of the permit from the Building Industry Association of San Diego County (BIA) and from the Western States Petroleum Association (WSPA).[3] The petitions are legally and factually related, and have therefore been consolidated for purposes of review.[4] None of the municipal dischargers subject to the permit filed a petition, nor did they file responses to the petitions.

I. BACKGROUND

MS4 permits are adopted pursuant to Clean Water Act section 402(p). This federal law sets forth specific requirements for permits for discharges from municipal storm sewers. One of the requirements is that permits "shall require controls to reduce the discharge of

[2] For a discussion of the evolution of the storm water program, consistent with guidance from the United States Environmental Protection Agency (U.S. EPA), see Board Order WQ 2000-11.

[3] On March 23, the State Water Board also received brief letters from the Ramona Chamber of Commerce, the North San Diego County Association of Realtors, the San Diego County Apartment Association, the National Association of Industrial and Office Properties, and the California Building Industry Association. All of these letters state that they are "joining in" the petition filed by BIA. None of the letters contain any of the required information for petitions, which is listed at Cal. Code of Regs., tit. 23, section 2050. These letters will be treated as comments on the BIA petition. To the extent the authors intended the letters be considered petitions, they are dismissed.

[4] Cal. Code of Regs., tit. 23, section 2054.

pollutants to the maximum extent practicable [MEP]." States establish appropriate requirements for the control of pollutants in the permits.

This Board very recently reviewed the need for controls on urban runoff in MS4 permits, the emphasis on best management practices (BMPs) in lieu of numeric effluent limitations, and the expectation that the level of effort to control urban runoff will increase over time.[5] We pointed out that urban runoff is a significant contributor of impairment to waters throughout the state, and that additional controls are needed. Specifically, in Board Order WQ 2000-11 (hereinafter, LA SUSMP order), we concluded that the Los Angeles Regional Water Board acted appropriately in determining that numeric standards for the design of BMPs to control runoff from new construction and redevelopment constituted controls to the MEP.[6]

The San Diego permit incorporates numeric design standards for runoff from new construction and redevelopment similar to those considered in the LA SUSMP order.[7] In addition, the permit addresses programmatic requirements in other areas. The LA SUSMP order was a precedential decision,[8] and we will not reiterate our findings and conclusions from that decision.[9]

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[5] Board Order WQ 2000-11.

[6] As explained in that Order, numeric design standards are not the same as numeric effluent limitations. While BIA contends that the permit under review includes numeric effluent limitations, it does not. A numeric design standard only tells the dischargers how much runoff must be treated or infiltrated; it does not establish numeric effluent limitations proscribing the quality of effluent that can be discharged following infiltration or treatment.

[7] The San Diego permit also includes provisions that are different from those approved in the LA SUSMP Order, but which were not the subject of either petition. Such provisions include the inclusion of non-discretionary projects. We do not make any ruling in this Order on matters that were not addressed in either petition.

[8] Government Code section 11425.60; State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.

[9] BIA restates some of the issues this Board considered in the LA SUSMP order. For instance, BIA contends that it is inappropriate for the permit to regulate erosion control. While this argument was not specifically addressed in our prior Order, it is obvious that the most serious concern with runoff from construction is the potential for increased erosion. It is absurd to contend that the permit should have ignored this impact from urban runoff.

The petitioners make numerous contentions, mostly concerning requirements that they claim the dischargers will not be able to, or should not be required to, comply with. We note that none of the dischargers has joined in these contentions. We further note that BIA raises contentions that were already addressed in the LA SUSMP order. In this Order, we have attempted to glean from the petition issues that are not already fully addressed in Board Order Board Order WQ 2000-11, and which may have some impact on BIA and its members. WSPA restated the contentions it made in the petition it filed challenging the LA SUSMP order. We will not address those contentions again.[10] But we will address whether the Regional Water Board followed the precedent established there as it relates to retail gasoline outlets.[11]

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[10] On November 8, 2001, following the October 31 workshop meeting that was held to discuss the draft order, BIA submitted a "supplemental brief" that includes many new contentions raised for the first time. (Interested persons who were not petitioners filed comments on the draft order asking the State Water Board to address some of these.) The State Water Board will not address these contentions, as they were not timely raised. (Wat. Code § 13320; Cal. Code of Regs., tit. 23, § 2050(a).) Specific contentions that are not properly subject to review under Water Code section 13320 are objections to findings 16, 17, and 38 of the permit, the contention that permit provisions constitute illegal unfunded mandates, challenges to the permit's inspection and enforcement provisions, objections to permit provisions regarding construction sites, the contention that post-construction requirements should be limited to "discretionary" approvals, the challenge to the provisions regarding local government compliance with the California Environmental Quality Act, and contentions regarding the term "discharge" in the permit. BIA did not meet the legal requirements for seeking review of these portions of the permit.

[11] On November 8, 2001, the State Water Board received eight boxes of documents from BIA, along with a "Request for Entry of Documents into the Administrative Record." BIA failed to comply with Cal. Code of Regs., tit. 23, section 2066(b), which requires such requests be made "prior to or during the workshop meeting." The workshop meeting was held on October 31, 2001. The request will therefore not be considered. BIA also objected in this submittal that the Regional Water Board did not include these documents in its record. The Regional Water Board's record was created at the time the permit was adopted, and was submitted to the State Water Board on June 11, 2001. BIA's objection is not timely.

II. CONTENTIONS AND FINDINGS[12]

Contention: BIA contends that the discharge prohibitions contained in the permit are "absolute" and "inflexible," are not consistent with the standard of "maximum extent practicable" (MEP), and financially cannot be met.

Finding: The gist of BIA's contention concerns Discharge Prohibition A.2, concerning exceedance of water quality objectives for receiving waters: "Discharges from MS4s which cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited." BIA generally contends that this prohibition amounts to an inflexible "zero contribution" requirement.

BIA advances numerous arguments regarding the alleged inability of the dischargers to comply with this prohibition and the impropriety of requiring compliance with water quality standards in municipal storm water permits. These arguments mirror arguments made in earlier petitions that required compliance with water quality objectives by municipal storm water permittees. (See, e.g., Board Orders WQ 91-03, WQ 98-01, and WQ 99-05.) This Board has already considered and upheld the requirement that municipal storm water discharges must not cause or contribute to exceedances of water quality objectives in the receiving water. We adopted an iterative procedure for complying with this requirement, wherein municipalities must report instances where they cause or contribute to exceedances, and then must review and improve BMPs so as to protect the receiving waters. The language in the permit in Receiving

[12] This Order does not address all of the issues raised by the petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349]; Cal. Code Regs., tit. 23, § 2052.) We make no determination as to whether we will address the same or similar issues when raised in future petitions.

Water Limitation C.1 and 2 is consistent with the language required in Board Order WQ 99-05, our most recent direction on this issue.[13]

While the issue of the propriety of requiring compliance with water quality objectives has been addressed before in several orders, BIA does raise one new issue that was not addressed previously. In 1999, the Ninth Circuit Court of Appeals issued an opinion addressing whether municipal storm water permits must require "strict compliance" with water quality standards.[14] (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159.) The court in *Browner* held that the Clean Water Act provisions regarding storm water permits do not require that municipal storm-sewer discharge permits ensure strict compliance with water quality standards, unlike other permits.[15] The court determined that: "Instead, [the provision for municipal storm water permits] *replaces* the requirements of [section 301] with the requirement that municipal storm-sewer dischargers '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 . . . determines appropriate for the control of such pollutants'." (191 F.3d at 1165.) The court further held that the Clean Water Act does grant the permitting agency discretion to determine what pollution controls are appropriate for municipal storm water discharges. (*Id.* at 1166.) Specifically, the court stated

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[13] In addition to Discharge Prohibition A.2, quoted above, the permit includes Receiving Water Limitation C.1, with almost identical language: "Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited." Receiving Water Limitation C.2 sets forth the iterative process for compliance with C.1, as required by Board Order WQ 99-05.

[14] "Water quality objectives" generally refers to criteria adopted by the state, while "water quality standards" generally refers to criteria adopted or approved for the state by the U.S. EPA. Those terms are used interchangeably for purposes of this Order.

[15] Clean Water Act § 301(b)(1)(C) requires that most NPDES permits require strict compliance with quality standards.

that U.S. EPA had the authority either to require "strict compliance" with water quality standards through the imposition of numeric effluent limitations, or to employ an iterative approach toward compliance with water quality standards, by requiring improved BMPs over time. (*Id.*) The court in *Browner* upheld the EPA permit language, which included an iterative, BMP-based approach comparable to the language endorsed by this Board in Order WQ 99-05.

In reviewing the language in this permit, and that in Board Order WQ 99-05, we point out that our language, similar to U.S. EPA's permit language discussed in the *Browner* case, does not require strict compliance with water quality standards. Our language requires that storm water management plans be designed to achieve compliance with water quality standards. Compliance is to be achieved over time, through an iterative approach requiring improved BMPs. As pointed out by the *Browner* court, there is nothing inconsistent between this approach and the determination that the Clean Water Act does not mandate strict compliance with water quality standards. Instead, the iterative approach is consistent with U.S. EPA's general approach to storm water regulation, which relies on BMPs instead of numeric effluent limitations.

It is true that the holding in *Browner* allows the issuance of municipal storm water permits that limit their provisions to BMPs that control pollutants to the maximum extent practicable (MEP), and which do not require compliance with water quality standards. For the reasons discussed below, we decline to adopt that approach. The evidence in the record before us is consistent with records in previous municipal permits we have considered, and with the data we have in our records, including data supporting our list prepared pursuant to Clean Water Act section 303(d). Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we

must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvement of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limitations and we will continue to follow an iterative approach, which seeks compliance over time.[16] The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced throughout large and medium municipal storm sewer systems.[17]

We have reviewed the language in the permit, and compared it to the model language in Board Order WQ 99-05. The language in the Receiving Water Limitations is virtually identical to the language in Board Order WQ 99-05. It sets a limitation on discharges that cause or contribute to violation of water quality standards, and then it establishes an iterative approach to complying with the limitation. We are concerned, however, with the language in Discharge Prohibition A.2, which is challenged by BIA. This discharge prohibition is similar to the Receiving Water Limitation, prohibiting discharges that cause or contribute to exceedance of

[16] Exceptions to this general rule are appropriate where site-specific conditions warrant. For example, the Basin Plan for the Lake Tahoe basin, which protects an outstanding national resource water, includes numeric effluent limitations for storm water discharges.

[17] While BIA argues that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric effluent limitations, this is simply not true. The permit is clearly BMP-based, and there are no numeric effluent limitations. BIA also claims that the permit will require the construction of treatment plants for storm water similar to the publicly-owned treatment works for sanitary sewage. There is no basis for this contention; there is no requirement in the permit to treat all storm water. The emphasis is on BMPs.

water quality objectives. The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2. The permit, in Discharge Prohibition A.5, also incorporates a list of Basin Plan prohibitions, one of which also prohibits discharges that are not in compliance with water quality objectives. (See, Attachment A, prohibition 5.) Language clarifying that the iterative approach applies to that prohibition is also necessary.[18]

BIA also objects to Discharge Prohibition A.3, which appears to require that treatment and control of discharges must always occur prior to entry into the MS4: "Discharges into and from MS4s containing pollutants which have not been reduced to the [MEP] are prohibited."[19] An NPDES permit is properly issued for "discharge of a pollutant" to waters of the United States.[20] (Clean Water Act § 402(a).) The Clean Water Act defines "discharge of a pollutant" as an "addition" of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges "from municipal storm sewers."

We find that the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. It is certainly

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[18] The iterative approach is not necessary for all Discharge Prohibitions. For example, a prohibition against pollution, contamination or nuisance should generally be complied with at all times. (See, Discharge Prohibition A.1.) Also, there may be discharge prohibitions for particularly sensitive water bodies, such as the prohibition in the Ocean Plan applicable to Areas of Special Biological Significance.

[19] Discharge Prohibition A.1 also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occurs "in waters of the state." Therefore, it is interpreted to apply only to discharges to receiving waters.

[20] Since NPDES permits are adopted as waste discharge requirements in California, they can more broadly protect "waters of the state," rather than being limited to "waters of the United States." In general, the inclusion of "waters (footnote continued)

true that in most instances it is more practical and effective to prevent and control pollution at its source. We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use "waters of the United States" as part of their sewer system, and that the Board is charged with protecting all such waters. Nonetheless, the specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.[21] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.

Contention: State law requires the adoption of wet weather water quality standards, and the permit improperly enforces water quality standards that were not specifically adopted for wet weather discharges.

Finding: This contention is clearly without merit. There is no provision in state or federal law that mandates adoption of separate water quality standards for wet weather conditions. In arguing that the permit violates state law, BIA states that because the permit applies the water quality objectives that were adopted in its Basin Plan, and those objectives were not specifically adopted for wet weather conditions only, the Regional Water Board violated

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of the state" allows the protection of groundwater, which is generally not considered to be "waters of the United States."

[21] There are other provisions in the permit that refer to restrictions "into" the MS4. (See, e.g., Legal Authority D.1.) Those provisions are appropriate because they do not apply the MEP standard to the permittees, but instead require the permittees to demand appropriate controls for discharges into their system. For example, the federal regulations require that MS4s have a program "to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(D).)

Water Code section 13241. These allegations appear to challenge water quality objectives that were adopted years ago. Such a challenge is clearly inappropriate as both untimely, and because Basin Plan provisions cannot be challenged through the water quality petition process. (See Wat. Code § 13320.) Moreover, there is nothing in section 13241 that supports the claim that Regional Water Boards must adopt separate wet weather water quality objectives. Instead, the Regional Water Board's response indicates that the water quality objectives were based on all water conditions in the area. There is nothing in the record to support the claim that the Regional Water Board did not in fact consider wet weather conditions when it adopted its Basin Plan. Finally, Water Code section 13263 mandates the Regional Water Board to implement its Basin Plan when adopting waste discharge requirements. The Regional Water Board acted properly in doing so.

BIA points to certain federal policy documents that authorize states to promulgate water quality standards specific to wet-weather conditions.[22] Each Regional Water Board considers revisions to its Basin Plan in a triennial review. That would be the appropriate forum for BIA to make these comments.

Contention: BIA contends that the permit improperly classifies urban runoff as "waste" within the meaning of the Water Code.

Finding: BIA challenges Finding 2, which states that urban runoff is a waste, as defined in the Water Code, and that it is a "discharge of pollutants from a point source" under the federal Clean Water Act. BIA contends that the legislative history of section 13050(d) supports

[22] These documents do not support the claim that U.S. EPA and the Clinton Administration indicated that the absence of such regulations "is a major problem that needs to be addressed," as claimed in BIA's Points and Authorities, at page 18.

its position that "waste" should be interpreted to exclude urban runoff. The Final Report of the Study Panel to the California State Water Resources Control Board (March, 1969) is the definitive document describing the legislative intent of the Porter-Cologne Water Quality Control Act. In discussing the definition of "waste," this document discusses its broad application to "current drainage, flow, or seepage into waters of the state of harmful concentrations" of materials, including eroded earth and garbage.

As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit. (At page 3.) It is also undisputed that urban runoff contains "waste" within the meaning of Water Code section 13050(d), and that the federal regulations define "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant," and not the runoff itself.[23] The finding does create some confusion, since there are discharge prohibitions that have been incorporated into the permit that broadly prohibit the discharge of "waste" in certain circumstances. (See Attachment A to the permit.) The finding will therefore be amended to state that urban runoff contains waste and pollutants.

Contention: BIA contends that the Regional Water Board violated California Environmental Quality Act (CEQA).

[23] The Regional Water Board is appropriately concerned not only with pollutants in runoff but also the volume of runoff, since the volume of runoff can affect the discharge of pollutants in the runoff. (See Board Order WQ 2000-11, at page 5.)

Finding: As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits.[24] BIA contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting "any waste discharge requirement" pursuant to Chapter 5.5 (§§ 13370 et seq., which applies to NPDES permits).[25] BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847. That case upheld the State Water Board's view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant only to state law. The case did not concern an NPDES permit, and does not support BIA's argument.

Contention: WSPA contends that the Regional Water Board did not follow this Board's precedent for retail gasoline outlets (RGOs) established in the LA SUSMP order.

Finding: In the LA SUSMP order, this Board concluded that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. We also noted that, in light of the small size of many RGOs and the proximity to underground tanks, it might not always be feasible or safe to employ treatment methodologies. We directed the Los Angeles Regional Water Board to mandate that RGOs

[24] Water Code section 13389; see, e.g., Board Order WQ 2000-11.

[25] The exemption does have an exception for permits for "new sources" as defined in the Clean Water Act, which is not applicable here.

employ the BMPs listed in a publication of the California Storm Water Quality Task Force. (*Best Management Practice Guide – Retail Gasoline Outlets* (March 1997).) We also concluded that RGOs should not be subject to the BMP design standards at this time. Instead, we recommended that the Regional Water Board undertake further consideration of a threshold relative to size of the RGO, number of fueling nozzles, or some other relevant factor. The LA SUSMP order did not preclude inclusion of RGOs in the SUSMP design standards, with proper justification, when the permit is reissued.

The permit adopted by the Regional Water Board did not comply with the directions we set forth in the LA SUSMP order for the regulation of RGOs. The permit contains no findings specific to the issues discussed in our prior order regarding RGOs, and includes no threshold for inclusion of RGOs in SUSMPs. Instead, the permit requires the dischargers to develop and implement SUSMPs within one year that include requirements for "Priority Development Project Categories," including "retail gasoline outlets." While other priority categories have thresholds for their inclusion in SUSMPs, the permit states: "Retail Gasoline Outlet is defined as any facility engaged in selling gasoline."[26]

The Regional Water Board responded that it did follow the directions in the LA SUSMP order. First, it points to findings that vehicles and pollutants they generate impact receiving water quality. But the only finding that even mentions RGOs is finding 4, which simply lists RGOs among the other priority development project categories as land uses that generate more pollutants. The Regional Water Board staff also did state some justifications for the inclusion of RGOs in two documents. The Draft Fact Sheet explains that RGOs contribute

[26] Permit at F.1.b(2)(a)(x).

pollutants to runoff, and opines that there are appropriate BMPs for RGOs. The staff also prepared another document after the public hearing, which was distributed to Board Members prior to their vote on the permit, and which includes similar justifications and references to studies.[27] The LA SUSMP order called for some type of threshold for inclusion of RGOs in SUSMPs. The permit does not do so. Also, justifications for permit provisions should be stated in the permit findings or the final fact sheet, and should be subject to public review and debate.[28] The discussion in the document submitted after the hearing did not meet these criteria. There was some justification in the "Draft Fact Sheet," but the fact sheet has not been finalized.[29] In light of our concerns over whether SUSMP sizing criteria should apply to RGOs, it was incumbent on the Regional Water Board to justify the inclusion of RGOs in the permit findings or in a final fact sheet, and to consider an appropriate threshold, addressing the concerns we stated. The Regional Water Board also responded that when the dischargers develop the SUSMPs, the dischargers might add specific BMPs and a threshold as directed in the LA SUSMP order. But the order specifically directed that any threshold, and the justification therefore, should be included in the permit. The Regional Water Board did not comply with these directions.

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[27] See "Comparison Between Tentative Order No. 2001-01 SUSMP Requirements and LARWQCB SUSMP Requirements (as Supported by SWRCB Order WQ 2000-11)."

[28] See 40 C.F.R. sections 124.6(e) and 124.8.

[29] U.S. EPA regulations require that there be a fact sheet accompanying the permit. (40 C.F.R. § 124.8.) The record contains only a draft fact sheet, which was never published or distributed in final form. The Regional Water Board should finalize the fact sheet, accounting for any revisions made in the final permit, and publish it on its web site as a final document.

III. CONCLUSIONS

Based on the discussion above, the Board concludes that:

1. The Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable. The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system, and for discharges "to" waters of the United States, but not for discharges "into" the sewer system.

2. The Regional Water Board was not required to adopt wet-weather specific water quality objectives.

3. The Regional Water Board inappropriately defined urban runoff as "waste."

4. The Regional Water Board did not violate the California Environmental Quality Act.

5. The permit will be revised to delete retail gasoline outlets from the Priority Development Project Categories for Standard Urban Storm Water Mitigation Plans. The Regional Water Board may consider adding retail gasoline outlets, upon inclusion of appropriate findings and a threshold describing which outlets are included in the requirements.

IV. ORDER

IT IS HEREBY ORDERED that the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems in San Diego County (Order No. 2001-01) are revised as follows:

1. Part A.3: The words "into and" are deleted.

2. Part C.2: Throughout the first paragraph, the words ", Part A.2, and Part A.5 as it applies to Prohibition 5 in Attachment A" shall be inserted following "Part C.1."

3. Finding 2: Revise the finding to read: **URBAN RUNOFF CONTAINS "WASTE" AND "POLLUTANTS"**: Urban runoff contains waste, as defined in the California Water Code, and pollutants, as defined in the federal Clean Water Act, and adversely affects the quality of the waters of the State.

4. Part F.1.b(2)(a): Delete section "x."

In all other respects the petitions are dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 15, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Clerk to the Board

TAB 34

DEPT. OF ENV. v. ANACOSTIA RIVERKEEPER

Nos. 42, Sept. Term, 2015, 43, Sept. Term, 2015, 44, Sept. Term, 2015.

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MARYLAND DEPARTMENT OF the ENVIRONMENT, et al. v. ANACOSTIA RIVERKEEPER, et al. Blue Water Baltimore, et al. v. Maryland Department of the Environment. Blue Water Baltimore, et al. v. Maryland Department of the Environment, et al.

Court of Appeals of Maryland.

March 11, 2016.

Reconsideration Denied May 20, 2016.

Attorney(s) appearing for the Case

Paul N. De Santis, Asst. Atty. Gen. (Brian E. Frosh, Atty. Gen. of Maryland, Baltimore, MD), on brief, for Petitioners in No. 42, Sept. Term, 2015.

Jennifer C. Chavez (Khushi K. Desai, Earthjustice, Washington, DC), on brief, for Respondents in No. 42, Sept. Term, 2015.

Jennifer C. Chavez (Khushi K. Desai, Earthjustice, Washington, DC), on brief, for Appellants in No. 43, Sept. Term, 2015.

Paul W. Smail (Jon Mueller, Chesapeaker Bay Foundation, Inc., Annapolis, MD), on brief, for Appellants in No. 43, Sept. Term, 2015.

