

**EXHIBIT “40”**



Linda S. Adams  
Secretary for  
Environmental Protection

## State Water Resources Control Board

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Arnold Schwarzenegger  
Governor

April 18, 2008

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

Dear Ms. Higashi:

**STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21**

The State Water Resources Control Board ("State Water Board") and the Los Angeles Regional Water Quality Control Board ("Los Angeles Water Board") jointly file this opposition to Test Claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. All of these test claims arise from a single permit that was issued by the Los Angeles Water Board as Order No. 01-182, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the Incorporated Cities therein, Except the City of Long Beach ("the Permit").<sup>1</sup> The requests for reimbursement in the test claims arise almost entirely from two requirements in the Permit and consolidation is therefore proper.

The Permit was issued by the Los Angeles Water Board pursuant to requirements in the federal Clean Water Act ("CWA").<sup>2</sup> The State Water Board and Los Angeles Water Board have been authorized by the United States Environmental Protection Agency ("U.S. EPA") to issue NPDES permits—which are mandated by the CWA—in lieu of issuance of these permits by U.S. EPA. The Permit regulates the discharge of storm water runoff from the municipal separate storm sewer system (MS4) of 84 cities and County of Los Angeles to rivers and the Santa Monica Bay.

The federal Clean Water Act mandates that municipalities must apply for and receive permits regulating discharges of pollutants from their MS4s 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). These test claims, filed by 20 cities and the County, seek reimbursement by the State of California for expenses they incur in implementing two of the requirements of the Permit: (1) Inspections of commercial and industrial facilities; and (2) Placement of trash receptacles at transit sites.

<sup>1</sup> The Permit serves as National Pollutant Discharge Elimination System permit (NPDES) No. CAS004001. It was issued by the Los Angeles Water Board on December 13, 2001.

<sup>2</sup> Federal Water Pollution Control Act [FWPCA; 33 U.S.C.A. §§ 1251 et seq.] The federal Act is referred to herein by its popular name, the Clean Water Act ("CWA") and the code sections used are those for the CWA.

In order to obtain reimbursement, the claimants must show that the requirements constitute a new program or higher level of service. They must prove either: (1) the program must carry out a governmental function of providing services to the public, or (2) the requirements, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. The claimants must also prove that the costs are mandated on them by the state, rather than by federal law. Finally, they must prove that any additional costs beyond the federal mandate are substantial and not *de minimis*. The claimants do not meet any of these tests.

The Permit as a whole, and including the inspection and trash receptacle provisions, is mandated on the local governments by federal law. The federal mandate applies to many dischargers of storm water, both public and private, and is not unique to local governments. The federal mandate requires that the Permit be issued to the local governments; it is not a question of "shifting" the costs from the state to the local governments. The specific requirements challenged are consistent with the minimum requirements of federal law. Even if the Permit were to be interpreted as going beyond federal law, any additional state requirements are *de minimis*. Moreover, 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 comply with these requirements through charges and fees, and are not required to raise taxes. The U.S. EPA has submitted a letter to the State Water Board dated April 10, 2008, in agreement with this position.<sup>3</sup>

#### Description of the Test Claims

The test claims focus on two discrete requirements in the Permit: the requirement to inspect certain industrial and commercial facilities that discharge into the MS4 and the requirement for some of the permittees to place and maintain trash receptacles at transit stops.

#### Industrial and Commercial Facilities Control Program (Part 4.C.)

Test claims 03-TC-19, 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements to reduce pollutants from industrial and commercial facilities. Test claims 03-TC-19 and 03-TC-20 are limited to Part 4.C.2.a. and b., the requirements to inspect industrial and commercial facilities. Test Claim 03-TC-21 refers broadly to Part 4.C., the entire industrial and commercial facilities control program, but the costs discussed in the test claim are those associated with inspections. (See, Declaration of Richard Montevideo, No. 4.) Therefore, the Boards' analysis of the subvention claims for Part 4.C. is generally limited to the inspection requirements.

Part 4.C. of the Permit requires permittees to implement pollutant reduction and control measures at industrial and commercial facilities within their jurisdictions. Permittees may choose from various pollutant reduction and control measures, alone or in combination and

<sup>3</sup> Letter dated April 10, 2008, from Alexis Strauss, Director, Water Division, U.S. EPA to Tam M. Doduc, Chair, and Dorothy R. Rice, Executive Director, State Water Board, Attachment 3.

before, during, or after the activities that generate pollutants. The permittees are required to track, inspect, and ensure compliance at those facilities that are critical sources of pollutants in storm water.

Critical sources are specified commercial facilities (restaurants and automobile-related businesses), and industrial facilities that are required by federal regulations to obtain their own NPDES storm water permits.

Part 4.C.2.a. and b. contain inspection requirements, which are generally to conduct two inspections of facilities over a 5-year period. The Permit describes what the inspector must look at. (For example, inspectors at restaurants must see if operators pour grease into the street, and gas station inspectors must observe whether fuel-dispensing areas are swept.) The Permit states that for industrial sites, inspection requirements do not apply if the Los Angeles Water Board conducted an inspection of the site within two years.