Paul N. De Santis, Asst. Atty. Gen. (Brian E. Frosh, Atty. Gen. of Maryland, Baltimore, MD; Nancy McCutchan Duden, Co. Atty., Kelly Phillips Kenney, Asst. Co. Atty., Anne Arundel County Office of Law, Annapolis, MD; M. Andree Green, Co. Atty., Josue Pierre, Associate Co. Atty., Prince George's County Office of Law, Upper Marlboro, MD), on brief, for Appellee in No. 43, Step. Term, 2015.

Jennifer C. Chavez (Khushi K. Desai, Earthjustice, Washington, DC; Paul W. Smail, Jon Mueller, Chesapeake Bay Foundation, Inc., Annapolis, MD), on brief, for Appellants in No. 44, Sept. Term, 2015.

M. Rosewin Sweeney (Thomas M. Lingan, Diana M. Krevor, Venable, LLP, Baltimore, MD; George A. Nilson, City Solicitor, Baltimore City Law Department, Baltimore, MD), on brief, for Appellees in No. 44, Sept. Term, 2015.

Paul N. De Santis, Asst. Atty. Gen. (Brian E. Frosh, Atty. Gen. of Maryland, Baltimore, MD; Nancy McCutchan Duden, Co. Atty., Kelly Phillips Kenney, Asst. Co. Atty., Anne Arundel County Office of Law, Annapolis, MD; Andree Green, Co. Atty., Josue Pierre, Associate Co. Atty., Prince George's County Office of Law, Upper Marlboro, MD), on brief, for Appellees in No. 44, Sept. Term, 2015.

Argued before BARBERA, C.J., BATTAGLIA, GREENE, ADKINS, McDONALD, WATTS, GLENN T. HARRELL, JR. (Retired, Specially Assigned), JJ.

ADKINS, *J.*

FACTS AND LEGAL PROCEEDINGS

Maryland Department of the Environment ("MDE") issued municipal separate storm sewer system ("MS4") discharge permits ("the Permits") to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County ("the Counties"). Multiple organizations argue that the Permits do not comply with federal and state law, and they request that we remand for MDE to correct these legal errors. [1]

Federal Framework: NPDES Permits and Municipal Stormwater Discharges

Federal Framework: NPDES Permits and Municipal Stormwater Discharges

Under the Clean Water Act ("CWA"), the discharge of pollutants is illegal. 33 U.S.C. § 1311. Through the National Pollution Discharge Elimination System ("NPDES"), [2] 33 U.S.C. § 1342, either the Environmental Protection Agency ("EPA") or an EPA-approved state, such as Maryland, may issue permits exempting a discharger from this prohibition. *See Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 265 (4th Cir.2001). MDE is the authority in Maryland that administers the NPDES program. Code of Maryland Regulations ("COMAR") 26.08.04.07. An NPDES permit, however, does not give a discharger carte blanche. "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102, 124 S.Ct. 1537, 158

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L.Ed.2d 264 (2004). These limits are called effluent limitations. *See* 33 U.S.C. § 1362(11) (defining an effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance"). The type of discharge determines the type of limitations the permit must impose on the discharger.

The Permits before us control stormwater pollutant discharge. [3] Stormwater consists of the rain and snowmelt that filters through the soil and courses over surfaces — collecting pollutants along the way — before passing through the municipal storm sewer systems [4] and into waterbodies. During the development of the Permits, the Water Groups explained the problems that stormwater poses, whether to the surface conditions of Maryland's waters, for humans who recreate and subsist on them, and for wildlife who live in them. *See* Letter with Comments on Draft MS4 Permit for Baltimore City from Blue Water Baltimore, Inc. and Earthjustice, to Brian Clevenger, MDE (Sept. 21, 2012). In recognition of extensive public commentary on the severity of the problems associated with stormwater, MDE stated: "[i]t becomes fairly easy for all organizations, individuals, and government agencies to agree that urban stormwater is a problem that must be addressed." MDE, Response to Formal Comments for Montgomery County NPDES Permit (2009).

Nevertheless, municipal stormwater discharge is "highly intermittent," "usually characterized by very high flows occurring over relatively short time intervals," and "depend[s] on the activities occurring on the lands." *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed.Reg. 47,990, 48,038 (Nov. 16, 1990) (codified at 40 C.F.R. § 122.26). It is also difficult to discern the amount of pollutant that any one discharger contributes to a waterbody because municipalities have so many outfalls, or discharge points, leading into the waters. *See* MDE, Montgomery County NPDES Permit Fact Sheet (900 outfalls); MDE, Anne Arundel County NPDES Permit Fact Sheet (nearly 1,000 outfalls); MDE, Baltimore County NPDES Permit Fact Sheet (nearly 700 outfalls.); MDE, Prince George's County NPDES Permit Fact Sheet (more than 4,000 outfalls); MDE, Baltimore City NPDES Permit Fact Sheet (around 350 outfalls.); *see also* 40 C.F.R.

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§ 122.26(b)(5), (9) (outlining minimum diameters of pipes in major MS4 outfalls). [5]

Because of the nature of municipal stormwater discharges, Congress adopted a flexible approach to the control of pollutants in MS4s. *See* 55 Fed.Reg. at 48,038 (The Congressional Record from 1986 stated not only that "an end-of-the-pipe treatment technology is not appropriate for [the MS4] discharge" but also that "[MS4] controls may be different in different permits."). [6] Pursuant to 33 U.S.C. § 1342(p)(3)(B)(iii), municipal stormwater permits "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...." [7]

Best management practices ("BMPs") have been a long-standing control or effluent limitation [8] in MS4 permits. *See* 40 C.F.R. § 122.44(k)(2) (BMPs "control or abate the discharge of pollutants when [a]uthorized under [33 U.S.C. § 1342(p)]"); *id.* § 122.44(k)(3) (BMPs are an appropriate control when "[n]umeric effluent limitations are infeasible"); *see also Tualatin Riverkeepers v. Or. Dep't of Envtl. Quality*, 235 Or.App. 132, 230 P.3d 559, 564 (2010) ("`Best management practices,' such as those incorporated in the permits at issue in this case, are a type of effluent limitation."). The EPA defined BMPs to mean "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of `waters of the United States.'" 40 C.F.R. § 122.2; *cf. Natural Res. Def. Council, Inc. v. EPA*, 808 F.3d 556, 579 (2d Cir. 2015) ("But EPA's narrative WQBEL [water-quality based effluent limitation] does not qualify as a BMP, as it is neither a practice nor a procedure."). Examples of the types of BMPs the Counties might implement pursuant to the Permits are infiltration practices and green roofs. [9]

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Through guidance memos, the EPA has endorsed the use of BMPs in MS4s for decades but has increasingly recommended that, where feasible, such permits include numeric effluent limitations. Interim Permitting Approach for Water-Quality Based Effluent Limitations in Storm Water Permits, 61 Fed.Reg. 43,761 (1996); EPA, Memorandum on Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs § 3 (2002) [hereinafter "2002 Memo"]; EPA, Memorandum on Revisions to the November 22, 2002 Memorandum 4-5 (2010) [hereinafter "2010 Memo"]; EPA, Memorandum on Revisions to the November 22, 2002 Memorandum at 4 n. 5 (2014) [hereinafter "2014 Memo"]. (A "numeric" effluent limitation "refers to [a] limitation[ ] with a quantifiable or measurable parameter related to a pollutant (or pollutants).").

Total Maximum Daily Loads ("TMDLs")

The concept of total maximum daily load ("TMDL") looms large in this case. [10] We begin by setting forth its basic purpose, then unpacking its complex formation.

TMDLs inform. *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 291 (3d Cir. 2015) ("Our understanding of [TMDLs] as informational tools is supported by every case and piece of scholarship to consider them as well as the language of the Chesapeake Bay TMDL itself."); *see also* EPA, Chesapeake Bay TMDL § 1.41, at 1-15 (2010) ("TMDLs are `primarily informational tools' that `serve as a link in an implementation chain....'"), *available at* http://www.epa.gov/chesapeake-bay-tmdl/ chesapeake-bay-tmdl-document [https:// perma.cc/9R7V-9VHV].

TMDLs arise out of a multi-step process that begins with the establishment of water quality standards ("WQS"). *See Am. Farm Bureau Fed'n*, 792 F.3d at 289 ("TMDLs happen after a state enacts pursuant to its law (but required by the Clean Water Act) `water quality standards.'"). Because the EPA and the states interact throughout this process, it has been described as one of "cooperative federalism." *Id.* at 288; *see Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 214-17 (D.D.C.2011).

Water quality standards, as the term itself suggests, protect water quality. 40 C.F.R. § 130.2(d); COMAR 26.08.02.01(A). Each state must set water quality standards by assigning a "use" to a water, such as recreation or fishing, then developing criteria to protect those uses, as well as ensuring that higher quality waters do not degrade to the minimally accepted standard (also known as an anti-degradation policy). 33 U.S.C. § 1313; COMAR 26.08.02.01(B)(1). All water quality standards are subject to EPA review, and if the EPA does not approve of them, the EPA will set those standards itself. 33 U.S.C. § 1313.

By way of example, the EPA approved a TMDL that MDE submitted for fecal bacteria for the Non-tidal Cabin John Creek Basin in Montgomery County in 2007. *See* MDE, Total Maximum Daily Loads of Fecal

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Bacteria for the Non-tidal Cabin John Creek Basin in Montgomery County, Maryland (Document version: Oct. 13, 2006) [hereinafter "John Creek Basin TMDL"]. These bacteria are microscopic organisms in animal waste. Fecal bacteria in water can raise the risk of illness in humans who recreate there. *Id.* at § 1.0, at 1. To develop the WQS, MDE selected "water contact recreation and protection of aquatic life and public water supply" as the use of the water and 126 MPN [11] per 100 milliliters as the criteria. *Id.* at § 2.3, at 11 (citing COMAR 26.08.02.08(O) and 26.08.02.03-3). This figure (126) represents a mean density for this pollutant. *Id.; see* 40 C.F.R. § 130.2(i) ("[M]ass per time, toxicity, or [an]other appropriate measure" may be used to express TMDLs.).

After setting WQSs, the states establish effluent limitations in permits as the primary way to meet the WQSs because, as we have explained, effluent limitations restrict the discharge of pollutants. *See* 33 U.S.C. § 1362(11). Nevertheless, we note, importantly, that *MS4s are not subject to* the requirement of imposing effluent limitations "necessary to meet water quality standards." *See* 33 U.S.C. § 1311(b)(1)(C); *see also Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1165 (9th Cir.1999); *cf.* 33 U.S.C. § 1342(p)(3)(A) (Industrial dischargers must comply with 33 U.S.C. § 1311.). [12] This important point notwithstanding, Congress requires that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by [33 U.S.C. § 1311] are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A).

This is where the TMDL comes into play. The TMDL tells a state what is the threshold amount of a pollutant that a body of water can tolerate before violating the WQS. *See In re City of Moscow, Idaho,* 10 E.A.D. 135, 2001 WL 988721, at *4 (EAB July 27, 2001) ("A TMDL is a measure of the total amount of a pollutant from point sources, nonpoint sources and natural background, that a water quality limited segment can tolerate without violating the applicable water quality standards."); EPA, Chesapeake Bay TMDL § 1.1, at 1-2 ("A TMDL specifies the maximum amount of a pollutant that a waterbody can receive and still meet applicable WQS."). [13]

States must establish TMDLs "at a level necessary to implement the applicable water quality standards," 33 U.S.C. § 1313(d)(1)(C), when they identify those waters for which effluent limitations cannot implement the WQSs, 33 U.S.C.

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§ 1313(d)(1)(A). [14] As with water quality standards, the states have the obligation of setting TMDLs and submitting them to the EPA for approval. *See supra* MDE, John Creek Basin TMDL (The EPA approved of MDE's TMDL in March 2007.). If the EPA disapproves of the TMDLs, the EPA will set them itself. 33 U.S.C. § 1313(d)(2).

For this case, wasteload allocations ("WLAs") are the most critical part of the TMDL equation. *See* 40 C.F.R. § 130.2(i) (A TMDL is "[t]he sum of the individual WLAs for point sources and LAs [load allocations] for nonpoint sources and natural background."). The WLA represents a water's "loading capacity" assigned to its "point sources of pollution." *Id.* § 130.2(h). Continuing with our example, MDE set the TMDL for fecal bacteria at 176.36 billion MPN/day, the LA at 68.17 billion MPN/day, and the WLA at 108.19 billion MPN/day. MDE, John Creek Basin TMDL. [15]

Although TMDLs are informational tools, of which WLAs are a part, WLAs are more akin to restrictions. *See Am. Farm Bureau Fed'n v. EPA,* 984 F.Supp.2d 289, 328 (M.D.Pa.2013) ("WLAs are not permit limits *per se;* rather they still require translation into permit limits....") (citation omitted) (internal quotation marks omitted) (emphasis in original), *aff'd,* 792 F.3d 281 (3d Cir.2015). Under 40 C.F.R. § 122.44(d)(1)(vii)(B), permitting authorities must ensure that effluent limitations "are consistent with the assumptions and requirements" of any approved WLA. [16]

We conclude our introduction of TMDLs by noting that MS4s are subject to the MEP standard under 33 U.S.C. § 1342. MS4s are not, however, required to impose effluent limitations necessary to meet water quality standards. The CWA still requires Maryland to set water quality standards and TMDLs — subject to the EPA's approval. Flowing from this obligation is the requirement that MS4s are subject to effluent limitations that are consistent with WLAs of EPA-approved TMDLs.

The Chesapeake Bay TMDL

As we will discuss in more detail, the Permits require the Counties to take actions to make progress in meeting the WLAs of many EPA-approved TMDLs. [17]

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By far, though, the most critical TMDL in this case is the Chesapeake Bay TMDL ("Bay TMDL").

Regarded as a national treasure, [18] the Chesapeake Bay is the largest estuary in the United States, a product of flooding from the Susquehanna River over thousands of years. Alice Jane Lippson, The Chesapeake Bay in Maryland: An Atlas of Natural Resources 2 (Johns Hopkins University Press 1973). Over 2,000 species of animals and plants reside in the Chesapeake Bay. Alice Jane Lippson & Robert L. Lippson, Life in the Chesapeake Bay viii (Johns Hopkins University Press 1984). These include phytoplankton, the blue crab, and striped bass, among many, many others. Lippson, The Chesapeake Bay in Maryland, *supra* at 14, 26, 36. In addition to housing much wildlife, the Chesapeake Bay is a shipping and commerce hub and a source of recreation. Chesapeake Bay Program, Chesapeake Bay: Introduction to an Ecosystem 2 (2004).

Human activity, however, threatens this complex ecosystem. "Excess sediment and nutrients endanger the Bay's water quality." *Id.* at 3-4. Such threats include: depriving species of oxygen; delivering chemicals which collect in animal tissue; and even destroying habitats because sunlight cannot reach critical underwater grasses where species reside. *Id.*

There is, then, no underestimating the importance of the restoration of the Chesapeake Bay in Maryland. *See Am. Farm Bureau,* 984 F.Supp.2d at 298 ("[The Bay] has been described as one of the most biologically productive ecosystems in the world," and, along with its watersheds, "add[s] ecological, economic, recreational, historic, and cultural value to the region.").

How to restore the Bay, however, has been a prolonged, frustrated process. *See id.* (The Bay TMDL "is not a new or recent idea," and thus, "it would be

How to restore the Bay, however, has been a prolonged, frustrated process. See id. ("The Bay TMDL" is not a new or recent idea, "and thus," it would be improper to view the Final TMDL in a vacuum as a single, isolated effort to restore water quality to the Chesapeake Bay."). Some of these restoration efforts include the Chesapeake Bay Agreement in 1980, another agreement in 1987, amendments to the agreement in 1992, and the Chesapeake 2000 Agreement. Department of Legislative Services, Office of Policy Analysis, Chesapeake Bay Restoration and the Tributary Strategy: An Analysis of Maryland's Efforts to Meet the Nutrient and Sediment Reduction Goals of the *Chesapeake 2000* Agreement 3-4 (2007).

The EPA established the Bay TMDL in December 2010. *See Am. Farm Bureau Fed'n,* 792 F.3d at 290 ("As noted, for the Chesapeake Bay the relevant states and the EPA agreed that the EPA would draft the TMDL in the first instance."). It has survived legal challenges before the U.S. District Court for the Middle District of Pennsylvania as well as the Third Circuit. [19]

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See Am. Farm Bureau Fed'n, 984 F.Supp.2d at 294; *Am. Farm Bureau Fed'n,* 792 F.3d at 287. These courts have noted that the efforts to restore the Chesapeake Bay extend back decades, and that the development of the Bay TMDL itself has been a decade-long process. *Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 299; *Am. Farm Bureau Fed'n,* 792 F.3d at 291.

The Bay TMDL provides information pertaining to pollution reduction for nitrogen, phosphorus and sediment in the Chesapeake Bay and applies to the District of Columbia and the six "Bay" states, including Maryland. EPA, Chesapeake Bay TMDL at ES-1. [20]

Modeling

Before delving into Maryland's role in the formation of the Bay TMDL, we must discuss the "critical and valuable" role that modeling played in the Bay TMDL's development. EPA, Chesapeake Bay TMDL at ES-5. [21] "Modeling is an approach that uses observed and simulated data to replicate what is occurring in the environment to make future predictions." *Id.* "A model `is an abstraction from and simplification of the real world.'" *Am. Farm Bureau,* 984 F.Supp.2d at 340 (citation omitted). Models are essential when one seeks to study "ecosystems that are too large or complex for real-world monitoring," such as the Chesapeake Bay and its watersheds. Chesapeake Bay Program, About the Bay Program: Modeling, *available at* http://www.chesapeakebay.net/about/programs/ modeling [https://perma.cc/RDM4-C4XF] (last visited Feb. 9, 2016) [hereinafter CBP: Modeling].

A prominent component in the modeling of the Bay TMDL was the Phase 5.3 Chesapeake Bay Watershed Model ["Phase 5.3 Model"]. EPA, Chesapeake Bay TMDL, at 5-19. [22] "The Phase 5.3 Model is the most recent of a series of increasingly refined versions of the Chesapeake Bay Watershed Model." EPA, Chesapeake Bay Phase 5.3 Community Watershed Model § 1.2.1, at 1-13 (2010), *available at* http://www.chesapeakebay.net/about/programs/modeling/53/ [https:// perma.cc/9YKS-WBZ4]. [23] The Phase 5.3

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Model simulates the "loading and transport of nitrogen, phosphorus, and sediment from pollutant sources throughout the Bay watershed." EPA, Chesapeake Bay TMDL, at 5-20. Additionally, this model provides "estimates of watershed nitrogen, phosphorus, and sediment loads resulting from various management scenarios." *Id.*

Because models are not "perfect forecasts," however, modeling is "part of a broader toolkit," including monitoring, "to gain the highest possible level of accuracy." CBP: Modeling. As the EPA explained: "The Bay modeling framework takes advantage of decades of atmospheric deposition, streamflow, precipitation, water quality, biological resource, and land cover monitoring data" as well as "tracking and reporting of the implementation of pollution load reduction best management practices." EPA, Chesapeake Bay TMDL, at § 5.1, 5-1-5-2. These resources allowed the EPA to calibrate its models. *Id.*

Because the Bay TMDL exists in significant part as a result of modeling, and because of how prevalent modeling is in TMDL formulation, MDE incorporated modeling into the Permits.

MDE incorporated by reference a document the agency published, called Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits ("the Guidance"). [24] As the name suggests, the document serves dual purposes: the Counties can assess progress in achieving WLAs and also assess restoration of impervious surface areas through a credits-to-acres approach. [25] In the Guidance, MDE sets forth acceptable models that the Counties can use, including, Maryland's Assessment and Scenario Tool ("MAST"). [26] MDE, Guidance at 2. The Guidance includes the pollutant rates for the Bay TMDLs — Total Nitrogen ("TN"), Total Phosphorus ("TP"), and Total Suspended Sediment ("TSS") — and requires that the Counties use these pollutant rates together with land use data to calculate baseline stormwater loads. *Id.* at 2-3. As the document explains, "[t]hese pollutant loads are specific to the [] Bay TMDL." *Id.* at 2. But the Counties may use the principles and methods in the Guidance "for any EPA approved TMDL." *Id.* at 1.

Maryland's Watershed Implementation Plan ("WIP")

The EPA developed the Bay TMDL to ensure that the Bay jurisdictions would put in place "all pollution control measures needed to fully restore the Bay and its tidal rivers" by 2025. EPA, Chesapeake Bay TMDL at ES-1. The EPA approved the Bay TMDL "only after" determining that each jurisdiction provided "reasonable assurance" that it would meet established pollutant reductions. *Am. Farm Bureau Fed'n,* 792 F.3d at 291. The Bay jurisdictions set forth their strategies for meeting pollutant reductions in Watershed Implementation Plans ("WIPs"). *Id.*

WIPs are "roadmaps" setting forth a plan for how and when a jurisdiction will reach the pollution reduction goals in the Bay TMDL. EPA, Chesapeake Bay TMDL, at ES-8. The EPA described these roadmaps as the "cornerstone" that ensured the States were accountable in

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achieving pollution reductions. *Id.* Notably, the EPA expressed no concerns about Maryland's Final WIP, [27] whereas the EPA had to implement backstop allocations and adjustments in other Bay jurisdictions so that the EPA had reasonable assurance that all jurisdictions would achieve necessary reductions. *See* EPA, Chesapeake Bay TMDL Executive Summary, ES-10-ES-13 (Dec. 29, 2010) [hereinafter "Bay TMDL ES"]. [28]

Maryland's WIP lists restoration of "twenty percent of the counties' impervious surface area that is not already restored to the maximum extent practicable (MEP)" in the "key elements" supporting the reasonable assurance of the implementation of the WIP. Phase I WIP at 5-30. The elements also include the adaptive management approach whereby additional or alternative practices are implemented if existing programs are not meeting target reductions. *Id.* [29]

Maryland's Stormwater Management History

In addition to an explication of the federal permitting system, NPDES, and the complex components arising out of it, such as TMDLs, we also set forth Maryland's stormwater management program, which has evolved since its inception in the 1980s, and which is informative for purposes of analyzing the Permits.

In 1982, the General Assembly enacted laws "to reduce as nearly as possible the adverse effects of stormwater runoff." Maryland Code (1982, 2007 Repl.Vol.), § 4-201 of the Environment Article ("EN"); *see* H.B. 1091, 1982 Gen. Assemb. Reg. Sess. (Md.1982). As a result, each county and municipality in Maryland was required for the first time to "adopt ordinances necessary to implement a stormwater management program" by July 1, 1984. *See* EN § 4-202. Then authorized by the General Assembly, the Department of Natural Resources issued regulations setting forth minimum control requirements and design criteria for the counties and municipalities. *See* 10 Md. Reg. 881, 884-85 (May 13, 1983) (to be codified at COMAR 08.05.05).[30] The regulations fostered the "primary goal" of "maintain[ing] after development, as nearly as possible, the predevelopment runoff characteristics" of the land. *See* EN § 4-203(b)(1); *see also* EN § 4-204(a) (Development of land is prohibited without submitting a stormwater management

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plan and obtaining the municipality's or county's approval of the plan.)