#### Trash Receptacle Requirements (Part 4.F.5.c.3)

Test claims 03-TC-04, and 03-TC-20, and 03-TC-21 claim subvention for costs of complying with permit requirements for some of the permittees to place trash receptacles at public transit stops. Claim 03-TC-21 states that it challenges the entirety of the storm drain operation and maintenance and streets and road maintenance requirements, but the only costs in these sections for which it seeks reimbursement are for the placement and maintenance of trash receptacles. The claims are limited to the trash receptacle requirements for those municipalities that are not subject to a separate federal requirement, the "trash TMDL."<sup>4</sup> The requirements are to place trash receptacles at all transit stops and to maintain these receptacles.

#### Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 appears to claim subvention for costs associated with Parts 1 and 2 of the Permit, which include general prohibitions and requirements to protect water quality. The claim itself fails to specify any particular costs associated with this claim, other than a general study that considers a hypothetical treatment plant. As discussed below, storm water permits are written with the assumption that there will be no treatment plant and the permit certainly does not require one. In any event, there are no signed declarations to support this claim and no estimate of costs to the specific claimants.

#### Background of Federal Law Requirements for Storm Water Permits

In order to understand the federal mandate that required this permit, some background of the federal law and of MS4s is necessary. In 1972, the federal Clean Water Act was extensively amended to implement a permitting system for all discharges of pollutants from "point sources"

<sup>4</sup> As will be explained below, the Los Angeles Water Board has also adopted a federally-mandated total maximum daily load ("TMDL") for the deposition of trash into rivers and the Bay. The claimants do not claim subvention for the trash receptacle requirements for those cities and portions of the County subject to the TMDL, presumably conceding that those requirements are not reimbursable.

to waters of the United States.<sup>5</sup> The permits are issued pursuant to the national pollutant discharge elimination system, and are known as "NPDES permits." The 1972 amendments allowed U.S. EPA to authorize states to issue these permits.<sup>6</sup> California was the first state in the nation to obtain such authorization. In order to obtain this authorization, the California Legislature amended the Water Code, finding that the state should implement the federal law in order to avoid direct regulation by the federal government.<sup>7</sup> The California legislature mandated that California's permit program must ensure consistency with federal law.<sup>8</sup> The Water Boards are the state agencies charged with implementing the federal program.<sup>9</sup> The State Water Board incorporates the U.S. EPA regulations for implementing the federal permit program.<sup>10</sup> Therefore, both the CWA and U.S. EPA regulations are applicable to the permit program in California.<sup>11</sup> In California, permits to allow discharges into state waters are termed "waste discharge requirements."<sup>12</sup> The term "waste discharge requirements" is equivalent to the term "permit" in the CWA, when the waste discharge requirements are issued to comply with the CWA.<sup>13</sup> Thus, waste discharge requirements that the Water Boards issue to comply with the CWA are NPDES permits under federal law. When the Los Angeles Water Board, a state agency, adopts an NPDES permit in lieu of U.S. EPA, it must adopt as stringent a permit as the federal agency would have.<sup>14</sup>

The discharge of pollutants from point sources to waters of the United States is illegal, except in compliance with an NPDES permit.<sup>15</sup> In 1973, U.S. EPA issued regulations that exempted certain types of discharges it determined were administratively infeasible to regulate, including storm water runoff. The reason that such regulation is difficult, as will be more fully explained below, is that storm water runoff generally is not subjected to any treatment. Instead, it simply runs off urban streets, into gutters and drainage ways, and flows directly into streams, lakes, and the ocean.<sup>16</sup> This exemption was overruled in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which held that the exemption was illegal, and ordered U.S. EPA

<sup>5</sup> CWA §§ 301 and 402.

<sup>6</sup> CWA § 402(b).

<sup>7</sup> Wat. Code, § 13370 *et seq.*, adding Chapter 5.5 to the Porter-Cologne Water Quality Control Act.

<sup>8</sup> Wat. Code, § 13372.

<sup>9</sup> Wat. Code, § 13370.

<sup>10</sup> Cal. Code of Regs., tit. 23, (C.C.R.) § 2235.2.

<sup>11</sup> The permits may also include additional state requirements. (C.C.R., tit. 23, § 2235.3; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.)

<sup>12</sup> Wat. Code, § 13263.

<sup>13</sup> Wat. Code, § 13374.

<sup>14</sup> CWA § 402(b).

<sup>15</sup> CWA § 301(a). In general, "navigable waters" or "waters of the United States," includes all surface waters, such as rivers, lakes, bays and the ocean. (CWA § 502.)

<sup>16</sup> The chief traditional categories of discharges subject to NPDES permits are industrial process wastewater and sanitary sewer effluent. Both of these discharges are typically processed in a treatment plant before they are discharged to surface waters.

to require NPDES permits for storm water runoff. In *Costle*, the court suggested innovative methods for permitting, including using general permits for numerous sources and issuing permits that "proscribe industry practices that aggravate the problem of point source Pollution."<sup>17</sup> Where permits proscribe actions that dischargers must implement, these requirements are commonly called "best management practices" ("BMPs").

Despite the *Costle* decision, U.S. EPA had not adopted regulations implementing a permitting program for storm water runoff by 1987. That year, Congress amended the CWA, specifically requiring storm water permits for industrial and municipal storm water runoff.<sup>18</sup> The amendments require NPDES permits for "[a] discharge from a municipal separate storm sewer system ["MS4"] serving a population of 250,000 or more."<sup>19</sup> The CWA contains three provisions specific to permits for MS4s: (1) Permits may be issued on a system- or jurisdiction-wide basis; (2) Permits must include a requirement to effectively prohibit non-storm water discharges into storm sewers; and (3) Permits must require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP").<sup>20</sup> In describing the controls that permits must include, the statute 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."<sup>21</sup> Thus, the federal law mandates that permits issued to MS4s must require management practices<sup>22</sup> that will result in reducing pollutants to the MEP. The state is required, by federal law, to select the BMPs.<sup>23</sup>

In 1990, U.S. EPA adopted regulations to implement section 402(p).<sup>24</sup> The regulations define which entities need to apply for permits and also the information they must include in permit applications. The regulations define "industrial activity" to include numerous categories of manufacturing, construction, and other typically private enterprises.<sup>25</sup> The regulations define MS4s as storm sewer systems operated by numerous public agencies, including cities, counties, states, and the federal government.<sup>26</sup> While both industrial activities and MS4s must

<sup>17</sup> *Costle, supra*, at 1380.

<sup>18</sup> CWA § 402(p).

<sup>19</sup> CWA § 402(p)(2)(C). U.S. EPA defines municipal separate storm sewer systems (MS4s) that serve a population over 250,000 as "large" MS4s. The population of the County of Los Angeles is approximately 9.5 million. (Permit, D.1.)

<sup>20</sup> CWA § 402(p)(B).

<sup>21</sup> *Ibid.*

<sup>22</sup> These are commonly referred to as "best management practices," or "BMPs."

<sup>23</sup> *NRDC v. USEPA* (9th Cir. 1992) 966 F.2d 1292.

<sup>24</sup> Vol. 55, Federal Register (Fed.Reg.) 47990 and following.

<sup>25</sup> 40 C.F.R. § 122.26(b)(14).

<sup>26</sup> 40 C.F.R. § 122.26(b)(8).

obtain permits, the requirements in the industrial permits must be more stringent than in MS4 permits.<sup>27</sup>

In order to obtain coverage under an NPDES permit, as required by the CWA, entities seeking coverage file an application with the permitting authority and the permitting authority holds a public hearing on contested permits.<sup>28</sup> U.S. EPA regulations specify the information that applicants for MS4 permits must include in their applications.<sup>29</sup> For large and medium MS4s, the application requirements are extensive.<sup>30</sup> Some of the application requirements relevant to these Test Claims are: management programs including procedures to control pollution resulting from construction activities (at § 122.26(d)(1)(v)), legal authority to control the contribution of pollutants associated with industrial activity (at § 122.26(d)(2)(i)(A)), programs to control illicit discharges to the MS4 (at § 122.26(d)(1)(v)), and conducting inspections to determine compliance with permit conditions (at § 122.26(d)(2)(i)(F)). The permit applicants must propose management programs that the permitting authority will consider in adopting the permit.<sup>31</sup> The management programs must address oversight of discharges into the system from the general population and from industrial and construction activities within its jurisdiction, and also maintenance and control activities by the permittees.<sup>32</sup>

Most NPDES permits are largely comprised of numeric limitations for pollutants. Compliance is measured by sampling the treated effluent, which is discharged from a treatment plant into surface waters. These permits are written assuming that an engineered treatment plant can be built and operated to obtain a specified effluent. Storm water permits, on the other hand, usually require dischargers to implement BMPs that will result in lessening the pollutants in the runoff, since without a treatment plant the pollutants can flow directly into surface waters. Storm water permits apply to several types of entities—industries, construction, and municipalities—and all usually mandate BMPs. For municipalities that operate MS4s, the BMPs require the municipalities take actions that will lessen the incidence of pollutants entering storm drains by regulating the *behavior and practices* of the municipalities, their residents, and their businesses.<sup>33</sup>

U.S. EPA has issued regulations and guidance documents that discuss the types of BMPs that must be included in storm water permits in order to reduce the discharge of pollutants in storm

<sup>27</sup> *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3rd 1159. The differences between municipal and industrial permits are complicated, but are relevant to the question whether this permit addresses a uniquely governmental program, and are therefore discussed in more detail below.

<sup>28</sup> CWA § 402(b)(3).

<sup>29</sup> 40 C.F.R. § 122.26(a)(4). The U.S. EPA regulations have varied requirements depending on the size of the population served by the MS4. A "large" MS4 serves a population of 250,000 or more. (40 C.F.R. § 122.26(b)(4).) Los Angeles County and the 84 cities regulated by this permit far exceed the minimum population for a large MS4.

<sup>30</sup> 40 C.F.R. § 122.26(d).

<sup>31</sup> 40 C.F.R. § 122.26(d)(2)(iv).