Maryland entered a new phase of stormwater management in the early 2000s. Pursuant to EN § 4-203(b), MDE adopted regulations to "rectify the[] programmatic shortcomings" of then-existing regulations that had provided "sparse guidance" on "water quality enhancement." 27 Md. Reg. 1167, 1168 (June 16, 2000) (to be codified at COMAR 26.07.02). Amending the stormwater regulations, MDE intended to "provide water quality treatment of up to 90 percent of the average annual rainfall throughout the State, establish ground water recharge standards, and out-line a channel erosion control strategy," as well as "promote environmentally friendly site design." *Id.* To fulfill this purpose, MDE incorporated by reference the 2000 Maryland Stormwater Design Manual ("the Manual"). *Id.* at 1167, 1169.[31] MDE required the counties and municipalities to revise their ordinances to incorporate the Manual's policies and practices by July 1, 2001. *Id.* at 1170.

The Manual "provide[d] designers a general overview on how to size, design, select and locate BMPs at a new development site to comply with State stormwater performance standards." Center for Watershed Protection ("CWP") & MDE, Manual, § 1.3, at 1.16. There are 14 performance standards, including the water quality volume standard ("WQv"). *Id.* § 1.2, at 1.13.

Another stormwater management phase began when the General Assembly required MDE to mandate the use of environmental site design ("ESD") in 2007. H.B. 786, Gen. Assemb. Reg. Sess. (Md. 2007). ESD is best understood as those practices, such as "small-scale stormwater management practices, nonstructural techniques, and better site planning," that "mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources." EN § 4-201.1(b); *see, e.g.,* note 9 (green roofs). MDE implemented regulations to this effect and explained that "[t]he goal of the regulations is to maintain after development as nearly as possible, the predevelopment runoff characteristics of the site being developed using ESD to the MEP." 35 Md. Reg. 2191 (Dec. 5, 2008) (to be codified at COMAR 26.17.02).

The Permits

MDE issued several series of MS4 permits to the Counties that preceded the Permits before us today. *See* MDE, NPDES MS4 Permit Montgomery County Fact Sheet (2008) (The first two permits were issued in 1996 and 2001.); MDE, Basis for Final Determination to Issue Prince George's County's NPDES MS4 Permit (2013) (The first three permits were issued in 1993, 1999, and 2004.); MDE, Basis for Final Determination to Issue Baltimore County's NPDES MS4 Permit (2013) (The first three permits were issued in 1994, 2000, and 2005.); MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit (2013) (The first three permits were issued in 1993, 1999, and 2004.); MDE, Basis for Final Determination to Issue Baltimore City's NPDES MS4 Permit

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(2013) (The first three permits were issued in 1993, 1999, and 2005.).[32]

At issue here are five-year term Permits MDE most recently issued: to Montgomery County in February 2010, to Baltimore County in December 2014, to Baltimore City in December 2013, to Prince George's County in January 2014, and to Anne Arundel County in February 2014.

The Water Groups challenge the Permits in several respects, namely, (1) the requirement to restore impervious surface area, (2) the requirement to submit plans for TMDLs, (3) the monitoring requirements, and (4) the public's ability to participate in the development of the Permits.

Some of these provisions are new and therefore represent an increase in responsibility on the Counties to maintain and improve the quality of their waters. *See, e.g.,* MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit (2013) ("These meetings resulted in the addition of more stringent conditions to Anne Arundel County's stormwater permit, in large part due to a regional and growing focus on restoring Chesapeake Bay."); *id.* ("New requirements in the permit will include ... developing restoration plans to meet stormwater WLAs for impaired waters."); MDE, NPDES Montgomery County Stormwater Permit Response to Formal Comments at 2 (2009) ("MDE believes that this current municipal stormwater permit will force Montgomery County to make major strides toward controlling urban runoff better than ever before. New conditions such as trash abatement jurisdiction-wide and requiring an additional 20% of the County's impervious area to be restored are major additions.");[33] MDE, Maryland's 2006 TMDL Implementation Guidance for Local Governments i (2006) ("Until recently, Maryland has focused primarily on TMDL development, which establishes limits on pollutant loads. Now the State is moving into the implementation phase....").

Before discussing these Permit provisions, we note additional Permit requirements that illustrate the breadth of the Counties' obligations. The Counties must implement management programs "to control stormwater discharges to the maximum extent practicable." These programs include a stormwater management program ("SWMP") and an erosion and sediment control program in accordance with state law; an "illicit discharge detection and elimination" program; requirements to reduce trash; obligations on the Counties to reduce pollutants associated with maintenance activities and on municipal facilities to submit pollution prevention plans; as well as a requirement to engage in public outreach activities to reduce stormwater pollution.

The Permits also require the Counties to engage in thorough analyses of the water quality of their watersheds. Among other things, the watershed

The Permits also require the Counties to engage in thorough analyses of the water quality of their watersheds. Among other things, the watershed assessments oblige the Counties to identify and prioritize water quality improvement projects.

MDE has also ensured that the Counties cannot use lack of adequate funding as a defense for failure to comply with Permit terms. The Permits explain that "[l]ack of

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funding does not constitute a justification for noncompliance with the terms of this permit." [34] To this end, the General Assembly enacted EN § 4-202.1 in 2012, requiring the Counties "to adopt local laws or ordinances necessary to establish an annual stormwater remediation fee and a local watershed protection and restoration fund to provide financial assistance for the implementation of local stormwater management plans." H.B. 987, 2012 Gen. Assemb. Reg. Sess. (Md.2012); *see also* EN § 4-202.1(a)(1) (This "section applies to a county or municipality that is subject to a [NPDES Phase I MS4 permit]."). [35] MDE had investigated the costs of meeting the Bay TMDL and commissioned a study that revealed that "stormwater BMPs likely represent the largest costs to local governments in implementing the TMDL." H.B. 987, 2012 Gen. Assemb. Reg. Sess. (Md. 2012).

The Permits also contain annual reporting requirements for: (1) the components of the stormwater management programs, and (2) data pertinent to the assessment of progress in implementing the Permit requirements, such as impervious surfaces and pollutant load reductions. MDE will review the Counties' reports to assess "progress toward meeting WLAs developed under EPA approved TMDLs" and the effectiveness of the programs in "reducing the discharge of pollutants to the MEP to protect water quality." MDE will require BMP and program modifications if the Counties fail to comply with the Permit or show progress.

The Permits also contain provisions setting forth sanctions for the violation of Permit conditions, including civil and criminal penalties. *See, e.g.,* Montgomery County NPDES Permit Part VI.C ("Failure to comply with a permit provision constitutes a violation of the CWA and is grounds for enforcement action; permit termination, revocation, or modification; or denial of a permit renewal application.").

Circuit Court and Court of Special Appeals Opinions

EN § 1-601 provides for judicial review of MDE's final determination to issue a permit. [36] The Water Groups [37] challenged the Permits in the various counties where MDE issued them.

The Circuit Court for Montgomery County remanded for MDE to revise the Permit in accordance with its opinion and order. In a reported opinion, the Court of Special Appeals affirmed. *Md. Dep't of the Env't v. Anacostia Riverkeeper,* 222 Md.App. 153, 157, 112 A.3d 979, 981 (2015), *cert. granted,* 443 Md. 734, 118 A.3d 861 (2015). MDE filed a petition for writ of certiorari, which we granted.

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The Circuit Court for Baltimore County, the Circuit Court for Anne Arundel County, and the Circuit Court for Prince George's County affirmed MDE's decision to issue those Permits. The Water Groups filed notices of appeal to the Court of Special Appeals and, upon MDE's motion, the Court of Special Appeals consolidated these three cases. MDE then filed a petition for writ of certiorari to this Court with questions nearly identical to those MDE submitted in its petition for writ of certiorari with respect to the Montgomery County Permit.

Finally, the Circuit Court for Baltimore City also affirmed MDE's decision to issue the Baltimore City Permit. The Water Groups filed a notice of appeal, and the Mayor & City Council of Baltimore ("Baltimore City") filed a petition for writ of certiorari with a request that we consider this petition in conjunction with MDE's petitions. We granted the City's petition.

As the Water Groups state in their brief, "the underlying Permits are substantively identical" and "are affected by the same legal defects." We agree that the Permits are so substantively similar that we will analyze the agreed upon questions brought before the Court with respect to all the challenged Permits. We have slightly rephrased the questions:

1. Did the MS4 permits issued by MDE for the counties' municipal storm sewer system appropriately incorporate by reference publicly available materials and was the requirement for restoration of 20% of pre-2002 developed impervious surfaces specific, measurable, and enforceable?
2. Was MDE's final decision to issue the permits with a 20% restoration requirement based upon the State's Chesapeake Bay TMDL strategies, and a reporting requirement to establish strategies to address wasteload allocations, supported by substantial evidence?
3. Do the provisions of the MS4 permits that require that the public have an opportunity to review and comment on restoration plans intended to meet the wasteload allocations established for the permittees under applicable total maximum daily loads satisfy public participation requirements?
4. Do the provisions of the MS4 permits satisfy federal monitoring requirements?

We uphold MDE's decision to issue the Permits on all grounds. Thus, we reverse the judgment of the Court of Special Appeals, which did not uphold the Montgomery County Permit, and we affirm the judgments of the circuit courts, which upheld the Permits in Anne Arundel County, Baltimore City, Baltimore County, and Prince George's County.

STANDARD OF REVIEW

Before 2009, challenges to the issuance or denial of a discharge permit were subject to a contested case hearing. Md.Code (1984, 2014 Repl.Vol.), § 10-222 of the State Government Article ("SG"), which is part of Maryland's Administrative Procedure Act, delineates the grounds upon which a court can reverse an agency decision in a contested case. Specifically, SG § 10-222 provides that a court can reverse an agency decision in a contested case that "is unsupported by competent, material, and substantial evidence in light of the entire record as submitted" or that "is arbitrary or capricious."

In 2009, the General Assembly changed the procedures for challenging a discharge permit. EN § 1-601 now permits direct judicial review of agency permitting

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decisions without a contested case hearing. Although this statute does not set forth a standard of review, the substantial evidence and arbitrary and

capricious standards apply where an "organic statute" authorizes judicial review without a contested case hearing and does not set forth a standard of review. *See Supervisor of Assessments of Carroll Cnty. v. Peter & John Radio Fellowship, Inc.*, 274 Md. 353, 355, 335 A.2d 93, 94 (1975) ("Our cases have held that where no scope of review is thus provided, decisions of an administrative body will not be disturbed on appeal unless they are not supported by substantial evidence or are arbitrary, capricious or unreasonable.") (citations omitted); *Med. Waste Assocs., Inc. v. Md. Waste Coal., Inc.*, 327 Md. 596, 621, 612 A.2d 241, 253 (1992) ("In an action for judicial review of an administrative decision granting a permit, however, the court determines not only whether the agency's decision to issue the permit was in accordance with law, but also whether the particular administrative decision was arbitrary, capricious or unsupported by substantial evidence in light of the record as a whole."). Thus, even though all challenges going to the merits of the Permits in these consolidated cases originated in the Circuit Courts, [38] we will review MDE's decision to issue the Permits under the substantial evidence and arbitrary and capricious standards of review.

Applying the substantial evidence standard of review to a case where no contested case hearing took place may seem anomalous because there is no formal record that was presented before an administrative law judge. EN § 1-606, however, expressly details the documents that can be included in a record. EN § 1-606(c)(1)-(9). [39] For example, EN § 1-606 stipulates that any draft permit, comments

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submitted to MDE during the public comment period, transcripts of public hearings on the permit application, and responses to submitted comments constitute part of the administrative record. Thus, we are essentially reviewing the same record that we would have examined, excluding the administrative law judge's decision, had the merits of this case been subject to a contested case proceeding. Accordingly, our review of the issuance of the Permits fits within the substantial evidence standard of review contemplated by SG § 10-222.

In a review for substantial evidence, we ask "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173, 12 A.3d 1255, 1261 (2011). We should accord deference "`to the agency's fact-finding and drawing of inferences'" when the record supports them. *Id.* (citation omitted); *see Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399, 396 A.2d 1080, 1089 (1979) ("The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.") (citation and internal quotation marks omitted). Moreover, we shall review the agency's decision "`in the light most favorable to it.'" *Najafi*, 418 Md. at 173, 12 A.3d at 1261. Finally, we must accord an agency great deference regarding factual questions involving scientific matters in its area of technical expertise. *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999) ("[T]he expertise of the agency in its own field should be respected.").

We have characterized the arbitrary and capricious standard of review as one that is "extremely deferential." *Harvey v. Marshall*, 389 Md. 243, 299, 884 A.2d 1171, 1205 (2005). In reviewing the issuance of an NPDES permit, the U.S. Court of Appeals for the Second Circuit quoted language derived from *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) — the United States Supreme Court's leading case on the arbitrary and capricious standard:

> To determine whether the agency's actions were arbitrary and capricious, we consider whether the agency `relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'

Natural Res. Def. Council, 808 F.3d at 569 (citations and quotation marks omitted). The court also elaborated that "[w]e must be `satisfied from the record that the agency... examine[d] the relevant data and articulate[d] a satisfactory explanation for its action'" and that it "afford[ed] the agency's decision greater deference regarding factual questions involving scientific matters in its area of technical expertise." *Id.* (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856) (citations and internal quotation marks omitted). The Second Circuit's articulation of the arbitrary and capricious standard is in accord with Maryland's treatment of this standard as one that is highly deferential. *See Harvey*, 389 Md. at 299, 884 A.2d at 1205. We are therefore mindful of the Second Circuit's explanation of the principles underlying the arbitrary and capricious standard

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when applying that standard to this case. [40]

In addition, we will review an agency decision for an error of law. When our review concerns a legal question, we apply less deference to the agency's conclusions. *HNS Dev., LLC v. People's Counsel for Balt. Cnty.*, 425 Md. 436, 449, 42 A.3d 12, 20 (2012). We refuse to uphold an agency decision "premised solely upon an erroneous conclusion of law." *Id.* (citation omitted) (internal quotation marks omitted). Otherwise, we ordinarily should give "considerable weight" to an agency's "interpretation and application of the statute which [it] administers." *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 453, 96 A.3d 210, 217 (2014); *John A. v. Bd. of Educ. for Howard Cnty.*, 400 Md. 363, 381-82, 929 A.2d 136, 147 (2007) ("In reviewing an agency's legal conclusions, it is a fundamental principle of administrative law that a reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency.").

DISCUSSION

Part I: The 20% Restoration Requirement

The Permits require, by the end of the five-year term, that the Counties restore 20% of the impervious surface areas in their watersheds that have not been restored to the MEP. This requirement "uses percent impervious cover in a watershed as a surrogate TMDL target." ENSR, Pilot TMDL Applications Using the Impervious Cover Method § 1.0, at 1-1 (2005). Like so much of this case, we must unpack the science before we analyze the parties' arguments.

As we develop on land, science has shown us that we profoundly impact our waters. Consider, for example, when "[t]rees, meadow grasses, and agricultural crops that had intercepted and absorbed rainfall are removed...." CWP & MDE, Manual, § 1.1, at 1.3. Problematically, "[c]leared and graded sites erode, are often severely compacted, and can no longer prevent rainfall from being rapidly converted into stormwater runoff." *Id.* These kinds of sites are known as impervious surfaces, surfaces "that do[] not allow stormwater to infiltrate into the ground," such as "rooftops, driveways, sidewalks, or pavement." EN § 4-201.1(d). "Impervious surfaces accumulate pollutants deposited from the atmosphere," pollutants which are "rapidly delivered to downstream waters" during storms. CWP & MDE, Manual, § 1.1.1, at 1.5. The purpose of the 20% restoration requirement, then, is to use stormwater management practices to restore the natural, beneficial processes in our environment that we have changed by developing impervious surfaces.

surfaces.

In other words, the 20% restoration requirement is a surrogate because the requirement does not control pollution reduction directly. *See* ENSR, Pilot TMDL

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Applications Using the Impervious Cover Method § 1.0, at 1-1. Rather, it is through restoring impervious surfaces with management practices that the Counties will reduce pollution. *See, e.g.,* CWP & MDE, Manual, § 1.2, at 1.13 ("[Management practices] shall be designed to remove 80% of the average annual post development total suspended solids load (TSS) and 40% of the average annual post development total phosphorus load (TP).").

A. Maximum Extent Practicable

The Water Groups argue that the 20% restoration requirement is too opaque to comply with 33 U.S.C. § 1342(p)(3)(B)(iii), the MEP standard. They so argue because, they contend, MDE "failed to provide a specific performance standard for restoration activities" or a "numeric limitation ... for what pollution reductions must be accomplished by the permittees' twenty-percent restoration efforts." They also argue that MDE failed to explain what impervious surface is "not restored to the MEP."

We disagree because (1) the applicable law does not impose a specific performance standard on MS4s and (2) MDE did actually select a performance standard for the Counties to adhere to. 33 U.S.C. § 1342(p)(3)(B)(iii) states:

> Permits for discharges from municipal storm sewers 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.

From the text, we discern that Congress established a broad requirement for MS4s. The list of required controls is not exclusive. *See* 55 Fed.Reg. at 48,038 ("[MS4] controls may be different in different permits."). And the purpose of the controls — reducing the discharge of pollutants — exists alongside the flexible, undefined standard "to the maximum extent practicable." *See City of Abilene v. EPA,* 325 F.3d 657, 659-60 (5th Cir.2003); *Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation,* 25 N.Y.3d 373, 406, 13 N.Y.S.3d 272, 34 N.E.3d 782 (N.Y.2015) (Rivera, J., dissenting in part) ("The CWA does not define the maximum extent practicable standard. However, it appears to provide broad authority to agencies to control stormwater pollution."); 55 Fed.Reg. at 48,038 ("In enacting section 405 of the WQA [Water Quality Act], Congress recognized that permit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges.").

33 U.S.C. § 1342(p)(3)(B)(iii) imposes no minimum standard or requirement on MDE other than to establish controls for MS4s to reduce the discharge of pollutants. *See Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1308 (9th Cir.1992) ("Congress did not mandate [in § 1342(p)(3)(B)(iii)] a minimum standards approach or specify that EPA develop minimal performance requirements. .... Congress could have written a statute requiring stricter standards, and it did not."). Thus, we reject the Water Groups' argument that MDE committed legal error by "fail[ing] to provide a specific performance standard for restoration activities." [41]

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Moreover, MDE tethered restoration to the practices in the Manual, which MDE incorporates into the Permits by reference. *See* Part III.E ("These management programs are designed to control stormwater discharges to the maximum extent practicable...."); Part III.E.1 ("At a minimum, the County shall ... [i]mplement the stormwater management ... practices found in the [Manual]...."). The Manual explains that the list of acceptable stormwater management practices is tied to the WQv. "The Water Quality Volume (denoted as the WQv) is the storage needed to capture and treat the runoff from 90% of the average annual rainfall." CWP & MDE, Manual, § 2.1, at 2.2. [42] The Manual further explains that the "WQv is directly related to the amount of impervious cover created at a site." *Id.* In other words, MDE chose a standard that relates to the very problem the 20% restoration requirement serves to abate: the increase in stormwater runoff and the discharge of pollutants because of the increase in impervious surfaces. *See* CWP & MDE, Manual, § 1.1., at 1.4 ("As can be seen, the volume of stormwater runoff increases sharply with impervious cover."). Thus, the record reflects that MDE has established a performance standard, WQv, that defines as acceptable those practices the Counties may choose from to fulfill the 20% restoration requirement. *See id.* § 2.7 (Acceptable Urban BMP Options).

Moreover, our discussion of restoration is instructive as to why, despite the Water Groups' contention, the "impervious surface area that is not restored *to the MEP*" is sufficiently clear and measurable. (Emphasis added.) The area that is not restored to the MEP is the area without the restoration controls described in the Manual. Moreover, the Manual explains that impervious area refers to an area "that does not have vegetative or permeable cover." CWP & MDE, Manual, § 2.1, at 2.4. Put together, the "impervious surface area that is not restored to the MEP" refers to a defined type of area (impervious surface) lacking a type of stormwater management control (the BMPs in the Manual). By way of example, previous MS4 reports delineate these criteria so that MDE can evaluate whether Montgomery County (in this example) installed the required controls. *See* Montgomery County Department of Environmental Protection, Annual Report for 2006 NPDES MS4 Permit F2, at III-64; *see also* 33 U.S.C. § 1342(p)(3)(B)(iii) (MS4 permits "shall require controls" such as management practices.).

Because 33 U.S.C. § 1342(p)(3)(B)(iii) does not require a specific performance

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standard, and because the concepts of restoration and impervious surface "not restored to the MEP" are sufficiently clear as to the controls that the Counties must install, the 20% restoration requirement in the Permits complies with the MEP standard. *See* 33 U.S.C. § 1342(p)(3)(B)(iii).

B. Substantial Evidence and Arbitrary and Capricious

The Water Groups also argue that MDE has not explained why it selected 20% as the restoration goal or how this Permit provision will promote necessary pollution reduction. The Water Groups contend that MDE ineffectively justifies its choice based on the Bay TMDL because the Permits do not assure that the Counties will achieve the Bay TMDL's objectives or reductions. Even accepting a connection between the 20% restoration requirement and the Bay TMDL, the Water Groups argue that MDE still failed to take into account numerous other TMDLs related to the Counties' waters.

We disagree with the Water Groups' position because (1) the applicable law affords permitting authorities flexibility in establishing controls for MS4s and (2) MDE has justified its decision based on a well-developed and vetted strategy. *Natural Res. Def. Council,* 808 F.3d at 569 (citation and internal quotation marks omitted). ("We must be `satisfied from the record that the agency ... examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.'").