<sup>32</sup> *Ibid.*

<sup>33</sup> There may also be engineered solutions, and there are some in Los Angeles, but it is important to keep in mind that there is no single engineered storm sewer treatment plant as there is for sanitary sewage.

water to the "maximum extent practicable." Numerous guidance documents point to inspections of businesses and proper trash collection as important parts of an effective BMP program.<sup>34</sup> U.S. EPA has issued an MS4 Program Evaluation Guide, which includes a lengthy process for conducting inspections of businesses. This Guide makes clear that inspections of businesses are mandatory:

#### Inspections

Most effective industrial/commercial inspection programs maintain a complete facility inventory and group them according to priorities established by the permittee. An inspection frequency is determined based on priority, and a database is used to manage such information as inspection findings, enforcement actions, and required follow-up activities. Many permittees use and cross-train existing staff to perform industrial/commercial inspections, but some permittees may need to maintain an exclusive stormwater inspector due to a potentially large number of high-priority facilities. There should be an inspection standard operating procedure that has been formalized and documented. It should include a checklist to be used during the inspection and possibly a report format. Inspectors should be aware of federal, state, and local stormwater regulations that may apply to industrial/commercial facilities. Inspectors should be familiar with various types of BMPs commonly used at the types of facilities typically found in the permit area and should be able to educate facility operators about such BMPs. In addition, inspectors should understand and use the permittee's established enforcement escalation response plan to gain compliance as necessary. The inspection staff should be proficient in the enforcement escalation procedure and should properly document all enforcement actions accordingly. Inspections should be used not only to identify non-compliance issues, but as an opportunity to educate facility operators about proper stormwater BMPs.<sup>35</sup>

The Guide also states that MS4 programs must address trash and litter.<sup>36</sup>

#### Adoption of the Los Angeles MS4 Permit

Starting in 1990, pursuant to the CWA amendments of 1987, the Los Angeles Water Board issued storm water permits to the County of Los Angeles and to the cities therein.<sup>37</sup> Without such a permit, the cities would be discharging pollutants in violation of federal law.<sup>38</sup> The permit

<sup>34</sup> See, e.g., Guidance documents at [http://cfpub.epa.gov/npdes/docs.cfm?document\\_type\\_id=1&view=Policy%20and%20Guidance%20Documents&program\\_id=6&sort=name](http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=6&sort=name), including <http://www.epa.gov/npdes/pubs/owm0233.pdf> (citing examples from MS4 permits throughout the country).

<sup>35</sup> MS4 Program Evaluation Guidance, at pp. 77-78.

<sup>36</sup> *Id.* at 79.

<sup>37</sup> For reasons not relevant to this matter, one city—Long Beach—has a separate permit. The current permit covers 84 cities.

<sup>38</sup> CWA §§ 301(a), 402(p)(3)(B).

that is the subject of these test claims is the third such permit, and was adopted December 13, 2001.<sup>39</sup> It is largely comprised of requirements to implement BMPs, most of which were proposed by the permittees.<sup>40</sup> The County and thirty-two of the cities challenged numerous aspects of the permit and the process by which it was issued, culminating in a court of appeal decision upholding the permit in its entirety.<sup>41</sup>

On February 1, 2001, the County, on behalf of all permittees,<sup>42</sup> submitted a Report of Waste Discharge (permit application), including a Stormwater Quality Management Plan (SQMP). The SQMP constituted the permittees' proposal for the BMPs that would be required in the permit.<sup>43</sup> (Permit C.) The permit that was ultimately adopted was based on the SQMP, with some revisions and additions necessary to meet minimum federal requirements. (*Id.*) The SQMP prepared by the County included several proposed BMPs that relate to inspections of commercial and industrial facilities and placement and maintenance of trash receptacles:

- (1) Municipalities must conduct site visits to industrial and commercial facilities, including automotive service businesses and restaurants, which must include, "a site walk-through to verify for, at a minimum, evidence of BMP implementation," and shall revisit facilities and take enforcement where illicit discharges are found;<sup>44</sup>
- (2) Municipalities will maintain a database of automotive and food service facilities, including whether they have "NPDES stormwater permit coverage;"<sup>45</sup> and
- (3) Municipalities must minimize trash from entering recreational water bodies,<sup>46</sup> remove trash from open channels;<sup>47</sup> and control litter and debris in streets.<sup>48</sup>

The SQMP included detailed requirements for municipalities to implement at construction sites, including inspections by the municipality.<sup>49</sup> The SQMP proposed that all municipalities be

<sup>39</sup> NPDES permits generally expire after 5 years, and must be reissued thereafter.

<sup>40</sup> A single permit applies to the County and 84 cities. Thus, while some entities may disagree with some provisions, other entities will agree and the entire group may propose permit terms that some cities oppose. The entire group submits a single proposed storm water management plan.

<sup>41</sup> *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985; referred to hereafter as *County of Los Angeles*.

<sup>42</sup> All permittees include the County and 84 cities. The County and the 21 cities that filed these Test Claims participated jointly with the application and permitting procedures with the remaining 63 cities who did not file Test Claims.

<sup>43</sup> The SQMP is several hundred pages. Relevant sections are attached; the entire SQMP is available should the Commission request it.

<sup>44</sup> SQMP, pp. 22-23 and 28.

<sup>45</sup> *Ibid.*

<sup>46</sup> SQMP, ES-6

<sup>47</sup> SQMP, ES-7

<sup>48</sup> *Ibid.*

<sup>49</sup> SQMP, pp. 24-26.

required to collect trash along open channels and encourage voluntary trash collection in natural stream channels.<sup>50</sup> The SQMP contains an Illicit Connection and Illicit Discharge Elimination Program, which includes education of inspectors employed by the permittees who will investigate businesses.<sup>51</sup>

Following adoption of the permit and a petition to the State Water Resources Control Board ("State Water Board"), the County, 32 cities,<sup>52</sup> the Los Angeles County Flood Control District and industry groups representing builders filed suit challenging numerous provisions in the Permit. The Superior Court upheld the Permit, and the Court of Appeal affirmed the judgment in its entirety.<sup>53</sup> First, the court held that the permit as a whole "imposes reasonable pollutant discharge requirements." Because the minimum federal requirement is that the permit require the municipalities to reduce pollutants to the maximum extent practicable, the court clearly determined that the permit's requirements are MEP. In its discussion of the consideration of costs to the municipalities, the court found that the permit did not exceed any federal requirements:

"The permit explicitly states it is intended to provide a cost-effective storm water pollution program to the maximum extent possible. The permit applies the same cost-effective analysis to efforts to reduce the flow of pollutants into receiving waters. Moreover, the [Los Angeles Water Board] in its finding referred to a report specifying how the 'maximum extent practicable' requirement includes considerations of costs and benefits."<sup>54</sup>

The court also discussed various cost analysis reports and U.S. EPA Guidance. It rejected the claim that the permit's requirements exceeded the federal mandatory standard. The court specifically upheld the inspection requirements, stating: "there is federal regulatory authority that required [the Los Angeles Water Board] to consider imposing the inspection requirements."

Several of the permittees filed these test claims with the Commission on State Mandates. The Commission rejected the claims, basing its determination on Government Code section 17516, subdivision (c), which exempted Water Board permits from the requirements to reimburse state-mandated local funds. That action also resulted in a Court of Appeal decision finding that subdivision to be unconstitutional and remanding to the Commission to determine the test claims.<sup>55</sup> In its decision, the court stated that the Commission must address factual issues

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<sup>50</sup> SQMP, p. 28

<sup>51</sup> SQMP, App. D

<sup>52</sup> These include 18 of the cities that filed the Test Claims, and Bellflower, Claremont, Diamond Bar, Gardena, Hawaiian Gardens, Industry, Irwindale, La Mirada, Lawndale, Monrovia, Paramount, Rosemead, Santa Clarita, Santa Fe Springs, Torrance, Walnut, and Whittier.

<sup>53</sup> *County of Los Angeles, supra*. Some of the determinations of the appellate court discussed here were not published and thus cannot be cited as precedent in other cases. They are binding on the claimants. A copy of the entire decision is attached.

<sup>54</sup> Unpublished decision, at p. 20.

<sup>55</sup> *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

April 18, 2008

regarding the requirements to conduct inspections and to place and maintain trash receptacles constitute state or federal mandates.

Following *Commission on State Mandates*, each of the four test claims was re-filed without any revisions.<sup>56</sup> All of the test claims are based upon requirements in the permit. Test Claim 03-TC-04 was filed by the County of Los Angeles, and challenges the requirement to place trash receptacles at transit stops.<sup>57</sup> Test Claim 03-TC-19 was filed by the County of Los Angeles, and challenges the requirements to inspect industrial and commercial businesses.<sup>58</sup> Test Claim 03-TC-20 was filed by nine cities<sup>59</sup> and challenges the requirements for trash receptacles and inspections, and the general requirements for a construction program.<sup>60</sup> Test Claim 03-TC-21 was re-filed by ten cities<sup>61</sup> and challenges the following permit requirements: discharge prohibitions, receiving water limitations, industrial program, construction program, storm drain program, and street and road maintenance<sup>62</sup>. While Test Claims 03-TC-20 and 03-TC-21 appear to assert broader requests for reimbursement, they address in detail only the requirements for inspections and trash receptacles, and these are the only requirements that the court in *Commission on State Mandates* stated were subject to the test claims.<sup>63</sup> In light of the absence of the necessary information for such claims and the court's remand, we assume that any claims additional to the inspections and trash receptacles are not valid claims.

In addition to the litigation over this permit, cities made similar arguments against an MS4 permit adopted by the Santa Ana Regional Water Quality Control Board. In a published decision, an appellate court in that case made additional findings applicable to the arguments in this matter<sup>64</sup>. It found that there was no evidence to support an argument that the permit "exceeded federal requirements." This finding is important because the cities in *Rancho Cucamonga* had argued that a ground for overturning that permit was that it used the same provisions as had

<sup>56</sup> The State Water Board and Los Angeles Water Board received several Notices of Complete Test Filing: a letter dated October 18, 2007, stated 03-TC-21 was complete; a letter dated October 29, 2007, stated that 03-TC-04 was complete; a letter dated October 29, 2007, stated that 03-TC-19 was complete; and a letter dated December 12, 2007, stated 03-TC-20 was complete. On December 21, 2007, the Commission extended time to respond to all four test claims until April 21, 2008.

<sup>57</sup> 03-TC-04 challenges Permit Part 4.F.5.c.3.

<sup>58</sup> 03-TC-19 challenges Permit Part 4.C.2.a. and b.