Congress established a flexible framework in 33 U.S.C. § 1342(p)(3)(B)(iii). As the text states, MS4s shall require controls "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)(iii) (emphasis added). MDE has determined that the 20% restoration requirement is a key strategy in restoring the Chesapeake Bay. *See* Part VI.A (Chesapeake Bay Restoration by 2025.). The Permits in particular state that the Counties will carry out the 20% restoration requirement in order to comply with the Bay TMDL. *Id.*

A review of Maryland's Watershed Implementation Plan ("WIP") is instructive as to why the 20% restoration requirement will help to restore the Chesapeake Bay. MDE, Basis for Final Determination. As we have discussed, WIPs are "roadmaps" setting forth a plan for how and when a jurisdiction will reach the pollution reduction goals in the Bay TMDL. EPA, Bay TMDL ES at ES-8. The EPA developed the Bay TMDL "*in reliance on*" the WIPs that each affected jurisdiction submitted to the EPA. *Am. Farm Bureau Fed'n,* 792 F.3d at 291 (emphasis added). Moreover, the EPA approved the Bay TMDL "*only after*" determining that each jurisdiction provided "reasonable assurance" that it would meet the pollutant reductions in its WIP. *Id.* (emphasis added); *see* EPA, Bay TMDL ES at ES-8 (The WIPs are the "cornerstone" that ensures accountability to achieve pollution reductions). [43]

Importantly, the strategies in Maryland's WIP for urban stormwater include, among other things, the reduction of impervious surface area by 20% over a five-year period, just as the Permits do. *Compare* Maryland Phase I Watershed Implementation Plan: Executive Summary ES-15 (Dec. 3, 2010) [hereinafter Phase I WIP ES], *with* Part III.G.2. In fact, restoration of "twenty percent of the counties' impervious

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surface area that is not already restored to the maximum extent practicable (MEP)" is listed in the "key elements" that provide reasonable assurance of the implementation of Maryland's WIP. Maryland Phase I Watershed Implementation Plan: § 5.2.2, at 5-30 (Dec. 3, 2010).

MDE incorporated another important element from the WIP to bolster compliance with the 20% restoration requirement. The EPA explained that the WIPs were to include "mechanisms to track and report implementation activities" and "provide alternative approaches." EPA, Chesapeake Bay TMDL ES at ES-8-ES-9. Maryland's WIP thus includes what we refer to as the adaptive management approach, whereby additional or alternative practices are implemented if existing programs are not meeting target reductions. Phase I WIP at 5-30. [44] MDE incorporated this approach from the WIP into the Permits as part of the agency's review of the Counties' annual reports: "BMP and program modifications shall be made" if the Counties fail to comply with the Permits or fail to show progress in meeting WLAs of EPA-approved TMDLs. [45] We are satisfied from the record that MDE "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Natural Res. Def. Council,* 808 F.3d at 569 (citations and internal quotation marks omitted). We conclude, then, that MDE's decision to include the 20% restoration requirement in the Permits was supported by substantial evidence and is not arbitrary and capricious. [46]

Although we recognize that MDE issued the Montgomery County Permit before Maryland's WIP and the Bay TMDL were prepared, the Bay TMDL was not an isolated event. *See Am. Farm Bureau,* 984 F.Supp.2d at 298 (The Bay TMDL "is not a new or recent idea," and thus, "it would be improper to view the Final TMDL in a vacuum as a single, isolated effort to restore water quality to the Chesapeake Bay."). As we have discussed, an important prior effort to restore the Chesapeake Bay was the Chesapeake 2000 Agreement. To achieve the restoration goals of that agreement, the Governor of Maryland's Chesapeake Bay Cabinet prepared a draft of the State's plan. Department of Legislative Services, Office of Policy Analysis, Chesapeake Bay Restoration and the Tributary Strategy: An Analysis of Maryland's Efforts to Meet the Nutrient and Sediment Reduction Goals of the *Chesapeake 2000* Agreement iii (2007). The strategy for stormwater included restoration of impervious surface in Montgomery County, the first County to successfully implement

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this program. *Id.* at 13. The State conceived of this strategy as an effective state-wide method of improving the Chesapeake Bay. *See* Maryland's Chesapeake Bay Tributary Strategy Statewide Implementation Plan 16 (2008) (stormwater strategy). Thus, MDE's decision to include the 20% restoration requirement in the Montgomery County Permit was also supported by substantial evidence and was not arbitrary and capricious.

We further disagree with the Water Groups' position that the 20% restoration requirement is insufficient because it does not relate to other TMDLs. Indeed, the Permits incorporate a requirement to submit plans regarding WLAs for all EPA-approved TMDLs. That requirement ensures the Permits address all applicable TMDLs. [47]

C. The Methodology in the Guidance

Finally, with respect to the 20% restoration requirement, the Water Groups object to MDE's method of calculating impervious surface area not restored to the MEP. They assert that the Guidance, which MDE incorporated into these Permits by reference, is flawed because MDE arbitrarily selected 2002 as the baseline for measuring impervious surface area. For example, the Water Groups allege that MDE has ignored the current definition for MEP in the agency's own regulations.

We disagree with the Water Groups because MDE reasonably justifies its decision based on the accurate determination that 2002 marked a significant milestone in the State's treatment of water quality. *See Najafi,* 418 Md. at 173, 12 A.3d at 1261 (discussing the substantial evidence test); *Natural Res. Def. Council,* 808 F.3d at 569 (discussing the arbitrary and capricious test).

MDE explained its selection of 2002 in the Guidance: "Maryland regulations and local ordinances began requiring BMPs [around this time] to address a specific suite of volumes [recharge (Rev), water quality (WQv), and channel protection (Cpv)] and it can therefore be justified that water quality treatment has been provided to the MEP." MDE, Guidance at 4. In proposing new regulations for stormwater management in 2000, MDE explained: "The resulting program will provide water quality treatment of up to 90 percent of the average annual rainfall throughout the State, establish ground water recharge standards, and outline a channel erosion control strategy." 27 Md. Reg. at 1168. Additionally, MDE explained that prior regulations had provided "sparse guidance" on "water quality enhancement." *Id.* To bolster MDE's focus on water quality, the agency incorporated the Manual by reference into the 2000 regulations. *See id.* at 1170; *see also* CWP & MDE, Manual § 2.1, at 2.2 ("The WQv is directly related to the amount of impervious cover created at a site.").

The Water Groups reject MDE's decision by arguing that Maryland's regulations *currently* define "maximum extent practicable" based on a different

The Water Groups reject MDE's decision by arguing that Maryland's regulations currently define "maximum extent practicable" based on a different requirement

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the State imposed after 2002. That is, COMAR 26.17.02.02 B(22) defines MEP as the design of "stormwater management systems so that all reasonable opportunities for using *ESD* planning techniques and treatment practices are exhausted and, only where absolutely necessary, a structural BMP is implemented." (Emphasis added.)

MDE has explained, however, that pursuant to the Stormwater Management Act of 2007, which precipitated the regulatory change the Water Groups refer to, [48] the performance requirement ESD pertains to "future development," not to restoration. MDE, Basis for Final Determination. As set forth in EN § 4-203(b)(1), ("[t]he rules and regulations shall [i]ndicate that the primary goal of the State and local programs will be to maintain *after development,* as nearly as possible, the predevelopment runoff characteristics.") (emphasis added). *See also* COMAR 26.17.02.01 B ("These regulations for stormwater management apply to the development or redevelopment of land...."). MDE has reached a correct legal conclusion, and one regarding the law in which the agency has expertise. *See John A.,* 400 Md. at 381-82, 929 A.2d at 147 ("In reviewing an agency's legal conclusions, it is a fundamental principle of administrative law that a reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency."). We find no error here.

Although the agency selected ESD as the MEP via regulation in 2009, [49] MDE chose 2002 because that year marked the beginning of the stormwater management era when BMPs were subjected to performance standards to better treat water quality. 27 Md. Reg. at 1168. WQv is one such standard. CWP & MDE, Manual § 1.2, at 1.13. The Manual shows a direct relationship between the amount of impervious surface and WQv. *Id.* § 2.1, at 2.3 (Figure 2.2). Thus, beginning in 2002, Maryland connected stormwater management practices to the restoration of impervious surface area, which is the Permit requirement at issue. MDE's conclusion that the Counties should calculate impervious surface area using 2002 as a baseline as part of the 20% restoration requirement was supported by substantial evidence and was not arbitrary and capricious. *See Banks,* 354 Md. at 69, 729 A.2d at 381 ("[T]he expertise of the agency in its own field should be respected."). [50]

Because we uphold the Guidance as a component the Counties may legally use to achieve the 20% restoration requirement, we must address whether Montgomery County can use this methodology, too. We recognize that MDE issued the Montgomery County Permit before MDE prepared the Guidance. *Compare* Montgomery County Permit: Part I: C (Effective Date: February 16, 2010), *with* MDE, Basis for Final Determination at 10 (MDE held meetings with the Counties about the Guidance from August 2010 to February

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2011 before completing it in June 2011.). As we have discussed, MDE limited the practices the County could implement by connecting restoration to the Manual. But, importantly, MDE did not limit the manner in which Montgomery County could *show* its compliance with the 20% restoration requirement. *See, e.g.,* Montgomery County Permit: Part G.2 (Watershed Restoration), Part IV.A (Annual Reporting). Because the Permit does not restrict how the County must show its progress in achieving the 20% restoration requirement and because of the important links we have already analyzed between the Guidance and the Manual (i.e., the WQv standard), we conclude that Montgomery County can rely on the Guidance in showing its compliance with this requirement.

Part II: TMDL Plans

As we discussed at the outset of this opinion, TMDLs are informational tools, of which WLAs — wasteload allocations — are critical. As the District Court for the Middle District of Pennsylvania aptly noted, "WLAs are not permit limits *per se;* rather they still require translation into permit limits...." *Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 328 (citation and internal quotation marks omitted) (emphasis in original). The EPA requires such translation pursuant to 40 C.F.R. § 122.44(d)(1)(vii)(B), which the Water Groups argue MDE failed to comply with. [51]

Pursuant to 40 C.F.R. § 122.44(d)(1)(vii)(B), MDE included a provision that requires the Counties to submit plans for all EPA-approved TMDLs one year after the issuance of the Permits (or alternatively, one year after the EPA approves the TMDL). [52] In creating these restoration plans, the Counties must select actions (including cost estimates) and set forth a schedule (including deadlines and pollution reduction benchmarks) to meet WLAs. Because MDE foresaw the process of meeting WLAs as "iterative," the Counties must also describe what actions they will take when they fail to make progress in meeting WLAs. [53]

Effluent Limitations Must Be Consistent with WLAs

40 C.F.R. § 122.44(d)(1)(vii)(B) requires MDE to establish effluent limitations that take into account WLAs:

> When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that[] ... [e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(emphasis added).

The Water Groups construe the contents of the TMDL implementation plans, that is, the actions and deadlines discussed *supra,* as effluent limitations. As they put it, nothing else in the Permits is "remotely capable of ... impos[ing] effluent limitations that are consistent with the assumptions and requirements of TMDLs." Thus, the Permits can only be in compliance with 40 C.F.R. § 122.44(d)(1)(vii)(B) when MDE has reviewed *the contents* of the TMDL implementation plans. The problem for MDE, then, is one of timing. Because MDE will review the contents one year *after* issuing the Permits, the Water Groups conclude that MDE cannot know whether the effluent limitations in the Permits are consistent with the WLAs.

We disagree with the Water Groups because (1) 40 C.F.R. § 122.44(d)(1)(vii)(B) is, like the MEP standard, flexible as to how a permitting authority complies with this regulation and (2) MDE has complied with the regulation by incorporating the WLAs (the most critical element of the regulation) into the Permits and by using an "iterative" process of agency review and program change to ensure progress in meeting the WLAs.

Before we analyze MDE's "iterative" process, we must take issue with the Water Groups' position that the *contents* of the restoration plans are effluent limits. We understand the effluent limits to be best management practices ("BMPs"). [54] But, importantly, the Permits do not incorporate these effluent

limits. We understand the effluent limits to be best management practices ("BMPs"). [54] But, importantly, the Permits do not incorporate these effluent limits in the restoration plans but in another section of the Permits — Part III.E. That is, the Counties must implement a stormwater management program ("SWMP"), including the "practices found in the *2000 Maryland Stormwater Design Manual.*" [55] Importantly, the Permits instruct that "these [management] programs shall be integrated with other permit requirements to promote a comprehensive adaptive approach toward solving water quality problems." In this light, we understand the TMDL implementation plans as roadmaps because they *describe* a plan for achieving a goal (using BMPs to meet WLAs). *See, e.g.,* Montgomery County Permit Part III.J (In the TMDL implementation plans, the County must "describe those actions necessary to meet the storm drain system's share of WLAs in EPA approved TMDLs."). The requirement to implement BMPs, however, exists independent of the requirement to submit the TMDL implementation plans.

Having clarified this matter, we turn to the regulation to better understand MDE's obligation with respect to effluent limits and WLAs. We note that the plain text imposes a duty on the permitting authority to ensure that effluent limits are

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consistent with WLA assumptions and requirements. *See In re City of Moscow, Idaho,* 2001 WL 988721, at *9 ("[T]he governing regulations require *consistency*....") (emphasis in original). But the text does not instruct the permitting authority as to how it must ensure this consistency. *See id.* at *8 (noting the lack of detail in the regulation). Instead, the EPA set a minimal, flexible requirement in which the permitting authority is to design a scheme where effluent limits are compatible or in agreement with WLAs. *See* National Pollution Discharge Elimination System, 54 Fed.Reg. 23,868, 23,870, 23,879 (June 2, 1989) (codified at 40 C.F.R. § 122.44) ("Subparagraph (vii) does not prescribe detailed procedures for developing water quality-based effluent limits. Rather, the regulation prescribes minimum requirements for developing water quality-based effluent limits, and at the same time, gives the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits."); *The American Heritage Dictionary of the English Language* 392 (4th ed. 2006) (Consistent means in agreement or compatible.) [56]; *cf. Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 328 ("Accordingly, in some circumstances, a state may write a NPDES permit limit that is different from the WLA, provided that it is consistent with the operative assumptions underlying the WLA.").

In re City of Moscow, Idaho is illustrative of the flexibility the regulation affords MDE. There, the Environmental Appeals Board rejected the City of Moscow's petition for review of an EPA-issued NPDES permit. 2001 WL 988721, at *1. In pertinent part, the Board concluded that the EPA (Region X) did not err in creating permit limits although the EPA did not incorporate the design flow rate of an applicable TMDL. *Id.* at *8-9. After reviewing 40 C.F.R. § 122.44(d)(1)(vii)(B) and the regulatory history, *see* 54 Fed.Reg. 23,868, 23,879, the Board explained that there was no law or rule prescribing how the EPA was to select a flow rate to create effluent limits, *In re City of Moscow, Idaho,* 2001 WL 988721, at *8. The Board concluded that the agency acted "well within the discretion accorded [it] under the applicable regulatory scheme." *Id.* at *9.

So too here. No law or regulation specifies how or burdens MDE in undertaking the process of complying with 40 C.F.R. § 122.44(d)(1)(vii)(B). In fact, as we have discussed, the overarching federal law for MS4s — 33 U.S.C. § 1342(p)(3)(B)(iii) — is broad and flexible, too. *See Natural Res. Def. Council,* 966 F.2d at 1308.

Under the Permits, the Counties must include in the TMDL implementation plans the actions needed to meet "WLAs in EPA approved TMDLs." Part III.J.1. Thus, the Permit ties the activities to WLAs, not to some other benchmark that could be inconsistent with the WLA. As the Permits make clear, "[a]ll EPA approved TMDL's that establish WLA's applicable to the County's storm drain system are incorporated by reference into this permit." *Id.*

The Counties must also submit "documentation of progress toward meeting applicable WLAs developed under EPA approved TMDLs." Reporting on WLA progress is reinforced through watershed assessment and restoration requirements. *See* Part III.F ("[W]atershed assessments shall [s]pecify how restoration efforts will increase progress toward meeting any applicable

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WLAs included in EPA approved TMDLs."); Part III.G (The Counties shall annually report on progress toward meeting WLAs.).

Moreover, "MDE will review program implementation, annual reports, and periodic data submittal on an annual basis." The Permit requires "BMP and program modifications" if this report fails to "show progress toward meeting WLAs." The modifications are a product of the "iterative approach" the Counties must follow if they do not make progress in achieving WLAs. That is, the Counties must propose "additional or alternate stormwater controls" to meet WLAs, which MDE will review and approve, if adequate.

Environmental Defense Center, Inc. v. United States Environmental Protection Agency ("EDC") is instructive on the importance of permittee reporting and agency review to ensure compliance with the law. 344 F.3d 832, 858 (9th Cir.2003). In EDC, the Ninth Circuit vacated a portion of an EPA rule that permitted small MS4s to discharge under a general permitting scheme, and remanded for the EPA to revise the rule to comply with the CWA. *Id.* at 858. [57] The Ninth Circuit stated that the rule did not require the permitting authority to review the MS4 operator's stormwater management program "to ensure" that the operator's program would "*in fact*" comply with the relevant law. *Id.* at 855 (emphasis in original). Thus, the Ninth Circuit concluded that "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation." *Id.*

The scheme the Ninth Circuit rejected in *EDC* is materially different from the scheme in the Permits here. MDE requires reporting, assessment, and adaptation to ensure that the Counties' BMPs will make progress to achieve WLAs. We find the effluent limits under this scheme to be consistent with approved WLAs. *See id.* at 856 ("However, stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity....."). Thus, the Permits comply with 40 C.F.R. § 122.44(d)(1)(vii)(B).

Part III: Monitoring

Here, the Water Groups raise two arguments: the Permits do not include federally mandated monitoring to (1) produce representative data in the MS4 jurisdictions and (2) assure compliance with Permit requirements. They contend that MDE elected not to comply with federal regulations that impose the above requirements and that the record does not otherwise show that MDE complied with these laws. MDE responds by defending its monitoring scheme as sufficient to comply with the applicable federal regulations. Moreover, MDE argues that some of the federal provisions are inapposite because they only pertained to the initial application for MS4 permits in the 1990s.

A. The Permit's Monitoring Requirements

We begin by noting what the Permits require. Under Part III.F, each County must conduct chemical, biological, and physical monitoring at one outfall and an

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associated in-stream station. [58] The Permits set forth the number of required monitoring events, sampling methods, pollutants, and locations. [59] The Counties must also conduct monitoring of stream channel protection. [60] These two levels of monitoring occur at different locations. *Compare* note 58, *with* note 60.

B. Applicable Law

We now consider what federal monitoring regulations apply to the Permits. Under 40 C.F.R. § 122.48(b), "[*a*]*ll permits shall specify* [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring." (Emphasis added.) Moreover, monitoring requirements must "assure compliance with permit limitations." 40 C.F.R. § 122.44(i)(1); *see also In re Gov't of the D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 2002 WL 257698, at *20 (Feb. 20, 2002) ("First, both section 122.48(b) and section 122.44(i) would appear to require that certain monitoring conditions be included in all permits."). The Clean Water Act makes plain the EPA's broad authority to set these requirements. 33 U.S.C. § 1318(a); *Natural Res. Def. Council, Inc. v. EPA*, 863 F.2d 1420, 1434 (9th Cir.1988) (The EPA "has wide discretion and authority to determine monitoring requirements in NPDES permits...."). These requirements apply to state programs. 40 C.F.R. § 123.25(15), (19).

The Water Groups point us to an additional regulation as part of their argument that the Permits are not capable of producing representative data. Specifically, pursuant to 40 C.F.R. § 122.26(d)(2)(iii)(D), applicants for large MS4s must submit a "proposed monitoring program for representative data collection

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for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations)," and, among other things, "why the location is representative." But MDE disputes whether this regulation is even applicable to our analysis of the agency's decision to issue the Permits when the regulation, in its view, pertains to applicants (i.e., permittees). MDE argues that we should read 40 C.F.R. § 122.26(d)(2)(iii)(D) as relevant only to a permit *application* — not a permit — and, moreover, only to the *first cycle* of permit applications for MS4s (i.e., the early 1990s). In MDE's view, the agency had "the flexibility to establish requirements [it] deem[ed] appropriate" in subsequent MS4 permits.

Recognizing that 40 C.F.R. § 122.26(d) concerns "[a]pplication requirements," we nevertheless agree with the Water Groups that the regulation is relevant to our review of MDE's decision to issue the Permits. Although state and federal permitting laws are unhelpful, an EPA Policy Memorandum interpreting 40 C.F.R. § 122.26(d) ("the Policy Memo") [61] is instructive. In the Policy Memo, the EPA instructs that "reapplications should focus on maintenance and improvement of [MS4 storm water management] programs" that were required in the initial applications. EPA, Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Sewer Systems, 61 Fed.Reg. 41,698, 41,698 (Aug. 9, 1996) [hereinafter Policy Memo]. [62] According to the Policy Memo, MDE can make changes to the MS4 monitoring program during the reapplication period, but such changes must be "appropriate and useful." *Id.* at 41,699. In other words, when a permittee reapplies for a discharge permit, and if the permitting authority reissues the permit, it is the permitting authority's responsibility to ensure that the reissued permit contains programs that are adequate in light of the initial application requirements in 40 C.F.R. § 122.26(d). We rely, then, on 40 C.F.R. § 122.26(d) as a baseline to review the monitoring program in the Permits to ensure that MDE only made program changes that were "appropriate and useful." *Id.* at 41,699.

C. The EPA Policy Memo

The EPA published the Policy Memo to "respond[] to requests from municipalities

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and NPDES permit writers for clarification about regulations which do not appear to address reapplication requirements, i.e., permit reissuance." 61 Fed.Reg. at 41,698.

In the Policy Memo, the EPA first explains that it does not require an applicant to repeat *in full* the process in 40 C.F.R. § 122.26(d)(1)-(2). *Id.* The EPA explained that it would be redundant to "request the same information again [including characterization of data at § 122.26(d)(2)(iii)], where it has already been provided and has not changed." *Id.* But an applicant "should identify any proposed changes or improvements" to "monitoring activities." *Id.*

If MS4 applicants and permit writers wish to change programs in future permits, the EPA explains, they may not only "de-emphasize" but also propose *to eliminate* a program component. *Id.* at 41,699; *see id.* at 41,698 ("MS4 permit applicants and NPDES permit writers have considerable discretion to customize appropriate and streamlined reapplication requirements on a case-by-case basis."). De-emphasis may be justified based on the discharger's experience during the first permit term. *Id.* By way of example, the EPA stated that "new information on the relative magnitude of a problem" and "new data on water quality impacts of storm water discharges" could justify program changes. *Id.* Moreover, elimination could be justified "when a different water quality program would serve the same goals." *Id.* We construe the phrase "same goals" as referring to the CWA's objective in Chapter 26 of Title 33 of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see* 33 U.S.C. § 1318(a)(1)(A)(i) ("Whenever required to carry out *the objective* of this chapter [26: Water Pollution Prevention and Control],.... the Administrator shall require the owner or operator of any point source to establish and maintain such records ... [and use such monitoring methods] ... as he may reasonably require.") (emphasis added).