<sup>59</sup> The cities that filed the test claim are Artesia, Azusa, Beverly Hills, Carson, Commerce, Norwalk, Rancho Palos Verdes, Westlake Village, and Vernon.

<sup>60</sup> 03-TC-20 challenges Permit Part 4.C.2.a. and b., 4.E, and 4.F.5.C.3.

<sup>61</sup> The cities that filed the test claim are Arcadia, Baldwin Park, Belflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina.

<sup>62</sup> 03-TC-21 challenges Permit Parts 1, 2, 4.C, 4.E, 4.F.5 and 6. In a letter dated January 18, 2008, sent to the Commission from Howard Gest, he states that the cities he represents, which include five of the cities that filed the claim, "do not currently intend to pursue a claim" as to Parts 1 and 2, but that the limitation is "without prejudice." In light of the fact that Mr. Gest apparently does not represent all of the cities that filed the claim and the limited nature of this limitation, we will address Parts 1 and 2 and ask the Commission to determine that these parts do not create a reimbursable mandate.

<sup>63</sup> 150 Cal.App.4th 898, 903.

<sup>64</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal.App.4th 1377.

been crafted for other permittees, including the Los Angeles MS4 permit. The *Rancho Cucamonga* court specifically addressed inspection requirements, holding that federal law, either expressly or by implication, required NPDES permittees to perform inspections for illicit discharge prevention and detection, including inspection of industrial facilities and construction sites. Because the Los Angeles MS4 permit is based on BMPs and courts have determined that it is consistent with MEP, it is necessarily no more stringent than required by federal law.

### State Mandate Law

Article XIII B, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claims are not subject to subvention. Article XIII B, Section 6 provides: "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."

Implementing statutes clarify that no subvention of funds is required if: (1) the mandate 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 (Govt. Code, § 17556(c)); or (2) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay (Govt. Code, § 17556(d)); or (3) the local agency proposed the mandate (Govt. Code, § 17556(a)). Each of these exceptions to subvention applies to these Test Claims. All of the mandates for which the Test Claims seek reimbursement are mandated by federal law or regulation. The County and cities can assess fees for all of the costs incurred. The claimants themselves, as part of the group of the County and 84 cities who applied for the permit, proposed most of the specific requirements challenged.

Numerous judicial decisions have further defined limitations on the requirements for subvention of funds. Specifically, subvention is only required if expenditure of tax monies is required, and not if the costs can be reallocated or paid for with fees.<sup>65</sup> In addition, reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention.<sup>66</sup> The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.<sup>67</sup>

<sup>65</sup> *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.

<sup>66</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 48.

<sup>67</sup> *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

The Permit is not subject to subvention; it meets each of these exceptions. The requirements that are the subject of the claims are part of permits that meet, but do not exceed, the minimum federal requirements. The federal mandate is specifically directed at the municipalities and not at the state in general. The costs for the programs can be paid for by levying service charges, including charges to companies for conducting their businesses, fees for collection of refuse, fees for transit services, and fees especially enacted for storm water programs.<sup>68</sup> Compliance with NPDES permits, and specifically with storm water permits, is required by private industry also. In fact, the requirements for industrial and construction entities are more stringent than for government dischargers. In addition, the government requirements apply to all governmental entities that operate MS4s, including state and federal facilities; local government is not singled out. The local agencies can assess fees to perform the required tasks; tax monies are not required. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not qualify.

In its remand, the court stated that the most significant issue is "whether the two obligations in question constitute federal or state mandates" and that these present factual issues for the Commission to decide.<sup>69</sup> The court pointed to four cases that the Commission stated would apply in making this determination.<sup>70</sup> Each case is discussed below.

*City of Sacramento v. State of California* (1990) 50 Cal.3d 51: The court held that application of unemployment insurance law to state and local agencies was not subject to subvention. In discussing whether the requirement was a federal mandate, the court held that the issue is whether compliance with the federal law was "mandatory" or "optional," which is based on the following factors: "A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal."<sup>71</sup>

*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564: The court considered claims for subvention for a special education mandate. It concluded that, although the program was a federal mandate, the state had freely chosen to shift the costs to local governments and that subvention was proper. The court held that the test for whether there is a federal mandate is whether compliance with federal requirements is "a matter of true choice," in other words whether participation in the federal program is "truly voluntary."<sup>72</sup> The court listed the significant factual determinations: "In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately

<sup>68</sup> The claimants refer to limitations on assessing services fees under California law. The referenced law concerns only the percent of voters who must approve the assessment. In fact, the largest entity subject to the permit, the City of Los Angeles, has successfully adopted such an assessment.

<sup>69</sup> *Commission on State Mandates*, 150 Cal.App.4th 898, 918.

<sup>70</sup> *Id.*, at 919.

<sup>71</sup> 50 Cal.3d 51, 76.

<sup>72</sup> 11 Cal.App.4th 1564, 1582.

forced to bear the costs and how those costs came to be imposed upon that agency. 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.<sup>73</sup>

*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3rd 155: The court held that subvention does apply where actions are mandated by the state, which go beyond the federal constitution or case law. Because federal law clearly would not have required steps for de-segregation where there was no finding of segregation, subvention applied.