If MS4 applicants and permit writers wish to change monitoring programs, the EPA encouraged them "to determine if storm water monitoring efforts are appropriate and useful." 61 Fed.Reg. 41,699. The EPA then suggested alternative techniques: "municipalities may wish to consider using monitoring techniques *other than* end-of-the pipe chemical-specific monitoring, including habitat assessments, bioassessments, and/or other biological methods." *Id.* (emphasis added).

D. Representative Monitoring

MDE argues, somewhat correctly, that the Policy Memo grants it "the flexibility to establish requirements [it] deem[s] appropriate." The Water Groups only repeat the language of the Policy Memo, arguing that MDE can change programs to make them "more appropriate and useful." They argue that MDE's decision was not supported by substantial evidence. Although the Policy Memo does grant NPDES permit writers, like MDE, the flexibility to modify program components, including monitoring, 61 Fed.Reg. at 41,699, the EPA does not allow permit writers to reissue permits and abdicate their responsibility in "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). 40 C.F.R. 122.26(d) required, among other things, a "proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations)," and, among other things, "why the location is representative." And as we also discussed

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earlier, the Permits must include monitoring "sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b).

We conclude that MDE's monitoring program in the Permits will produce representative data because MDE has (1) ensured that the Counties monitor stormwater discharges at monitoring locations that represent an adequate range of land uses statewide, and (2) increased the frequency of monitoring to yield more representative information at the County level.

MDE revised the MS4 monitoring program in the late 1990s to implement a monitoring approach called the "three legged stool," so named because it incorporated not only "[c]hemical testing" but also "biological criteria" and "physical assessments." MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.2 (1997); *see also* MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit. The agency articulated this approach as being "more aligned with the CWA's goal to `restore and maintain the *chemical, physical,* and *biological* integrity of the nation's waters.'" MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.2 (emphasis added); *see also* MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit. MDE also increased the frequency of monitoring so that the Counties needed to monitor twelve storm events instead of three. MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.0. Finally, in light of the increase in monitoring *type,* MDE decreased the number of monitoring sites to one outfall and one associated in-stream station in a watershed. *Id.* at § 4.3.

The agency explained that it adopted the "three legged stool" approach after an analysis of the MS4s' concerns in implementing the first permits: "local governments argued that in many instances, *biological* and *physical* monitoring results are better indicators of small stream health." Maryland's NPDES Municipal Stormwater Monitoring § 4.1; MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit (2013) (emphasis added). MDE acknowledged the local jurisdictions' concern that "water chemistry data are of little value" in discerning the effects of stormwater in local streams when there is no assessment of stormwater as to "physical stream habitat and biological health." MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.1. Nevertheless, MDE explained in its analysis that "[t]here is still a need to continue water chemistry work for the far field objectives of nutrient reduction in the Bay and accurate loading estimates for NPDES." *Id.* at § 4.2.

In explaining its decision to increase the number of monitored storm events, MDE stated that "more frequent sampling" would "improve pollutant load estimates." MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.0.

Moreover, in explaining why it pared the number of chemical monitoring sites, MDE stated that the addition of biological and physical monitoring required the agency to reapportion resources. *Id.* at § 4.3. To compensate for the reduced number of sites, MDE explained that: (1) "[a] major goal for future monitoring will be to integrate water chemistry, biology, and physical assessments in one suitable watershed" to ensure "all three techniques [are] analyzed holistically"; and that (2) "site selection will be orchestrated at the state level" to "maintain an adequate number of residential, commercial, and industrial sites for State water chemistry needs." MDE, Maryland's

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NPDES Municipal Stormwater Monitoring at § 4.3. [63]

MDE's decision-making illustrates that, as the Policy Memo stated, the permitting authority and permittees worked together to "determine if storm water monitoring efforts [were] appropriate and useful." 61 Fed.Reg. at 41,699. MDE did not rubber stamp the jurisdictions' proposal but affirmed that "[t]here is still a need to continue water chemistry work for the far field objectives of nutrient reduction in the Bay and accurate loading estimates for NPDES." MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.2. [64]

Moreover, biological and physical monitoring are within the scope of the EPA's suggestions for alternative techniques, that is, "monitoring techniques *other than* end-of-the pipe chemical-specific monitoring, including habitat assessments, bioassessments, and/or other biological methods." 61 Fed.Reg. at 41,699 (emphasis added).

By increasing the number of monitored storm events, [65] MDE intended for the Counties to acquire more *representative* data about pollutant loads. *Compare* 61 Fed.Reg. at 41,699 (The EPA encouraged permit writers "to determine if storm water monitoring efforts are appropriate and useful."), *with* 40 C.F.R. § 122.62(d)(2)(iii)(D) (The initial application called for "[a] proposed monitoring program for representative data collection."). [66]

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The Water Groups insist on interpreting *representative* in terms of the boundaries of the political subdivisions. In its analysis of the Counties' initial monitoring experiences, MDE explained that site selection was a challenging undertaking, and one that it had to interpret flexibly so that the Counties could reasonably carry out their monitoring duties. That is, "monitoring only five sites did not allow any single jurisdiction to monitor all possible land uses." Maryland's NPDES Municipal Stormwater Monitoring at § 2.3. From MDE's perspective, however, the state-wide program to improve water quality was maintained by, "*in the aggregate,*" monitoring "the continuum from low density residential to heavy industrial sites." *Id.* (emphasis added). The watersheds MDE has approved extend from low-density residential land use to commercial use and light industrial use. [67] Thus, we conclude MDE has approved of monitoring locations that adequately *represent* a continuum of land uses for the agency and the Counties to collect data. *See* MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.3 ("[S]ite selection will be orchestrated at the state level" to "maintain an *adequate* number of residential, commercial, and industrial sites for State water chemistry needs.") (emphasis added).

MDE amended the program with the CWA's objective at the forefront of its mind: "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *Id.; see* 33 U.S.C. § 1251(a). In accordance with the Policy Memo, the agency's changes and reasoning strike us as thorough efforts to make the monitoring program "appropriate and useful." 61 Fed.Reg. at 41,699. We conclude that MDE acted within the discretion the EPA accorded it in the Policy Memo. Thus, we also conclude that MDE has committed no legal errors pertaining to 40 C.F.R. § 122.26(d)(2)(iii)(D).

For many of the same reasons, we believe that the Permits contain monitoring "sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b). The Permits require monitoring of many pollutants. Part IV. F.1.a-d. [68] Following the Counties' first experience implementing MS4 permits, MDE

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increased the frequency of monitoring to "improve pollutant load estimates." MDE, Maryland's NPDES Municipal Stormwater Monitoring § 4.0. The agency also decided to orchestrate site selection at the state level to "maintain an adequate number of residential, commercial, and industrial sites for State water chemistry needs." *Id.* § 4.3. By taking control of the selection of monitored sites, MDE could better ensure monitoring of a continuum of activities (industrial, residential, and commercial). Additionally, the Counties will have to explain their monitoring process to ensure that the agency can evaluate whether they have complied with MDE's requirements. Part V.A.1.b. (The Counties shall submit annual reports and include "[a] narrative summary describing the results and analyses of data, including monitoring data that is accumulated throughout the reporting year."). [69]

MDE also requires the Counties to assess WLAs, which represent pollutant loads. Part IV.E.2.b.iii. The Counties must record continuous flow measurements to obtain data to estimate pollutant reductions. Part IV.F.1.a.iv. Because the Counties are to achieve WLAs over time through restoration activities, MDE requires the Counties to conduct such monitoring "where the *cumulative* effects of watershed restoration activities can be assessed." Part IV.F.1 (emphasis added).

MDE thus structured the Permits and imposed requirements on the Counties to ensure that they will monitor the discharge of pollutants to yield representative data. We conclude that the Permits comply with 40 C.F.R. § 122.48(b).

E. Permit Limitations

40 C.F.R. § 122.44(i) requires monitoring "to assure compliance with permit

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limitations." We begin by noting the two applicable limitations: (1) controls to reduce the discharge of pollutants [70] and (2) the restoration of 20% of impervious surface area not restored to the MEP. *See* Part III.D; Part III.E.2. [71]

1. Reduction of Pollutant Discharge

The Permits include two important components that inform our analysis of whether MDE's monitoring program ensures reductions in the discharge of pollutants: (a) the monitoring and modeling scheme and (b) adaptive management. As we explain, our initial discussion of monitoring and modeling is not sufficient to measure MDE's compliance with 40 C.F.R. § 122.44(i). Rather, it is a necessary component of what we consider a two-part scheme MDE designed to ensure the Counties would implement controls to reduce stormwater discharges.

a. Monitoring and Modeling

MDE requires the Counties to implement a stormwater management program ("SWMP"), which consists of BMPs. Part IV.D.1.a. The Counties must integrate SWMPs with other permit requirements. Part IV.D. Aside from their role in the 20% restoration requirement, BMPs are most critical in the restoration plans that the Counties must implement to achieve progress in meeting WLAs. Part IV.E.2, 4; *see supra* note 17 (The WLAs are derived from the EPA approved TMDLs for each Permit.).

To achieve progress in meeting WLAs, the Counties must first set a baseline for stormwater pollutant loads. MDE, Guidance, at 3. [72] To set this baseline, the Counties must apply TMDL pollutant loading rates to urban land use data. *Id.* An MDE-approved model, such as MAST, will automatically calculate the cost and load estimates for Counties to inform their decision-making. *See* About MAST, Maryland Assessment Scenario Tool, *available at* http://www.mastonline.org/About.aspx [https://perma.cc/7NRV-QNXX]. The Counties can compare different scenarios to determine what BMPs they can implement to reduce pollution. *Id.; see also* MDE, Guidance, at 1 ("Local governments can weigh the cost associated with implementing different practices and choose the most efficient option for meeting pollutant load reductions."). The Counties select and begin implementing BMPs in accordance with their restoration plans. Part IV.E.2. Then they can monitor the effectiveness of the activities, Part IV.F.1.a.iv, and use the monitoring information to determine if the activities have helped make progress in achieving WLAs, Part IV.E.2, 4.

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But the efficiencies for BMPs that the Counties select are based in part on estimates. *See, e.g.,* MDE, Guidance, at 10 (Table 4). [73] As our discussion of modeling illustrates, a model predicts the reductions a BMP can achieve. [74] But it does not tell the Counties exactly what the BMP will do in terms of pollution reduction. Indeed, many variables impact this process. [75] *See* Chesapeake Bay Program, Phase 5.3 Community Watershed Model, § 6.1.2, at 6-4 ("Uncertainty in estimates of BMP effectiveness is due to factors including (1) variability in precipitation, hydrology, soils, and geology; (2) variable performance of land management practices; [and] (3) lag time between implementing a practice and full performance and observed water quality benefits...."); *see also id.* at § 6.2.2, at 6-8 ("Virtually all research data are generated under controlled management conditions" that, among other things, are designed to minimize hazards; thus, "the research estimates are more representative of a best-case scenario.").

But this should not raise a red flag about the legal correctness of the Permits. Indeed, the inherent shortcoming in estimating BMP effectiveness explains MDE's decision to require the Counties to adapt their practices based on improved knowledge over time. *See infra* Discussion: Adaptive Management. Rather, because the Counties *must* implement BMPs to make progress in achieving WLAs, estimation and prediction are necessary evils in this context. Thus, high quality assessments of BMPs are particularly important in the Permits so that MDE and the Counties can understand which practices are most effective to meet the many WLAs incorporated into the Permits. *See infra* note 17.

As we have discussed, MDE requires the Counties to assess BMPs through a

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focused monitoring approach. Part IV. F.1.a.iv. In the Basis for Final Determination, MDE explained that pollution reduction research supported the use

of focused monitoring to better understand and, thus, improve BMPs. MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit (2013).[76] The research includes an analysis of how states, including Maryland, were "tracking nutrient and sediment control practices" to restore the Chesapeake Bay. *See* Committee on the Evaluation of Chesapeake Bay Program Implementation for Nutrient Reduction to Improve Water Quality, Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay vii (National Academies Press 2011) [hereinafter Achieving Nutrient and Sediment Reduction Goals in the Bay]. The National Research Council ("NRC")[77] established a "multidisciplinary committee of experts to provide advice to the EPA, the six states in the Chesapeake Bay watershed," and "other interested parties." Achieving Nutrient and Sediment Reduction Goals in the Bay at viii.

Importantly, "[t]he EPA specifically directed the NRC to evaluate the tracking of best management practice implementation...." *Id.* The NRC's appointed committee stated that "[t]argeted monitoring programs ... would provide valuable data to refine BMP efficiency estimates...." *Id.* at 5.[78]

Consistent with the NRC committee report, MDE's approach to monitoring requires the Counties to assess the effectiveness of BMPs. Part IV.F.1 ("Monitoring activities shall occur where the cumulative effects of watershed restoration activities can be assessed."). Indeed, MDE designed the second component of the monitoring program with the same purpose in mind: monitoring "for determining the effectiveness of stormwater management practices for stream channel protection." Part IV.F.2.

MDE then uses the monitoring data to calibrate its models. Part IV.F.1.a.iv ("Data collected shall be used to estimate annual and seasonal pollutant loads and reductions, and for the calibration of watershed assessment models."). That is, MDE's approach yields more accurate data on the efficacy of BMPs, which increases certainty for all interested parties in understanding what effects restoration activities will have on the State's waters. MDE, Guidance, at 1 ("The data gathered may be used to update and improve Maryland's stormwater management matrix of options for achieving water quality."). Our review of the first component in the Permits

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— the monitoring and modeling scheme — illustrates that it is necessary to ensure the Counties are implementing BMPs to the maximum extent practicable.

b. Adaptive Management

In their annual report, the Counties must submit the pollutant load reductions determined through monitoring. Part V.A.2.g; *see also* Attachment A: Annual Report Databases (G).

The required measurement is pounds per year, which is consistent with the federal requirement that a discharger monitors "mass (or other measurement specified in the permit) for each pollutant" or "volume of effluent discharged from each outfall." 40 C.F.R. § 122.44(i)(1)(i)-(ii). As discussed above, these reductions pertain to the pollutants which the Counties must monitor. Part IV.1.a.iv; *see* Attachment A: Annual Report Databases (G) (The pollutants arise from the Bay TMDL and local TMDLs.).

MDE will review the annual reports, Part V.B, and will require program modifications "according to needed program improvements identified as a result of [MDE's] periodic evaluations," Part IV.D.[79] "Failure to comply with a [P]ermit provision," such as the stormwater management or reporting requirements, "constitutes a violation of the CWA and is grounds for enforcement action; permit termination, revocation, or modification; or denial of a permit renewal application." Part VII.C.

As we have discussed,[80] MDE has flexibility in setting controls in MS4s: "Congress did not mandate [in 33 U.S.C. § 1342(p)(3)(B)(iii)] a minimum standards approach or specify that the EPA develop minimal performance requirements." *Natural Res. Def. Council, Inc.,* 966 F.2d at 1308; *see also* 54 Fed.Reg. at 23,870, 23,879 (codified at 40 C.F.R. § 122.44) ("Subparagraph (vii) does not prescribe detailed procedures for developing water quality-based effluent limits. Rather, the regulation prescribes minimum requirements for developing water quality-based effluent limits, and at the same time, gives the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits."). We discern that the law requires a regulating authority such as MDE to review the entity's actions (or non-action, as the case may be) to ensure accountability in implementing stormwater controls: "stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." *EDC,* 344 F.3d at 856.[81]

MDE's adaptive management approach includes a requirement to impose program changes based on annual report data obtained

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from monitoring. Where, for example, the Counties' current strategy is not reducing discharges, the Permits allow MDE to force the Counties to implement BMPs that will, or at least are an improvement. Because the Counties will implement controls to reduce discharges under MDE's oversight, the monitoring provisions comply with 40 C.F.R. § 122.44(i).[82] *See Natural Res. Def. Council, Inc. v. Cnty. of L.A.,* 673 F.3d 880, 897 (9th Cir. 2011) ("As opposed to absolving noncompliance or exclusively adopting the MEP standard, the iterative process ensures that if water quality exceedances `persist,' despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its [stormwater quality management program]."), *rev'd on other grounds sub nom. L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,* ____ U.S. ____, 133 S.Ct. 710, 713, 184 L.Ed.2d 547 (2013); *cf. Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn.2d 568, 90 P.3d 659, 679 (2004) (en banc) ("Monitoring and adaptive management provide a mechanism through which [the Washington State Department of Ecology] can mitigate [an] inherent uncertainty" in the question of whether there was a reasonable assurance that an airport runway project would not violate applicable water quality standards.); University of Maryland/Mid-Atlantic Water Program, BMP Assessment Final Report 25-26 (2009) ("Utilizing an adaptive management approach recognizes uncertainty and limitations in science, but does not impede implementation of management actions.").[83]

2. 20% Restoration Requirement

As to the second limitation, it is true that the Permits do not require monitoring of impervious surfaces in the section entitled "Assessment of Controls," which contains the focused monitoring requirements. *See* Part IV.F. But, as we explain, because (1) 40 C.F.R. § 122.44(i) contemplates a flexible approach to monitoring and (2) MDE incorporated a clear evaluation tool into the Permits to assess restoration of impervious surfaces, MDE has assured compliance with the 20% restoration requirement under 40 C.F.R. § 122.44(i).

Under the restoration provision, MDE's approach requires the Counties first to submit an assessment of their impervious surface area within a year of the issuance of the Permits. Part IV.E.2.a. This Permit part incorporates by reference the Guidance, which contains the methodology we discuss herein. In the assessment, the Counties must delineate those portions in their jurisdictions "that are either treated to the [MEP], partially treated, or untreated

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and available for retrofit." [84] MDE, Guidance at III.4, at 4.

To ensure that the Counties implement satisfactory BMPs on their untreated surfaces, MDE requires the Counties to translate the activities into credits. *Id.* at IV, at 8. This credit system is tethered to the performance standard through which MDE determined which BMPs are satisfactory: the WQv. *Id.* "An acre for acre impervious credit will be given when a structural BMP is specifically designed to provide treatment for the full WQv (one inch), or [a] proportional acreage of credit will be given when less than the WQv is provided." *Id.* Moreover, for BMPs that "provide greater than one inch of volume control," the activities "receive additional credit." *Id.* [85]

Because the Counties must adhere to the credit system, MDE can evaluate the jurisdictions' performances uniformly. The Guidance "standardizes procedures for the reporting of traditional, new, and alternative [BMPs] and the impervious area they control." MDE, Guidance at 1; *id.* ("By developing a comprehensive matrix of practices and consistent accounting measures, [MDE] brings greater certainty to the local planning and budgeting process."). This accounting system is also flexible enough to accommodate more non-traditional activities for which restoration credits are still available. *See* MDE, Guidance at V, at 11 ("This section presents alternative BMPs that will give jurisdictions greater flexibility toward meeting stormwater permit requirements.").

Moreover, the Counties must report annually on their progress in achieving the 20% restoration requirement. Part V.A.1.a.ix. [86] Failure to comply with these requirements — submission of the impervious surface area assessment; implementation of restoration practices on impervious surfaces not controlled to the MEP; and submission of reports on the Counties' activities according to the credit system — is a violation of the CWA and grounds for agency action. Part VII.C.

We find instructive the Second Circuit's reasoning in upholding, in part, the EPA's monitoring provisions in permits to regulate the discharge of ballast water from ships. *Natural Res. Def. Council, Inc.*, 808 F.3d at 562. [87] As to certain effluent

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limitations in these permits, [88] the EPA required the monitoring of "functionality" of a vessel's ballast water treatment system, and of the concentrations of two specific bacteria. *Id.* at 581. [89] The EPA did not, however, require vessel owners "to take any measurement of pollutants or significant categories of living organisms in ballast water being discharged." *Id.*

Although environmental organizations argued that the EPA should have required monitoring of the concentrations of living organisms, the Second Circuit concluded that the EPA's provisions complied with 40 C.F.R. § 122.44(i). *Id.* at 582-83. Because the regulation sanctioned the monitoring of some "other measurement specified in the permit," the functionality and indicator organism monitoring "qualif[ied] as such `other measurement.'" *Id.* at 582. Although the environmental organizations had advocated for the alternative of "direct monitoring," the Second Circuit reasoned that dischargers did not have the capacity to quantify living organisms of certain size classes. *Id.* Moreover, the current technology would require an analysis that was "prohibitively expensive and impractical." *Id.* There was, in essence, no "feasible" alternative the EPA could have established under these permits. *Id.* at 582-83. Thus, the Second Circuit deferred to the EPA's decision. *Id.* at 583.

From *NRDC,* we discern that a permitting authority has *flexibility* in how it sets monitoring requirements. As 40 C.F.R. § 122.44(i) reveals, the EPA wrote the regulation with the understanding that not every permit limitation could be measured in terms of mass or volume. *See* 40 C.F.R. § 122.44(i)(1)(i) (The regulation requires monitoring of mass "or other measurement specified in the permit."). In this case, those measurements would not aid the Counties or MDE in evaluating progress toward restoring impervious surface *area.* Rather, MDE requires the translation of restoration practices, implemented on impervious surface areas, into credits to make restoration of those areas understandable. The agency can also monitor restoration in a uniform manner.

From *NRDC,* we also discern that 40 C.F.R. § 122.44(i)(1)(i) requires *feasible* monitoring. Here, the Guidance not only promotes accountability in a uniform manner but also gives MS4 permittees the flexibility to choose from among approved restoration practices to address local conditions. Flexibility is a hallmark in designing MS4 permits. *See* 55 Fed.Reg. at 48,038 ("In enacting section 405 of the [Water Quality Act], Congress recognized that permit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges."). The Water Groups have not presented a feasible alternative that contains both the flexibility and the accountability to assure compliance with the permit limitation that Counties restore 20% of their impervious surface areas. MDE has complied with 40 C.F.R. § 122.44(i) by incorporating the Guidance by reference for the Counties to use to meet the 20% restoration requirement.

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We recognize that MDE did not incorporate the Guidance into the Montgomery County Permit. But that fact is not fatal to that Permit's ability to comply with 40 C.F.R. § 122.44(i). When the County submits its annual report, the County must include databases of impervious acreage and specify those areas treated by BMPs, proposed for restoration, under construction for restoration, and completed. Montgomery County Permit Part IV:A.2, Attachment A: (C). The County must also submit descriptions of the type of BMP it used at specific locations. *Id.* at Part IV:A.2, Attachment A: (D). As we have discussed, those BMPs are the stormwater practices in the Manual. These reporting requirements will allow MDE to evaluate on a yearly basis the Counties' compliance with the 20% restoration requirement. We recognize that this reporting system is not as detailed as the method in the Guidance, but 40 C.F.R. § 122.44(i) does not include requirements as to the specificity of the measurement the permitting authority selects. *See, e.g., Natural Res. Def. Council, Inc.,* 808 F.3d at 581 (As to monitoring of a vessel's ballast water treatment system, the EPA required ship owners to measure system functionality, "such as how much chlorine the system is using each month.").