*San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859: A school district sought subvention of funds to conduct expulsion hearings. The federal law made expulsions discretionary, but where expulsions occurred, the federal law mandated certain hearing procedures. The state law mandated expulsions whenever firearms were involved, and made all other expulsions discretionary. It also mandated some hearing procedures in addition to the federal requirements. The Supreme Court held that for firearms expulsions, the state mandated a higher level of service, and that all hearing costs for these expulsions were reimbursable, even those attributable to procedures mandated by federal law. It also held that no hearing costs are reimbursable for expulsions that are discretionary under state law. Even if the hearing procedures are mandated by state law, the court found they are incidental to federal due process requirements and are *de minimis* and therefore not reimbursable. In determining that any additional state-mandated hearing costs were *de minimis*, the court found that the state reasonably set forth requirements that were intended to implement the federal hearing requirements: "challenged state rules or procedures that are intended to implement an applicable federal law-and whose costs are, in context, *de minimis*-should be treated as part and parcel of the underlying federal mandate."<sup>74</sup>

#### The Claims do not Qualify for Subvention

#### The Programs are Federal Mandates that Apply Directly to Local Governments; the State has not Shifted the Burden; and the Mandates do not Exceed Federal Law

The challenged provisions are mandated by federal law. Two appellate courts have determined that the provisions in this permit constitute MEP—the minimum requirements mandated by federal law. The court in *Los Angeles* has determined that the Permit is cost-effective and based on the MEP standard. The court in *Rancho Cucamonga* found that a very similar permit met the MEP standard and did not exceed the minimum federal standard. That case specifically stated that the requirement to conduct inspections reflected MEP. The federal law specifically requires that permits be issued to the local governments that operate MS4s and that permits must require programs and actions that will result in reducing the pollutants that discharge from the MS4 to waters of the United States to the maximum extent practicable. The permit is a federal mandate on the local governments. It is the local governments that must apply for and obtain a permit. Without the permit, the cities are discharging pollutants in violation of federal

<sup>73</sup> *Id.* at 1593-4.

<sup>74</sup> 33 Cal.4th 859, 889.

law.<sup>75</sup> If the Water Boards had not been authorized to issue the permit in lieu of U.S. EPA, that federal agency would have issued a similar permit directly to the local governments.

The claimants contend that the Los Angeles Water Board exercised discretion to impose requirements beyond those required by federal law because the Los Angeles Water Board had a choice in establishing the mandated programs and "[t]he [Water Boards] cannot point to any provisions of the Clean Water Act or related regulations that require the programs at issue in this claim."<sup>76</sup> The fact that some discretion is exercised in implementing a federal program does not mean that subvention is required. The court in *Hayes* explained that, where the state has some discretion in mandating the program but ultimately the factual situation requires some type of mandate, there is a federal mandate:

"The remaining question is whether the state's participation in the federal program was a matter of "true choice" or was "truly voluntary." The alternatives were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event. We conclude that so far as the state is concerned the Education of the Handicapped Act constitutes a federal mandate."<sup>77</sup>

The central issue before the Commission is whether the requirements to conduct inspections and to place trash receptacles at bus and train stops exceed the federal mandate for MS4 permits. As to the inspections, the claimants appear to concede that federal law specifically requires MS4s to conduct inspections of industrial facilities and construction sites, but claim that the Los Angeles Water Board could have conducted all of the inspections and instead exercised its discretion to "shift" the responsibility to the claimants. They base this contention on a permit issued by the State Water Board to industrial facilities<sup>78</sup> and contend that permit obligates the Regional Water Boards, including Los Angeles, to conduct inspections. Therefore, they claim, the Los Angeles Water Board has shifted that responsibility to the municipalities. They also contend that the federal law does not specify that restaurants and automobile-related businesses must be inspected. As to the trash receptacles, they claim that the federal law does not specify this particular BMP.

In order to evaluate these contentions, some more detailed discussion of the storm water permitting scheme established by U.S. EPA is necessary. Of particular importance are: the process of selecting BMPs that are included in MS4 permits; the obligation of MS4s to regulate discharges from businesses into their systems, including discharges that are simultaneously regulated by separate NPDES permits; the process for selecting which businesses to regulate; and the requirement for MS4s to conduct inspections.

<sup>75</sup> CWA §§ 301(a), 402(p)(3)(B).

<sup>76</sup> Test Claim 03-TC-21, at page 10.

<sup>77</sup> 11 Cal.App.4th 1584, 1593.