The Permit also states that the County must merely describe "the results and analysis of data." Part IV.A.1.b. Because the Permit does not prohibit the type of analysis that the County may use to evaluate the 20% restoration requirement, we conclude that the County may use the Guidance. Thus, we conclude that the Montgomery County Permit complies with 40 C.F.R. § 122.44(i) too.

Part IV: Public Participation

"Many tensions exist between the democratic aspiration of government of the people, by the people, and for the people and modern representative government with its mass electorate and elaborate bureaucracy for carrying out government functions. Nowhere are these tensions more acute than in the domain of environmental policy." National Research Council, Public Participation in Environmental Assessment and Decision, National Academies Press 7 (2008). The dispute between the Water Groups and MDE over whether the Permits satisfy public participation requirements exemplifies this tension. The Water Groups frame their argument by highlighting the ways in which the Permits' two most critical elements — the TMDL Plans and the 20% restoration requirement — fail to satisfy public participation requirements.

A. TMDL Plans

We have discussed at length that the Permits require the Counties to submit TMDL plans and that, among other things, the Permits satisfy 40 C.F.R. § 122.44(d)(1)(vii)(B), which requires that effluent limits be consistent with WLAs.

Nevertheless, the Water Groups contend that the TMDL plans create another problem. The Permits require the Counties to design and submit these plans *after* the agency approves of the Permits. *See, e.g.,* Montgomery County Permit Part III.J.2 ("Within one year of the effective date of this permit or the approval of an applicable TMDL by EPA, whichever is later, the County shall submit to MDE for review and approval a TMDL implementation plan...."). The Water Groups contend that MDE has "unlawfully circumvent[ed]" federal and state procedural requirements because the restoration plans, which include significant new requirements, come into existence more than one year after the Permits are issued, without providing for

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public notice and comment. [90] The Water Groups characterize this scheme as an "end-run around mandatory permitting requirements" and as an approach that "thwart[s] accountability." Put simply, the essence of the Water Groups' argument is that the public cannot comment about decisions that have yet to be made.

1. Permit Modification

Specifically, the Water Groups view the TMDL plans that must be submitted to MDE as a modification of the Permits. Federal and state regulations stipulate that a permitting authority must provide the public an opportunity to be heard prior to a modification of a permit authorizing discharges. 40 C.F.R. §§ 122.62, 124.10; EN §§ 1-601, 9-324. [91] Courts across the country have cited these federal regulations as well as related state regulations in recognizing the necessity of public participation when a permit has been modified. *See, e.g., United States v. Smithfield Foods,* 191 F.3d 516 (4th Cir.1999); *Citizens for a Better Env't — California v. Union Oil Co. of California,* 83 F.3d 1111 (9th Cir.1996). Thus, the Water Groups' argument requires us to determine whether the restoration plans constitute a modification of the Permits triggering an obligation upon MDE to implement the public participation provisions in those regulations.

The Permits direct the Counties to develop restoration plans using BMPs that are found in the Manual and discussed again in the Guidance. These documents, which MDE incorporated into the Permits by reference, provide a "menu of options" for the Counties to utilize. By incorporating these documents, MDE made the BMPs available to the Counties at the time the agency issued the Permits. When the Counties submitted (or will submit) restoration plans using these BMPs, no modification will have occurred because the Counties will merely have drawn from the same pool of BMPs that the agency had previously analyzed and approved of for *restoration* purposes. CWP & MDE, Manual § 2.0 ("This chapter also presents a list of acceptable BMP options that can be used to comply with the sizing criteria," including, the WQv.); *see* 27 Md. Reg. at 1168 (to be codified at COMAR 26.07.02) (MDE incorporated the Manual as part of the agency's effort to enhance its regulations which had until then provided "sparse guidance" on "water quality enhancement."). Although we recognize that the Counties have selected *specific* BMPs to implement from among a larger group of BMPs, the larger group still satisfies MDE's specific performance standard, WQv. Thus, no "material and substantial alterations or additions" will occur after Permit issuance "justify[ing] the application of [] conditions that are different or absent in the existing [P]ermit." 40 C.F.R. § 122.62(a)(1).

2. Opportunity to Comment

The Water Groups also argue that the restoration plans violate federal and state laws on public notice and comment because they are unable to meaningfully comment about decisions that have yet to be made. This argument is unavailing because, as we have explained, the BMPs were previously

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able for the public to comment on. Indeed, many of the same Water Groups challenging the Permits in this case submitted comments on these BMPs.

For example, in the Basis for Final Determination, MDE noted that it "received many, varied and often conflicting comments regarding the Guidance," which referred to the BMPs, and that the Guidance was "widely distributed and commented on." One salient BMP that was objected to by some Water Groups was the use of detention facilities, such as detention ponds. [92] For example, Natural Resources Defense Council submitted a comment in which they criticized the Guidance as "flawed" because it "overestimate[d] the efficacy of detention ponds" and "overstate[d] the channel protection benefits of detention practices." Chesapeake Bay Foundation, also a party, commented that detention systems "provid[e] very little water quality benefits." [93]

On the other hand, the Water Groups strongly supported the use of ESD in their submitted comments. [94] Natural Resources Defense Council proffered that the draft Guidance "ignore[d] the Maryland statute establishing ESD as the preferred Maryland approach." [95] The Chesapeake Bay Foundation stated that the Permits "should impose a higher performance standard" and recommended that this "be done primarily through Environmental Site Design." [96] In its Basis for Final Determination, MDE responded to the Water Groups' comments by highlighting its credit approach to improving water quality. MDE explicated that the Guidance incentivized the utilization of ESD practices by granting greater pollution credit for ESD and less credit for structural treatment BMPs such as detention facilities. Furthermore, MDE justified the use of detention ponds and other types of structural BMPs pursuant to the Manual to afford the Counties the "flexibility to implement various strategies based on site specific opportunities." The comments and MDE's substantive responses thereto, illustrate that there was a vigorous and pellucid public discussion regarding the practices set forth in the Manual and Guidance, and that the agency defended its

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approach to water improvement strategies as flexible but effective. [97]

Thus, the record in this case clearly supports that the public had the opportunity and, in fact, actually commented on which BMPs would best meet the MEP standard for restoration purposes. [98] In arguing that they cannot comment about decisions that have yet to be made, the Water Groups overlook the fact that the public was able to comment on BMPs — the core component of the TMDL restoration plans.

Moreover, even though the Counties create the restoration plans after the Permits are approved, the public is still able to participate in the formulation of the plans. The Permits explicitly provide for "[a] minimum 30 day comment period" before finalization of the restoration plans. In addition, the Counties must give notice in a local newspaper and on their website outlining how the public may obtain information and provide comments on the restoration plans. Critically, the Counties must also include a summary in their annual reports of how they "addressed or will address any material public comments received." MDE reviews these reports. The Counties are "responsible for complying with all conditions of" the Permits, and "[f]ailure to comply with a [P]ermit provision constitutes a violation of the CWA and is grounds for enforcement action." Thus, contrary to the Water Groups' assertion that the Permits "thwart accountability," the Permits afford the opportunity for robust public involvement in the attempt to abate stormwater pollution and improve water quality.

That the Permits provide for public participation at the County level is not enough for the Water Groups. The Water Groups fault the Permits for not providing for public participation at the state level and proffer that the Permits "prevent[] members of the public from commenting on ... MDE's decision to approve the restoration plans." Because the public had the opportunity to comment on the "menu" of BMPs in the Manual and the Permits unambiguously mandate public participation at the County level, the restoration plans have been subject to a "double layer" of public participation. We, therefore, are not persuaded by the Water Groups' arguments.

Finally, the Water Groups maintain that MDE's claims of "potential administrative burdens are irrelevant and specious." We must, however, give weight to the notion that MDE permitted the Counties to draw from a broad group of BMPs in the Manual in light of the highly variable nature of stormwater discharges. MDE possesses a comparative advantage in addressing environmental problems affecting our State. It is axiomatic that a reviewing court should respect "the expertise of an agency in its own field." *Banks,* 354 Md. at 69, 729 A.2d at 381 (citations omitted). Moreover, the Counties have expertise in water quality assessments of waterbodies found within the boundaries of their political subdivisions. As the Permits require, the Counties "shall complete detailed watershed assessments" for their entire jurisdiction. Thus, there is great value in deferring to the Counties' choice of BMPs, and because the public had an opportunity to

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comment on the BMPs during the drafting of the Permits as well as on the select BMPs in the restoration plans the Counties submit to MDE, we conclude that the public has not been deprived of notice and comment.

3. Case Law

The Seventh Circuit's decision in *Texas Independent Producers and Royalty Owners Assoc. v. EPA,* 410 F.3d 964 (7th Cir. 2005), is also instructive on this point. In *Texas Independent Producers,* the EPA issued a general permit for stormwater discharges from construction sites that required operators to file a Notice of Intent ("NOI") stating that they planned to operate under the general permit, rather than apply for an individual permit. 410 F.3d at 968. Absent a negative ruling by the EPA, stormwater discharges that complied with the terms of the general permit were automatically authorized. *Id.* The permit also required that operators "create, maintain, and implement a site-specific Storm Water Pollution Prevention Plan (`SWPPP')." *Id.* An environmental organization challenged the Permit and asserted that it violated the Clean Water Act because it failed to satisfy public participation requirements regarding the NOI and SWPPP.

After conducting a *Chevron* analysis, the court concluded that EPA's reasoning as to why it issued the general permit without providing for public review of NOIs and SWPPPs was "eminently reasonable." *Id.* at 978. Notably, the court accepted EPA's argument that because the public had the opportunity to comment on the proposed general permits whose terms governed the NOIs and SWPPPs, there was "no need for additional public comment or a notice period [regarding NOIs and SWPPPs themselves]." *Id.* In addition, the court credited the EPA's contention "that requiring `an additional public hearing on each individual NOI and SWPPP would eviscerate the administrative efficiency inherent in the general permitting concept,' in effect making the general permit scheme no different from the process of obtaining individual permits." *Id.*

The Water Groups point out that the permit in *Texas Independent Producers* was a general permit whereas the Permits at issue here are "not eligible for general permits." The Water Groups rightly note that the "existence of different permitting regimes for large and small municipal storm sewer systems reflects Congressional policy judgment" that large MS4s be regulated differently than small systems. Even if the permits are not the same, the Permits at issue in this case are conceptually analogous to a general permit because all Counties create their restoration plans based upon the *same* document setting forth the *same* groups of BMPs — the Manual. Accordingly, we find the Seventh Circuit's determination regarding public participation in *Texas Independent Producers* persuasive, and conclude that the Permits' TMDL planning requirement does not violate notice and comment mandates.

The Water Groups rely on the Second Circuit's decision in *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486 (2d Cir.2005), in support of their argument that the contents of the TMDL plans are subject to public participation requirements. In *Waterkeeper Alliance,* the court examined the regulation of water pollutants contained in the runoff from concentrated animal feeding operations ("CAFOs"). In pertinent part, the court held that the nutrient management plans the CAFOs were required to develop were effluent limits but that the EPA violated public participation requirements because it "fail[ed] to require that the terms of the nutrient management plans be included in the NPDES permits." *Waterkeeper Alliance,*

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399 F.3d at 502-04. The court stated that the plans were effluent limits because the CAFOs were required to set waste application rates in the plans. *Id.* at 502; *see* 33 U.S.C. § 1362(11) (An effluent limit includes a restriction on a rate.). In contrast to the nutritional plans discussed in *Waterkeeper Alliance,* the most critical element of the restoration plans — the BMPs — is already included in the Permits because the Permits incorporate the Manual and Guidance, which set forth those practices. Thus, the Water Groups' reliance on *Waterkeeper Alliance* is misplaced. *See* Part III.G, Part IV.E.2.a.

A Ninth Circuit decision addressing public participation is also distinguishable. In *Environmental Defense Center v. EPA,* the Ninth Circuit remanded an EPA regulation that required operators of MS4s to develop and implement individualized pollution control programs that were not subject to agency review or public participation. 344 F.3d at 853-58. The court found that the rule violated 33 U.S.C. § 1342(p)(3)(B)(iii), which is the same statutory provision that is at the center of this case. The court held that MS4 pollution control programs must be reviewed by the permitting agency and were subject to public comment, in part because those permittee-prepared programs — not the general permits issued to MS4 operators — would contain

the substantive requirements that operators must implement to reduce discharges to the "maximum extent practicable." *Id.* at 855, 857.

Here, the Counties must submit restoration plans derived from specified best management practices, including ponds, wetlands, infiltration practices, filtering systems, open channels, and other structural water quality practices, that were previously available for public comment. In contrast to the specific practices that form the basis of the restoration plans in the Permits, all that was available at the time of permit issuance in *Environmental Defense Center* were "six *general* criteria" designed to protect water quality that were never reviewed by the public. *Id.* at 845, 853 (emphasis added). [99] Consequently, the court's holding in *Environmental Defense Center* rested, at least in part, on facts that are distinguishable from the circumstances in this case.

4. Incorporation By Reference And Deference

To be sure, the Permits rely heavily on incorporation by reference. But such incorporation by reference, even of important documents, does not contravene public participation requirements because the Manual and Guidance are readily accessible to the public. *Cf.* Proposed Action on Regulations, 35:25 Md. Reg. 2193 (Dec. 5, 2008) ("Pursuant to State Government Article § 7-207, Annotated Code of Maryland, the 2000 Maryland Stormwater Design Manual ... has been declared a document generally available to the public and appropriate for incorporation by reference. For this reason, it will not be printed in the Maryland Register or [COMAR]."). [100] Additionally, including the

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best management practices in the Permits would significantly lengthen the document, which would obfuscate other requirements in the Permit. The Manual has also been part of Maryland regulatory law for two decades. It is so entrenched in the permitting process that we see no reason to detail the content of the Manual in the Permits.

5. Compliance Schedules

The Water Groups further argue that MDE must formally incorporate the restoration plans through modification procedures because the plans contain compliance schedules. They allege that compliance schedules are effluent limitations under the CWA, *see* 33 U.S.C. § 1362(11), (17), and they must be "included in a `permit,'" 40 C.F.R. § 122.2. Ergo, MDE must formally incorporate the Counties' restoration plans — containing the compliance schedules — after the Counties submit their plans to MDE. The problem, however, is that the Water Groups do not explain why the schedules in the restoration plans constitute compliance schedules.

The Permits state that the Counties must include in their restoration plans "the final date for meeting applicable WLAs and a detailed schedule for implementing all structural and nonstructural water quality projects, enhanced stormwater management programs, and alternative stormwater control initiatives necessary for meeting applicable WLAs." Part IV. E.2.b.i. Quite obviously, the restoration plans contain schedules. *Id.* But a schedule of compliance, which is an effluent limitation, is "any restriction *established by a State.*" 33 U.S.C. § 1362(11) (emphasis added); *see In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738,* 763 N.W.2d 303, 318 (Minn.2009) (holding that even though the TMDL was not yet complete, a schedule of compliance existed where the *state pollution control agency required* a facility "to meet an effluent limit set upon completion of the TMDL process"). Here, however, the schedule in the restoration plan is set by the *Counties.* States are not required to set compliance schedules, 40 C.F.R. § 122.47, and MDE has not exercised its discretion to do so.

We recognize that a schedule of compliance is "an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17). But the "detailed schedule" the Counties must set is subject to change. The Counties may substitute activities where the initially scheduled projects are not making progress in achieving WLAs. Part IV.E.2.b.iv. Consequently, the County-set schedules in the restoration plans are not "enforceable" sequences of actions or operations. What forces the Counties to comply with the WLAs is the annual reporting requirement, which explains that "BMP and program modifications shall be made within 12 months if the [Counties'] annual report[s] do[] not ... show progress toward meeting WLAs developed under EPA approved TMDLs." Part V.A.3. As we have discussed, [101] this adaptive management approach is the true enforcement mechanism that "lead[s] to compliance with an effluent limitation [or] other limitation." 33 U.S.C. § 1362(17). Thus, we conclude that the nature of the schedules

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in the restoration plans does not require MDE to incorporate those plans into the Permits by modification. [102]

B. 20% Restoration Requirement

The second key component of the Permits that the Water Groups focus on is the 20% restoration requirement. [103] This part of the Permits requires the Counties to complete restoration efforts for 20% of the Counties' impervious surface area that is not restored to the maximum extent practicable. Part III.G.2; Part IV.E.2.a. Although not required to do so, *see* 33 U.S.C. 1342(p), MDE decided to impose this numeric effluent limitation. [104]

The Water Groups allege that this provision "is not specific, measurable, or enforceable." Thus, they argue, MDE has created a requirement that the Water Groups cannot comment on or seek judicial review of.

Because of our earlier analysis, in part, the Water Groups' arguments are unavailing. Restoration is not "undefined" as the Water Groups argue because MDE anchored restoration in the universe of practices in the Manual. *See* Part III.E.1 ("At a minimum, the County shall ... [i]mplement the stormwater management ... practices found in the [Manual]...."). [105] Although the Water Groups do not know in advance which specific practices the Counties will select to restore their impervious surfaces, MDE has permitted the Counties to select from among practices that satisfied a specific performance standard, WQv. CWP & MDE, Manual § 1.2 (General Performance Standards for Stormwater Management in Maryland).

Moreover, it is inaccurate for the Water Groups to allege that MDE can approve activities "that are *known* to be ineffectual without ever being required to articulate its rationale for doing so, or being held accountable." MDE articulated a response to the Water Groups' criticism of detention practices: "Maryland's Manual for stormwater BMP design and MDE's approach to retrofitting under the municipal permit program are completely aligned with the National Research Council report [stating that detention ponds fail to meet the full range of urban stream and watershed restoration objectives]."

MDE, Basis for Final Determination to Issue NPDES Permit. MDE has responded to comments adverse to the draft permit in accordance with Maryland law and its response is adequate. *See* EN § 1-604(b) ("The Department shall prepare a final determination if" the Department received comments adverse to the tentative determination.). Thus, MDE's approach has not

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shielded its decision to approve the Counties' restoration efforts from comment or judicial review.

The Water Groups criticize MDE's use of the Guidance because, in their view, the Guidance provides assumptions about stormwater practices rather than an enforceable standard. According to the Water Groups, MDE could not know whether the Counties' efforts would be adequate when it issued the Permits because "whether the chosen practices actually meet these [pollution reduction] expectations depends entirely on the details of a permittee's restoration plans."

This argument, however, must fail because it overlooks the nature of the 20% restoration requirement: a surrogate. ENSR, Pilot TMDL Applications Using the Impervious Cover Method § 1.0, at 1-1 ("The IC [Impervious Cover] method uses percent impervious cover in a watershed as a surrogate TMDL target."). [106] Because the 20% restoration requirement is a surrogate for reducing pollution, MDE has logically created an accountability system based on an assessment of compliance *with the surrogate,* not on assessment of pollution reduction in fact. [107] *See* 33 U.S.C. § 1342(p)(3)(B)(iii) (This law requires "controls to reduce the discharge of pollutants" to the MEP, not "reductions to the MEP."); *EDC,* 344 F.3d at 855 (The permitting authority must "review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable.") (emphasis in original).

To ensure that the 20% requirement is met, MDE requires the Counties to translate the BMPs they implement on impervious surfaces into credits. As we previously explained, the credit system is related to the performance standard in the Manual: the WQv. "An acre for acre impervious credit will be given when a structural BMP is specifically designed to provide treatment for the full WQv (one inch), or [a] proportional acreage of credit will be given when less than the WQv is provided." Moreover, for BMPs that "provide greater than one inch of volume control," the activities "receive additional credit." [108] As a

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result, the Counties must choose the appropriate mix of BMPs to obtain enough credits to satisfy the 20% requirement. If the Counties ignore the credit system and the consequences of selecting BMPs with efficiency estimates below the WQv standard, then the Counties risk failing to fulfill the 20% restoration requirement and confronting an enforcement action by MDE. Part VI.C. The Counties must complete restoration efforts for 20% of their impervious surface area within five years under the express terms of the permit according to the credit system we have explained. The 20% restoration requirement is thus also measurable and enforceable. [109] *See also* EPA, 2014 Memo at 10 (Box 1: Examples of WQBELs in MS4 Permits) ("The MS4 Permit includes a specific, quantifiable performance requirement that must be achieved within a set timeframe. For example: Restore within the 5-year permit term 20 percent of the previously developed impervious land (2014 Prince George's County, MD MS4 permit).").

CONCLUSION

Upholding MDE's decision to issue the Permits, we are guided first and foremost by the law. That law, 33 U.S.C. § 1342, provides a flexible approach to MS4 permitting. Moreover, this approach contemplates that states shall set controls *they deem necessary* to reduce the discharge of pollutants into their waters. *See* 33 U.S.C. § 1342(p)(3)(B)(iii). The Water Groups insist that the Permits may not contain effluent limitations "to allow maximum flexibility." But even the EPA, to whom Congress delegated authority to issue regulations pertaining to TMDLs, has afforded permitting agencies such as MDE the flexibility to develop effluent limitations. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

We recognize that the CWA sets forth an important goal of public participation in the "development, revision, and enforcement" of these Permits. 33 U.S.C. § 1251(e). In our consideration of (1) the opportunity to comment in writing and at a public hearing on the draft Permits, (2) MDE's responses to the public's comments, and (3) the opportunity for the public to participate further in the Counties' efforts to meet WLAs, MDE has upheld its part of the bargain. That is, the agency has "provided for, encouraged, and assisted" public participation as Congress envisioned. 33 U.S.C. § 1251(e). Therefore, we conclude that MDE's decision was lawful and that the Permits are valid.

IN CASE NO. 42, JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND AFFIRM MDE'S DECISION TO ISSUE THE MONTGOMERY COUNTY PERMIT. COSTS TO BE PAID BY RESPONDENT.

IN CASE NOS. 43 & 44, JUDGMENTS OF THE CIRCUIT COURTS FOR ANNE ARUNDEL COUNTY, BALTIMORE CITY, BALTIMORE COUNTY, AND PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY PETITIONER.

FootNotes

1. We refer to the various environmental groups and individuals who challenge the Permits as the Water Groups. They include Anacostia Riverkeeper, Blue Water Baltimore, Inc., Chesapeake Bay Foundation, Inc., Earthjustice, Friends of the Earth, Gunpowder Riverkeeper, Inc., Magothy River Association, Inc., Mattawoman Watershed Society, Natural Resources Defense Council, Patuxent Riverkeeper, Inc., Potomac Riverkeeper Network, Sierra Club, Waterkeeper Alliance, Waterkeepers Chesapeake, West/Rhode Riverkeeper, Inc., Mac Thorton and Pat Munoz.

2. Congress established the National Pollution Discharge Elimination System ("NPDES") pursuant to 1972 amendments to the Clean Water Act ("CWA"). *Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1371 (D.C.Cir.1977).

3. Notably, in 1973, the EPA exempted "separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity" from the requirements of 33 U.S.C. § 1342. *Id.* at 1372. The United States Court of Appeals for the D.C. Circuit invalidated this regulatory action in *Natural Resources Defense Council, Inc. v. Costle. Id.* at 1377 ("[T]he EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of [33 U.S.C. § 1342]."). It was not until 1987 that Congress acted to regulate municipal separate storm sewer systems ("MS4s"). *See Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1296 (9th Cir.1992) (explaining that Congress passed amendments to the CWA in 1987 in

recognition of "the environmental threat posed by storm water runoff and EPA's problems in implementing regulations").

4. MS4s are classified based on the population in the jurisdiction. 40 C.F.R. § 122.26(b)(4), (7), (16). Because the Counties all have more than 250,000 people, the Permits are large MS4 permits. MDE, Montgomery County NPDES Permit Fact Sheet; MDE, Anne Arundel County NPDES Permit Fact Sheet; MDE, Baltimore County NPDES Permit Fact Sheet; MDE, Prince George's County NPDES Permit Fact Sheet; MDE, Baltimore City NPDES Permit Fact Sheet.

5. A point source is "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Although storm sewers are point sources, the urban runoff that leads to them had once been considered nonpoint source pollution. Mark Ryan, The Clean Water Act Handbook 167 (3d ed.2011) ("Stormwater runoff in the early days of the NPDES program was treated as a diffuse source of non-point source pollution. This may have seemed logical because most runoff cannot efficiently be controlled using the strict end-of-pipe effluent limitations that are effective in regulating traditional industrial and municipal discharges."); *cf. Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir.2013) ("Stormwater runoff is `a nonpoint or point source ... depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).'").

6. Congress passed the Water Quality Act of 1987, thereby amending the CWA and revising the law for municipal stormwater discharge. *See* Water Quality Act, Pub.L. No. 100-4, 101 Stat. 7, 69 (1987) (codified at 33 U.S.C. § 1342(p)); *see also Natural Res. Def. Council, Inc.*, 966 F.2d at 1296, 1308.

7. We shall sometimes refer to this provision with the acronym MEP.

8. Although, as we explain, effluent limitations in MS4 permits are not required to meet water quality standards, we note that these limitations are often described as water quality based effluent limitations ("WQBELs"). *See* 33 U.S.C. § 1312.

9. An infiltration practice "is characterized by a depression to form an infiltration basin where sediment is trapped and water infiltrates the soil." EPA, Chesapeake Bay Phase 5.3 Community Watershed Model § 6.7.5., at 6-51 (2010), *available at* http://www.chesapeakebay.net/about/programs/modeling/ 53/ [https://perma.cc/9YKS-WBZ4]. "A green roof, or rooftop garden, is a vegetative layer grown on a rooftop." EPA, Using Green Roofs to Reduce Heat Islands (last updated Sept. 22, 2015), *available at* http://www.epa. gov/heat-islands/using-green-roofs-reduce-heat-islands [https://perma.cc/9JBC-R3GM].

10. At the end of 2010, when the EPA issued the Chesapeake Bay TMDL ("Bay TMDL"), which we will discuss, the EPA explained that there were more than 40,000 completed TMDLs in the United States. EPA, Chesapeake Bay TMDL Executive Summary, ES-3 (2010) [hereinafter "Bay TMDL ES"], *available at* http://www.epa.gov/chesapeake-bay-tmdl/chesapeake-baytmdl-document [https:// perma.cc/9R7V-9VHV].

11. MPN refers to Most Probable Number. Code of Maryland Regulations ("COMAR") 26.08.02.03-3C.

12. The Water Groups do not challenge the Court of Special Appeals' holding that the Montgomery County Permit "is *not* subject to the technology-based discharge limitations (`TBDLs') of § 1311(a), but rather to § 1342(p)(3)(B)...." *Md. Dep't of the Env't v. Anacostia Riverkeeper*, 222 Md.App. 153, 172, 112 A.3d 979, 990 (2015) (emphasis in original), *cert. granted*, 443 Md. 734, 118 A.3d 861 (2015).

13. The EPA has defined the TMDL as "[t]he sum of the *individual WLAs for point sources* and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i) (emphasis added). In this case, we focus on wasteload allocations ("WLAs"), which we will soon discuss. The other major component of the TMDL equation — load allocations ("LAs") — deals with nonpoint sources of pollution, 40 C.F.R. § 130.2(g), and is irrelevant to this case because we are concerned with the discharge of pollutants from point sources. *See Natural Res. Defense Council*, 966 F.2d at 1295-96 & n. 5 (discussing the legislative and regulatory history leading up to the regulation of stormwater as a point source).

14. To be clear, Maryland, as all other states, must comply with 33 U.S.C. § 1313(d) and establish TMDLs even though MS4s are not subject to effluent limitations "necessary to meet water quality standards." *See* 33 U.S.C. § 1311(b)(1)(C).

15. MDE documented WLAs for two sources of fecal bacteria for the Cabin John Creek TMDL — domestic pets and wildlife — but the final WLA represents "one combined load for the entire land area of the county." MDE, Total Maximum Daily Loads of Fecal Bacteria for the Non-tidal Cabin John Creek Basin in Montgomery County, Maryland § 4.8, at 32 (Document version: Oct. 13, 2006) [hereinafter "John Creek Basin TMDL"]. MDE was acting according to the EPA's 2002 guidance memo: "available data and information usually are not detailed enough to determine WLAs for NPDES-regulated stormwater discharges on an outfall-specific basis." *See* EPA, Memorandum on Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs 4 (2002) [hereinafter "2002 Memo"]. Since then, the EPA continues to express that it "does not expect states to assign WLAs to individual MS4 outfalls." EPA, Memorandum on Revisions to the November 22, 2002 Memorandum at 7 (2014) [hereinafter "2014 Memo"].

16. Thus, MDE has incorporated this requirement into the Permits at Part IV.E.

17. *See* Part IV.E.4. The Fact Sheet for Montgomery County's Permit shows that, less than two years before that Permit became effective, the EPA had approved seven TMDLs (and consequently seven WLAs), that five TMDLs were pending the EPA's approval or soon to be subject to the EPA's review, and that MDE would later address 21 TMDLs. At the time the other Permits were issued, the EPA had approved 34 WLAs for Anne Arundel County, 33 WLAs for Baltimore County, 63 WLAs for Prince George's County, and 18 WLAs for Baltimore City.

18. On May 12, 2009, President Barack Obama issued Executive Order 13508, Chesapeake Bay Protection and Restoration, and called the Chesapeake Bay a "national treasure." The White House Office of the Press Secretary, Executive Order 13508 — Chesapeake Bay Protection and Restoration (May 12, 2009), *available at* https://www. whitehouse.gov/the-press-office/executive-order-chesapeake-bay-protection-and-restoration [https://perma.cc/QML9-6VSF].

19. On February 29, 2016, the United States Supreme Court denied American Farm Bureau Federation's Petition for Writ of Certiorari for review of the Third Circuit's decision to uphold the EPA's exercise of its authority in developing the Bay TMDL. *See* Supreme Court of the United States (March 10, 2016), *available at* http://www.supremecourt.gov/ Search.aspx?FileName=/docketfiles/15-599. htm [https://perma.cc/R8L8-EX54].

20. A multi-year congressional study revealed in 1983 that nitrogen and phosphorus were major sources contributing to the Bay's degradation. Ben Franklin, *Chesapeake Bay Study Citing Pollution Threats,* N.Y. Times (Sept. 27, 1983) ("The reports said the steady inflow of nitrogen and phosphorus ... had caused large, offensive, blue-green `blooms' of algae on the bay's surface. The algae growth consumes oxygen in the water and reduces the penetration of sunlight, killing aquatic life in large areas of the bay."). Former Maryland Senator Charles Mathias was a chief supporter of this study. *Id.*

21. To be clear, the EPA did not rely exclusively on modeling to develop this TMDL but also used monitoring and environmental research. EPA, Chesapeake Bay TMDL, at 5-19.

22. The EPA has explained that "[t]he primary reason, and benefit, for applying a watershed model for TMDL development typically is the ability to predict pollutant generation from varying land uses and from multiple subwatersheds." EPA, Handbook for Developing Watershed TMDLs: Draft 58 (2008). As opposed to single-segment TMDLs, watershed TMDLs involve the "simultaneous development of multiple TMDLs for hydrologically linked impaired segments." *Id.* at 3.

23. The District Court for the Middle District of Pennsylvania rejected American Farm Bureau Federation's challenge to the Phase 5.3 Model "as being insufficient for allocations established at the sub-watershed level." *Am. Farm Bureau Fed'n,* 984 F.Supp.2d at 341-42. The American Farm Bureau Federation did not appeal this issue to the Third Circuit. *Am. Farm Bureau Fed'n,* 792 F.3d at 294.

24. Although MDE did not incorporate the Guidance into the Montgomery County Permit, we set forth in our discussion why the Guidance is nevertheless available to the County in carrying out Permit requirements. *See infra* Discussion at pp. 130, 140 n. 60, 134 A.3d at 917, 923 n. 60.

25. We discuss the credits-to-acres approach in depth in the Discussion.

26. This model is accessible at www. mastonline.org.

27. The EPA highlighted Maryland's pursuit of legislation to fund urban stormwater management programs as a specific improvement between the draft and final versions of Maryland's Watershed Implementation Plan ("WIP"). EPA, Bay TMDL ES-10; *see* H.B. 987, 2012 Gen. Assemb. Reg. Sess. (Md.2012); *see also* Maryland Code (1982, 2007 Repl. Vol.), § 4-202.1(a)(1) of the Environment Article ("EN").

28. For example, in Pennsylvania, the EPA transferred half of the stormwater load not subject to permit restriction to the wasteload allocation (and thus bringing the load within the scope of a permit's restrictions) to increase the reasonable assurance the state would achieve pollutant allocations for urban stormwater discharge. EPA, Bay TMDL ES-11.

29. Maryland allocated pollutant loads by sector. Thus, although its strategy to reduce impervious surface area will help the State comply with the pollutant load requirements for stormwater, Maryland will nevertheless have to implement other strategies to target other sectors, such as agriculture, air, and wastewater. Department of Legislative Services, Office of Policy Analysis, Achieving the Chesapeake Bay Restoration Mandate in Maryland 3-4 (2012).

30. MDE subsequently assumed the Department of Natural Resources' position to issue such regulations in 1987. S.B. 671, 1987 Gen. Assemb. Reg. Sess. (Md.1987).

31. The Center for Watershed Protection ("CWP") produced a draft of the Manual in 1997 for the Water Management Administration pursuant to an agreement between MDE and the Department of Natural Resources and a grant from the National Oceanic and Atmospheric Administration. The Water Management Administration administers the stormwater program for MDE. MDE, Water Management Permits (last visited Feb. 8, 2016) http://www.mde.maryland.gov/ programs/permits/watermanagementpermits/ pages/permits/watermanagementpermits/ index.aspx [https://perma.cc/2HJB-474E].

32. We shall sometimes refer to this agency document in the record as the Basis for Final Determination.

33. *Cf.* Montgomery County Department of Environmental Protection, Annual Report NPDES MS4 Permit Montgomery County, Maryland III-56 (2003) ("The Permit requires the County to track progress and evaluate effectiveness of implementing programs and projects to restore a drainage area `equaling ten percent of Montgomery County's impervious area that has not been treated to the maximum extent practicable' (10% goal).").

34. *See* Montgomery County Permit Part III. I.2 ("Adequate program funding to comply with all conditions of this permit shall be maintained.").

35. The General Assembly amended EN § 4-202.1 in 2015 by repealing the mandate that the relevant counties collect a stormwater remediation fee and instead "*authoriz[ing]* such jurisdictions to do so." S.B. 863, 2015 Gen. Assemb. Reg. Sess. (Md.2015) (emphasis in original).

36. The statutory requirements for judicial review, which include standing, are not in dispute. *See* EN § 1-601. The Court of Special Appeals determined that Anacostia Riverkeeper and other environmental groups had standing to challenge the Montgomery County Permit in Case No. 42. We reach the same conclusion with respect to all parties in the four other challenges in the circuit courts.

37. Although we refer to the Water Groups collectively, we recognize that different coalitions within the Water Groups challenged the Permits in each County rather than each environmental group participating in the challenge before the circuit court in each County.

38. The Water Groups initiated a challenge to the Montgomery County Permit before the General Assembly amended the Environmental Article and

thus, the dispute over this Permit was the subject of a contested case hearing. The administrative law judge ("ALJ") concluded that the Water Groups lacked standing to challenge the Permit, but this was appealed. The Court of Special Appeals eventually held that the Water Groups did in fact have standing and remanded for consideration of the underlying substantive issues. The General Assembly, however, changed the procedures for challenging a discharge permit during this time. As a result, it was the circuit court that first held a hearing on the merits of the issuance of the Montgomery County Permit. Thus, no issues involving the merits of this Permit were addressed in a contested case hearing.

39. EN § 1-606(c) provides:

> Any judicial review of a determination provided for in accordance with § 1-601 of this subtitle or § 5-204 or § 16-204 of this article shall be limited to a record compiled by the Department or Board, consisting of:
>
> (1) Any permit or license application and any data submitted to the Department or Board in support of the application;
>
> (2) Any draft permit or license issued by the Department or Board;
>
> (3) Any notice of intent from the Department or Board to deny the application or to terminate the permit or license;
>
> (4) A statement or fact sheet explaining the basis for the determination by the Department or Board;
>
> (5) All documents referenced in the statement or fact sheet explaining the basis for the determination by the Department or Board;
>
> (6) All documents, except documents for which disclosure is precluded by law or that are subject to privilege, contained in the supporting file for any draft permit or license;
>
> (7) All comments submitted to the Department or Board during the public comment period, including comments made on the draft application;
>
> (8) Any tape or transcript of any public hearings held on the application; and
>
> (9) Any response to any comments submitted to the Department or Board.

40. Case law from the U.S. Court of Appeals for the D.C. Circuit, the preeminent federal appellate court for review of administrative action, is also helpful in understanding the degree of deference accorded under the arbitrary and capricious standard. In *Weyerhaeuser Co. v. Costle,* the court noted that in light of the structure and aims of the Clean Water Act, "and the breadth of authority delegated by it to the EPA to identify highly sophisticated control technology in an area fraught with scientific uncertainty," its review of the agency's action "encounter[ed] significant limitations in the substantive aspect where the given statutory standards are `arbitrary,' `capricious,' or `abuse of discretion.'" 590 F.2d 1011, 1025 (D.C.Cir.1978). The court highlighted that "an expansive concept and exercise of the review power [by numerous courts] charged with that function could easily impede accomplishment of the [Clean Water] Act's ambitious pollution-ending aspiration as well as its goal of industry-by-industry uniformity." *Id.*

41. A review of the EPA's guidance on MS4s shows that the restoration requirement does have a numeric limitation — 20%, which denotes the minimum percentage of impervious surface with respect to which the Counties must implement stormwater management practices from the Manual in order to fulfill this Permit requirement. *See* EPA, 2014 Memo at 4 n. 5. (A numeric effluent limitation has "a quantifiable or measurable parameter related to a pollutant.... Numeric WQBELs may include ... limits on pollutant discharges by specifying parameters such as ... percentage or amount of effective impervious cover...."). In other words, the EPA's guidance shows that numeric limits need not be limits on pollution reduction to be acceptable. The limits can, alternatively, specify parameters such as percentage of impervious cover.

42. By connecting restoration practices to the water quality volume ("WQv") standard, MDE acted in accordance with the EPA's then most recent guidance on the development of BMPs. *See* EPA, Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" 3 (Nov. 12, 2010) ("Where WQBELs in permits for stormwater discharges from MS4s.... are expressed in the form of BMPs, the permit should contain objective and measurable elements (e.g., schedule for BMP installation or level of BMP performance).") [hereinafter "2010 Memo"].

43. Notably, the EPA expressed no concerns about Maryland's WIP, whereas the EPA had to implement backstop allocations and adjustments in other Bay jurisdictions so that the EPA had reasonable assurance that all jurisdictions would achieve necessary reductions. *See* EPA, Bay TMDL ES at ES-10-13.

44. We also sometimes refer to this as the "iterative" process, a phrase MDE uses to refer to the same sequence of events in the Permits.

45. We will explore the relationship between TMDLs and WLAs in more detail in our discussion of the Water Groups' challenge to the TMDL planning requirement in the Permits.

46. To the extent that the Water Groups seek to challenge the soundness of a past action, i.e., Maryland's WIP, this is not the proper forum for such a challenge. *See In re City of Moscow, Idaho,* 10 E.A.D. 135, 2001 WL 988721, at *17 (EAB July 27, 2001) ("[W]e find that this is not the appropriate forum for raising this issue [of a time period incorporated into a TMDL]. We agree with the Region (Ten of the EPA) that Petitioner's allegations are in essence challenges to," among other things, "the Region's decision to approve the Paradise Creek TMDL." Petitioner "should have" raised that challenge earlier.). As to the soundness of Maryland's WIP, for example, the Water Groups should have raised that challenge in the litigation over the EPA's decision to promulgate the Bay TMDL. *See* Brief for Water Groups at 40, *Blue Water Balt. v. Md. Dep't of the Env't* (No. 44) ("Nor does Appendix A to the Phase II WIP ... explain how the twenty-percent restoration requirement relates to the need to reduce the discharge of pollutants....").

47. We also find unpersuasive the Water Groups' reliance on the EPA's discussion of the MEP standard when the EPA promulgated rules for MS4 permitting. *See* NPDES — Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed.Reg. 68,722, 68,754 (Dec. 8, 1999). Although the Water Groups stress that "specific local concerns" are a factor for MS4s to consider in selecting controls to reduce pollutant discharges, that factor is one of many from a non-exclusive list. The more enlightening aspect of the EPA's commentary is that the agency "intentionally [did] not provide[] a precise definition of MEP to allow maximum flexibility in MS4 permitting." *Id.*

48. *See* Fiscal and Policy Note, H.B. 786, 2007 Sess. (2007).

49. *See* 36 Md. Reg. 652, 652 (April 24, 2009) (to be codified at COMAR 26.17.02.02 B(22)).

50. Moreover, MDE explained that it designed the Permit to incentivize use of ESD even though it did not tailor the 20% restoration requirement to this concept. MDE, Basis for Final Determination ("[T]he Guidance clearly shows that ESD practices will be given greater pollutant load reductions than other acceptable water quality treatment practices."); *see* MDE, Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits at 10, Table 4: Structural BMP Retrofit Matrix (2011) [hereinafter "the Guidance"].

51. After analyzing this challenge, we will return to discuss the TMDL planning requirement in the final section of this opinion, which concerns the Water Groups' argument that all the Permits fail to comply with federal and state public participation laws.

52. We shall sometimes refer to this Permit requirement as the TMDL implementation plans or the restoration plans. We stress that this requirement is distinct from the 20% restoration requirement. The operative word here is *plan* whereas the operative phrase with respect to the 20% restoration requirement is *restoration of 20% of impervious surface area.* In other words, MDE is assessing the former by looking for the submission of a planning document and analyzing the latter by reviewing the amount of impervious surface area the Counties have restored.

53. As we mentioned earlier, we sometimes refer to this process as the adaptive management approach to the Counties' implementation of BMPs.

54. The EPA provided guidance that, at the time MDE was designing the Permits, endorsed this approach. *See* EPA, 2002 Memo at 4 (Effluent limits "should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits."); EPA, 2010 Memo at 3 ("Where WQBELs in permits for stormwater discharges from MS4s ... are expressed in the form of BMPs, the permit should contain objective and measurable elements (e.g., ... level of BMP performance.)."). The level of BMP performance, as we have discussed, is the WQv standard.

55. These practices are best management practices. *See, e.g.,* CWP & MDE, Manual § 1.3 ("[Chapter 2] also briefly outlines the six groups of acceptable BMPs that can be used to meet recharge and water quality volume sizing criteria."); *see also* COMAR 26.17.02.02 A, B(5) (defining BMP as it relates to the Manual and the stormwater management chapter of COMAR).

56. "When conducting a `plain meaning analysis,' dictionary definitions `provide a useful starting point for discerning what the legislature could have meant in using a particular term.'" *Preston v. State,* 444 Md. 67, 84, 118 A.3d 902, 912 (2015) (internal quotation marks omitted) (citations omitted).

57. In a general permitting scheme, a general permit is established with set limits and requirements. *See Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 853 (9th Cir.2003). Then, a discharger may file a notice of intent ("NOI"), through which the discharger agrees to discharge under the terms of the general permit. *Id.* "[T]he NOI represents no more than a formal acceptance of terms elaborated elsewhere." *Id.*

58. The designated locations in Anne Arundel County are the Parole Plaza outfall and Church Creek in-stream station in the South River watershed. The watershed in Baltimore County is the Scotts Level Branch watershed. The watershed in Prince George's County is the Bear Branch watershed. Baltimore City's location is the Moores Run. Although Montgomery County's Permit states that the watershed is the Lower Paint Branch watershed, Part III.H.1, the location was changed to the Sligo Creek Watershed after it was determined that the prior location was no longer effective for monitoring purposes. *See* Montgomery County Department of Environmental Protection, Annual Report for 2010 NPDES MS4 Permit, at III-26.

59. For chemical monitoring, the Counties must monitor 12 storm events each year, use automated or manual sampling methods, submit three representative samples for laboratory analysis under EPA approved methods, and record continuous flow measurements. Part IV.F.1. The Counties must obtain pollutant samples for biochemical oxygen demand, total Kjeldahl nitrogen, nitrate plus nitrite, total suspended solids, total petroleum hydrocarbons, e. coli or enterococcus, total lead, total copper, total zinc, total phosphorus, and hardness. *Id.* The Counties must also record continuous flow measurements and use the data to estimate pollutant load reductions. *Id.* And the Counties must report such estimates for EPA approved TMDLs. *Id.*

For biological monitoring, the Counties must annually gather benthic macroinvertebrate samples through approved methods. For physical monitoring, they must conduct a geomorphologic stream assessment, a stream habitat assessment, and use a hydrologic and/or hydraulic model to analyze the effects of rainfall, discharge rates, stage, and if necessary, continuous flow on channel geometry. *Id.* Benthic pertains to species living on the floor of a waterbody. Chesapeake Bay Program, Chesapeake Bay: Introduction to an Ecosystem at 3.

60. In Anne Arundel County, the designated location is the Picture Spring Branch in the Severn River watershed. In Baltimore County, it is the Windlass Run watershed. In Prince George's County, it is the Black Branch watershed. In Baltimore City, it is the Stony Run Watershed. And in Montgomery County, it is the Clarksburg Special Protection Area.

61. The parties do not dispute that we should accord considerable deference to the Policy Memo. Courts have turned to agency interpretations of their own regulations, if ambiguous, to discern how to understand them. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 557 U.S. 261, 283, 129 S.Ct. 2458, 174 L.Ed.2d 193 (2009) ("The regulations do not give a definitive answer to the question whether § 306 [of the CWA] applies to discharges regulated by the Corps under § 404 [of the CWA], but we do find that *agency interpretation* [in a memorandum from and to EPA officers] and agency application of the regulations are instructive and to the point.") (emphasis added).

62. MDE's Bases for Final Determination explain that the Counties submitted their applications as part of their fourth annual reports. MDE followed the method the EPA suggested in the Policy Memorandum. *See* EPA, Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Sewer Systems, 61 Fed.Reg. 41,698, 41,699 (Aug. 9, 1996) [hereinafter Policy Memo] ("MS4s may use the fourth year annual report ... as the MS4 permit reapplication."). Regulating authorities in other jurisdictions have used the submission of an annual report as part of the permit reapplication process. *See Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation,* 25 N.Y.3d 373, 13 N.Y.S.3d 272, 34 N.E.3d 782, 790 (2015) ("The vast majority of New York's 500 plus small MS4s achieved initial authorization to discharge stormwater prior to the effective date of the 2010 General Permit; they were able to maintain coverage under the 2010 General Permit by submitting their 2009 annual reports.") (citation omitted).

63. As the initial permit application requirements indicate, the appropriate land uses that a permittee was to monitor were commercial, residential, and industrial. *See* 40 C.F.R. § 122.26(d)(2)(iii)(A).

64. MDE also took into consideration the financial burden on local jurisdictions in revising the monitoring program: "The cost for establishing four monitoring sites with either automated equipment or staff and having numerous storm events sampled and analyzed [as required of NPDES MS4 permits] makes this one of the more expensive undertakings for local jurisdictions." MDE, Maryland's NPDES Municipal Stormwater Monitoring § 4.1 (1997). Although the Policy Memo does not explicitly include cost as a factor in making program changes, it does state that "[c]hanges to the stormwater management program may be justified due to the availability of *new information* on the relative magnitude of a problem." EPA, Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Sewer Systems, 61 Fed.Reg. 41,698, 41,699 (Aug. 9, 1996) (emphasis added) [hereinafter Policy Memo]. Research on the cost to undertake certain monitoring requirements strikes us as information relevant in considering programmatic changes.

Moreover, we cannot view MDE's decision in a vacuum. In light of MDE's addition of biological and physical monitoring, MDE stated that "[t]o be fair, current chemical requirements, at least in terms of monitoring sites, need to be pared with a commensurate reapportionment of resources to accommodate the two additional stool legs." MDE, Maryland's NPDES Municipal Stormwater Monitoring at § 4.3. We believe it was reasonable for MDE to reallocate resources for its revised program to further the objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

65. MDE has amassed a wealth of data from monitoring stormwater throughout the State: "Since the inception of the NPDES stormwater program, Maryland's MS4 jurisdictions have monitored more than 2,745 storm events along with an additional 1,605 sampling activities during baseflow conditions." MDE, Basis for Final Determination to Issue Anne Arundel County's NPDES MS4 Permit.

66. The Water Groups argue: "[T]he monitoring location for Baltimore City — Moores Run — is located on the eastern edge of the City near the border with Baltimore County, and is located within the Back River watershed which is just one of four major watersheds that receives discharges from the City's MS4." MDE's approach illustrates that *representative* does not only reflect the boundaries of the political subdivisions. Increasing the *frequency* of monitoring at a location is a way to yield more representative data.

To the extent that the Water Groups insist on interpreting *representative* only with respect to the boundaries of the political subdivisions, we note that the Permits require "detailed" watershed assessments "for the *entire* County." Part IV.E.1 (emphasis added). The assessment shall include the following activities: "[d]etermin[ing] current water quality problems"; "[i]nclud[ing] the results of a visual watershed inspection"; and "[i]dentify[ing] and rank[ing] water quality problems." *Id.* This Permit requirement facilitates comprehensive data collection in each jurisdiction.

67. For a comparison of land uses, see Anne Arundel County Department of Public Works, 2013 Annual Report (NPDES MS4 Permit) § III-73, *available at* http://www.aacounty. org/departments/public-works/wprp/npdes-ms 4-permit/[https://perma.cc/T9C5-S3NF]; Baltimore County Government, 2014 NPDES Annual Report § 10-4, *available at* http://www. baltimorecountymd.gov/Agencies/ environment/npdes/npdesarchive.html [https://perma.cc/6UPE-J6VZ]; City of Baltimore Department of Public Works et al., 2011 Annual Report (NPDES MS4 Permit); MDE, Review of Prince George's County's 2009 Annual Report (NPDES MS4 Permit), *available at* http://www.mde.state.md.us/programs/ Water/StormwaterManagementProgram/ SedimentandStormwaterHome/Documents/ Prince% 20George% 203-6% 20Annual% 20Report% 20Review.pdf [https://perma.cc/C2 F9-4GA3]; Montgomery County Department of Environmental Protection, Breewood Tributary Restoration, *available at* http://www. montgomerycountymd.gov/DEP/Restoration/ breewood.html [https://perma.cc/LX3Z-62Z9] (last visited Feb. 11, 2016).

68. Part IV.F.1. The Counties must obtain samples representative of a dozen storm events for biochemical oxygen demand, total Kjeldahl nitrogen, nitrate plus nitrite, total suspended solids, total petroleum hydrocarbons, e. coli or enterococcus, total lead, total copper, total zinc, total phosphorus, and hardness. *Id.* Consequently, "the resulting data will accurately portray the most common conditions for each site." EPA, NPDES Storm Water Sampling Guidance Document § 2.7.1, at 18 (1992). The Counties must also ensure that a laboratory analysis of these samples is conducted under EPA approved methods. Part IV.F.1.a.

69. When the EPA issued the initial permit application requirements for MS4s, the EPA set criteria to make storm events and sampling representative. 40 C.F.R. § 122.26(d)(2)(iii) (citing 40 C.F.R. § 122.21(g)(7)); *see* EPA, NPDES Storm Water Sampling Guidance Document § 2.7.1, at 18 (1992) ("These criteria were established to: (1) ensure that adequate flow would be discharged; (2) allow some build-up of pollutants during the dry weather intervals, and (3) ensure that the storm would be `representative,' (i.e., typical for the area in terms of intensity, depth, and duration)."). To wit, a storm event must be "greater than 0.1 inch," "at least 72 hours" after the "previously measured storm event," and the sample must be for a "flow-weighted composite sample" taken for "either the entire discharge or for the first three hours of the discharge." 40 C.F.R. § 122.21(g)(7).

As we discussed, it is ambiguous whether this regulation (40 C.F.R. § 122.26(d)(2)) pertains to subsequent permit applications and, thus, to this case. Thus, we turn again to the EPA Policy Memo which clarifies reapplication requirements. EPA, Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Sewer Systems, 61 Fed.Reg. 41,698, 41,698 (Aug. 9, 1996) [hereinafter "Policy Memo"]. The EPA encouraged "permitting authorities to work with permittees to determine if storm water monitoring efforts are appropriate and useful," and to "propose changes to make the program more appropriate and useful." *Id.* at 41,699. Because MDE did not propose any changes to the EPA's sampling criteria, *see* MDE, Maryland's NPDES Municipal Stormwater Monitoring, at §§ 4.0-4.3; App'x. 5, we conclude that these criteria should inform MDE's assessment of the Counties' chemical monitoring summary and, specifically, whether the Counties obtained *representative* samples of pollutants.

70. 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.44(d)(1)(vii)(B). To be clear, the phrase "reduce the discharge of pollutants" does not appear in the text of 40 C.F.R. § 122.44(d)(1)(vii)(B). But the effect of the regulation is the same. When a permitting authority ensures that effluent limits will be consistent with WLAs, permittees are subject to discharge requirements that in accordance with "the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h).

71. Under 33 U.S.C. § 1342(p)(3)(B)(iii), MS4s shall require "such other provisions" as "the State determines appropriate for the control of such pollutants." MDE (acting on behalf of the State) required the Counties to achieve the 20% restoration requirement.

72. As we have previously discussed with respect to the Montgomery County Permit, the Permit language is broad enough such that Montgomery County can rely on the Guidance in establishing pollutant loads. Montgomery County Permit Part III.J ("In order to accomplish these goals, this permit requires in Part III.J.2 below, that the County develop TMDL implementation plans that include estimates of pollutant loading reductions....").

73. MDE developed efficiencies in part based on the Maryland stormwater management eras in which approved BMPs were introduced. MDE, Guidance, at 6. BMPs have become increasingly sophisticated over time. *See* MDE, Guidance, at 10 (Table 4). MDE also derived efficiencies from the Chesapeake Bay Program ("CBP"), *see id.,* which explained inherent limitations in such efficiencies:

> It must also be recognized that the BMP efficiencies are being developed using an adaptive management approach that recognizes that our knowledge is incomplete. Adaptive management proposes a science-based and conservative approach to efficiencies. It allows a BMP efficiency review and updating at recurring intervals on the basis of new research, monitoring, and experience.

Chesapeake Bay Program, Phase 5.3 Community Watershed Model, § 6, at 6-9, *available at* http://www.chesapeakebay.net/about/programs/modeling/53/ [https://perma.cc/9 YKS-WBZ4].

74. The modeling, which in many cases yields the WLAs the Counties are trying to meet, is itself a process of estimation and prediction. EPA, Bay TMDL § 5.3, at 5-19 ("The models produce estimates, not perfect forecasts. Hence, they reduce, but do not eliminate, uncertainty in environmental decision making."); *see also* EPA, Bay TMDL ES at ES-5 ("The TMDL is informed by a series of models....").

75. Research on BMP effectiveness suggests that it would be challenging to monitor practices through comparing data at multiple sites because of variables likely beyond the Counties' control. *See id.* at § 6.2.1, at 6-4 (Because "pollutant transport occurs through a variety of environmental pathways," transport time "varies substantially.... Surface runoff to a stream can take minutes to days, whereas leaching to groundwater followed by discharge to a stream can take months to decades."); *cf. Natural Res. Def. Council, Inc.,* 13 N.Y.S.3d 272, 34 N.E.3d at 783 ("[A]lthough municipalities operate sewer systems, stormwater contamination results from the often unforeseen or unpredictable choices of individual residents and businesses (for examples, to let litter pile up or to use certain lawn fertilizers)....").

76. In 2009, the EPA contacted the National Research Council ("NRC") about evaluating the Chesapeake Bay Program ("CBP"). Committee on the Evaluation of Chesapeake Bay Program Implementation for Nutrient Reduction to Improve Water Quality, Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay viii (National Academies Press 2011) [hereinafter Achieving Nutrient and Sediment Reduction Goals in the Bay]. The CBP is a partnership to restore the Chesapeake Bay that began in the 1980s between the EPA and several jurisdictions including Maryland. *Id.* at viii.

77. The NRC, established by the National Academy of Sciences, is "the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public, and the scientific engineering communities." *Id.* at iii.

78. The Water Groups contend that the NRC's opinion "cannot override legally promulgated regulations." We do not disagree. Rather, as we have explained, MDE relies on this publication in support of its program of focused monitoring, which improves the quality of pollutant data during BMP implementation. *See* 40 C.F.R. § 122.48(b) (Monitoring must be "sufficient to yield data which are representative of the monitored activity.").

79. *See also* Part V.A.3 ("Because this permit uses an iterative approach to implementation, the County must evaluate the effectiveness of its programs in each annual report. BMP and program modifications shall be made within 12 months if the County's annual report does not demonstrate compliance with this permit....").

80. *See supra* Part I.A: Maximum Extent Practicable.

81. The Ninth Circuit in *EDC* concluded that the EPA had implemented a rule that failed to comply with 33 U.S.C. § 1342(p). *See* 344 F.3d at 855 ("Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable.") (emphasis in original).

82. The New York State Department of Environmental Conservation ("DEC") designed a similar approach in its MS4 general permits, which the Court of Appeals of New York upheld in 2015:

> DEC's review of annual reports allows the Department to keep tabs on small MS4s and to require any necessary refinement of best management practices. DEC refers to these contemplated successive rounds of reviewing and, as necessary, fine-tuning and refocusing best management practices as the iterative process that is the hallmark of the flexible maximum extent practicable standard, which Congress deliberately chose as best suited for regulating small municipalities' stormwater discharges.

Natural Res. Def. Council, Inc., 13 N.Y.S.3d 272, 34 N.E.3d at 790.

83. "The Mid-Atlantic Water Program (MAWP) housed at the University of Maryland (UMD) led a project to develop the components or subcategories of select BMPs and a corresponding definition(s) and effectiveness estimates." University of Maryland/Mid-Atlantic Water Program, BMP Assessment Final Report 5 (2009).

84. We have already discussed and approved of MDE's decision to require the Counties to use 2002 as the baseline for determining those impervious surfaces controlled to the MEP. *See supra* Part I.C: The Methodology in the Guidance.

85. As MDE explained in the Basis for Final Determination, "the Guidance clearly shows that ESD practices will be given greater pollutant load reductions than other acceptable water quality treatment practices." *See* MDE, Basis for Final Determination to Issue Anne Arundel County NPDES Permit. By way of example, the pollution reduction rate for total suspended sediment (TSS) for the WQv standard is 80%. MDE established the pollution reduction rate for TSS for a rain garden at 90% and established the rate for the same pollutant for a dry detention pond at 10%. MDE, Guidance, at 10 (Table 4).

86. The Counties must submit annual databases for BMP locations and impervious surface area to document progress toward the 20% restoration requirement. Part IV.A.2.b-c; Attachment A: Annual Report Databases.

87. "A ship takes on and discharges ballast water to compensate for changes in its weight caused by activities such as loading and unloading cargo or consuming fuel or supplies." *Natural Res. Def. Council, Inc. v. EPA,* 808 F.3d 556, 561 (2d Cir.2015). During this process, a ship can collect organisms, then discharge them somewhere else, thereby "enabling these organisms to establish new, non-native populations. As a result, ships have become one of the primary ways that invasive species are spread from one waterbody to another." *Id.*

88. The specific limitations to which the relevant monitoring provisions in *NRDC* were applicable restricted the discharges of organisms and of pathogen and pathogen indicators. *Id.* at 567.

89. Functionality monitoring required a ship owner to measure something to assess system functionality, "such as how much chlorine the system is using each month." *Id.* at 581. Indicator organism monitoring required the owner to analyze samples of ballast discharge to determine whether the sample contained "significant levels" of the bacteria. *Id.*

90. It is, however, undisputed that MDE provided the public with an opportunity to comment on the reissuance of the Permits.

91. A permitting authority need not engage in public notice and comment procedures for "minor modifications" of a permit. 40 C.F.R. §§ 122.62, 122.63. The restoration plans, however, do not fall within the specific, enumerated list of revisions that constitute a minor modification under 40 C.F.R. § 122.63. Accordingly, the only issue here is whether the TMDL plans are a non-minor modification of the Permits.

92. The Guidance classifies detention facilities as a "structural" BMP.

93. The Natural Resources Defense Council, Anacostia Riverkeeper, Maryland Sierra Club, and Potomac Riverkeeper also commented on street sweeping and catch basin cleaning, which are deemed "alternative BMPs" by the Guidance. The Water Groups maintained that these practices were "not the best practices for restoring [] County water bodies."

94. ESD is another type of BMP which includes green roofs, reinforced turf, dry wells, rain gardens, submerged gravel wetlands, permeable pavements, and other "green infrastructure" BMPs. Nancy Stoner, Acting Assistant Administrator, EPA Office of Water, & Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, *Protecting Water Quality with Green Infrastructure in EPA Water Permitting and Enforcement Programs* (Apr. 20, 2011).

95. These Water Groups also favored the use of the following BMPs: street sweeping, catch basin cleaning, erosion and sediment control, and storm drain vacuuming. However, they noted that these practices should "not be credited toward restoration or retrofit obligations" because "they do not reduce runoff volume."

96. Likewise, the Natural Resources Defense Council, Anacostia Riverkeeper, Maryland Sierra Club, and Potomac Riverkeeper endorsed the use of ESD in comments they submitted to MDE. These Water Groups disapproved of the draft Permits because they did "not require or prioritize the use of environmental site design [] techniques" and allowed the Counties "to meet its `restoration requirement' through the use of non-ESD practices."

97. In addition to the opportunity to provide written comments on the draft Permits, MDE held public hearings to accept formal testimony on each Permit.

98. We recognize that these public comments on the BMPs did not appear during the development of the Montgomery County Permit. Nevertheless, the Manual, from which the BMPs arise, was publicly available. It is the BMPs that are the actions the Counties will take to make progress toward WLAs.

99. The six general criteria were:

(1) conducting public education and out-reach on stormwater impacts;

(2) engaging public participation in the development of stormwater management programs;

(3) detecting and eliminating illicit discharges to the MS4;

(4) reducing pollution to the MS4 from construction activities disturbing one acre or more;

(5) minimizing water quality impacts from development and redevelopment activities that disturb one acre or more; and

(6) preventing or reducing pollutant runoff from municipal activities.

100. Indeed, the Manual can be found through a quick Internet search and is available on MDE's website: http://www.mde.state.md.us/programs/water/stormwatermanagement program/marylandstormwaterdesignmanual/ Pages/Programs/WaterPrograms/Sedimentand Stormwater/stormwater_design/index.aspx [https://perma.cc/86SJ-4GGD].

101. *See Supra* Part III.E.1.b: Adaptive Management.

102. Because we disagree with the Water Groups' arguments, the TMDL plans are not "enforceable" such that MDE has violated public participation laws. Rather, the TMDL plans are "enforceable" insofar as the Counties are required to submit them to MDE and MDE will monitor the Counties' implementation of the TMDL plans through the reporting requirements in the Permits.

103. The Water Groups mischaracterize the 20% restoration requirement as a "plan" and thus discuss it in the same context that they discuss how the TMDL plans violate public participation requirements. This description is inaccurate because, quite simply, there is no plan for the 20% restoration requirement. Rather, the Counties need only restore 20% of their impervious surface area within five years. Part III.G.2. Consequently, the Water Groups' argument that MDE's approval of TMDL plans constitutes a modification with respect to the 20% requirement is inapposite.

104. As we have previously discussed, MDE's decision to impose this restoration requirement on the Counties was supported by substantial evidence and was not arbitrary and capricious. *See supra* Part I.B: Substantial Evidence and Arbitrary and Capricious.

105. *See supra* Part I.A: Maximum Extent Practicable.

106. There is no allegation that MDE has failed to follow the impervious cover method in designing the 20% restoration requirement. In fact, attorneys representing the Water Groups recognized MDE's adherence to this model when MDE was drafting the Permits. University of Maryland Environmental Law Clinic, Comments on the Tentative Determination to Issue the NPDES MS4 Permit to Montgomery County at 9 & n. 26 (2008) ("The watershed restoration approach advanced by the Draft Permits comports with the impervious cover method (`ICM'). ICM involves reducing impervious cover to a target percentage as a `surrogate TMDL target.'").

107. The Water Groups also overlook that, before the EPA issued the Bay TMDL, Maryland "reasonably assured" the EPA that it would achieve the necessary pollution reductions to restore the Chesapeake Bay. Maryland's strategy included the 20% restoration requirement. *See supra* Part I.B: Substantial Evidence and Arbitrary and Capricious.

Our prior discussion of monitoring and modeling also renders the Water Groups' criticism of the efficiency estimates in the Guidance inapposite. *See, e.g.,* Chesapeake Bay Program, Phase 5.3 Community Watershed Model, § 6, at 6-9 ("It must also be recognized that the BMP efficiencies are being developed using an adaptive management approach that recognizes that our knowledge is incomplete."). As we have discussed, MDE's use of monitoring and the adaptive management approach ensures that the Counties will implement BMPs to reduce discharges in compliance with the MEP standard. *See supra* Part III.E.1: Reduction of Pollutant Discharge.

108. Undoubtedly, if the Counties choose BMPs with efficiency estimates above the WQv standard, such as infiltration practices and ESD, they will comply with the 20% restoration requirement.

109. As we discussed, we recognize that MDE did not incorporate the Guidance into the Montgomery County Permit. But this Permit allows MDE to measure the County's progress and ultimate compliance through the annual reporting requirement. Montgomery County Permit Part IV:A.2, Attachment A: (C, D). *See supra* Part III.E.2: 20% Restoration Requirement.

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.

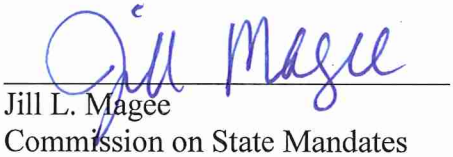
On February 13, 2018, I served the:

- **Notice of Complete Joint Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued February 13, 2018**
- **Test Claim filed by County of Riverside, Riverside County Flood Control and Water Conservation District, and the cities of Murrieta, Temecula, and Wildomar on June 30, 2017**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a , B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)a, E.5.c(3), E.5.e, E.6, F.1.a, F.1.b, F.2.a, F.2.b, F.2.c, F.3.b(3), and F.3.c, 16-TC-05
  County of Riverside, Riverside County Flood Control and Water Conservation District, and the cities of Murrieta, Temecula, and Wildomar, 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 February 13, 2018 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/30/18

Claim Number: 16-TC-05

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2015-0100, Provisions A.4, B.2, B.3.a, B.3.b, B.4, B.5, B.6, D.1.c(6), D.2.a(2), D.3, D.4, E.3.c(2), E.3.c(3), E.3.d, E.5.a, E.5.c(1)a, E.5.c(2)a, E.5.c(3), E.

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation 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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