<sup>78</sup> Order No. 97-03-DWQ; <http://www.waterboards.ca.gov/stormwtr/docs/induspmnt.pdf>

### The Process for Selecting BMPs

The chief argument regarding trash receptacles is that the federal law does not specify this particular BMP and that, therefore, it exceeds federal law. The claimants appear to rely on *Hayes* to argue that the exercise of any discretion in selecting requirements automatically results in a reimbursable state mandate. As discussed above, however, the federal law specifically requires that the Water Boards prescribe the BMPs that the MS4 must implement. This issue was addressed succinctly in *Rancho Cucamonga*:

In creating a permit system for dischargers from municipal storm sewers, Congress intended to implement actual programs. [Cite to *NRDC, supra.*] The Clean Water Act authorizes the imposition of 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." [Cite to CWA § 402(p)(3)(B)(iii).] The Act authorizes states to issue permits with conditions necessary to carry out its provisions. [Cite to § 402(a)(1).] The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants. [Cite to *NRDC.*] That is what the Regional Board has created in the 2002 permit.<sup>79</sup>

Because the federal mandate requires the Water Boards to choose specific BMPs 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 standard. "The [Water Board] must comply with federal law requiring detailed conditions for NPDES permits."<sup>80</sup> This is completely different from the state discretion exercised in *San Diego*, where the state law compelled expulsions for bringing firearms to school, while the federal law clearly did not mandate such expulsions. Therefore, it is clear that the mere exercise of discretion in selecting BMPs, does not create a reimbursable mandate.

It is conceivable that an MS4 permit issued in California could require practices that exceed the federal requirement of MEP. It is clear, however, that inspection requirements do not exceed MEP. That issue has been specifically ruled on by *Rancho Cucamonga* and there are federal regulations, discussed below, that require these inspections. The claimants allege, however, that there is no similar requirement for the placement of trash receptacles at transit stops. The trash receptacle requirements in the Permit are different for those cities subject to a "trash TMDL" than for other cities. The Los Angeles Water Board has adopted TMDLs for some of the water bodies that receive discharges from MS4s subject to the permit. As required by the TMDL and federal law, the permit contains specific provisions for permittees that are subject to the trash TMDLs. The claimants do not seek subvention for those requirements. For

<sup>78</sup> *Rancho Cucamonga, supra*, at 1389.

<sup>80</sup> *Ibid.*

permittees not subject to a trash TMDL, the permit requires they implement BMPs to reduce trash entering the MS4s, including placing trash receptacles at all transit stops that have shelters by August 1, 2002, and at all other transit stops by February 3, 2003, and that they maintain trash receptacles as necessary. (Permit, Part 4.F.5.c.3.)

The requirements regarding trash receptacles are found in the section of the Permit concerning public agency activities. (Part 4.F.) This section imposes BMPs concerning sewage treatment overflows, construction by public agencies, storm drain maintenance and operation, and municipal construction projects. In other words, these are BMPs concerning the municipalities' own activities, as opposed to its regulation of discharges into its system by others. U.S. EPA storm water regulations address BMP requirements for the MS4s' maintenance and operation of the storm sewer system. Specifically, the MS4s' plan must include maintenance activities and schedules, including 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. . ."<sup>81</sup> As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to "increase cleaning frequency of and number of roadside trash receptacles in areas where needed."<sup>82</sup>

The requirements to control the release of trash into MS4s and surface waters are at the heart of the storm water program. "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."<sup>83</sup> In carrying out the federal mandate to select BMPs, the decision to require trash receptacles at transit stops is a reasonable, practicable, and cost-effective method to reduce trash in storm water runoff. The claimants have not, and cannot, explain how such a requirement exceeds the federal standard of actions that reflect the "maximum extent practicable." The Permit also allows individual permittees to substitute BMPs for specific requirements in the Permit.<sup>84</sup>

At bottom, the trash receptacle 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 Role of MS4s in Regulating Discharges from Industrial and Commercial Activities

The claimants allege that because the Water Boards have a role in directly regulating businesses within the jurisdiction of MS4s, and therefore conduct inspections at such sites, that the requirements in the Permit for the MS4s to conduct inspections reflect a decision to shift the costs of a federal mandate from the state to local government. The court in *Hayes* discussed

<sup>81</sup> 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

<sup>82</sup> Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

<sup>83</sup> *Environmental Defense Center v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 841; emphasis added.

<sup>84</sup> Permit, Part 4.A.1.

this issue. There, the mandate was to the state generally, and the state government decided to shift the cost for implementing special education to local school districts. Here, there is no general mandate addressed to the entire state. Instead, the federal law clearly required that municipalities that operate MS4s must obtain and comply with a permit. The state does not operate the MS4; the mandate is directed to the municipalities.

In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge storm water "associated with industrial activity."<sup>65</sup> As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits.<sup>66</sup> The State Water Board has issued permits for industrial and construction discharges of storm water, 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 storm water practices, was specifically envisioned and required by U.S. EPA in adopting its storm water regulations.<sup>67</sup>

In promulgating its regulations for MS4s and industrial dischargers, U.S. EPA made clear its intent to require industrial facilities that discharge into municipal storm sewers to obtain their own NPDES permits and also to require MS4s to regulate and be liable for these same discharges. In 1990, U.S. EPA adopted the regulations that spell out the federal mandates for MS4s to develop and implement plans for regulation of industrial facilities. In its Preamble to the regulations, it explained that MS4 permits "are expected to require that controls be placed on storm water discharges associated with industrial activity which discharge through the municipal system." It presented the rationale for this dual regulatory approach:

"[U.S. EPA] believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. Under the CWA, large and medium municipalities are responsible for reducing pollutants in discharges from municipal separate storm sewers to the [MEP]. Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program."<sup>68</sup>

<sup>65</sup> CWA § 402(p)(2)(B).

<sup>66</sup> CWA § 402(b).

<sup>67</sup> In fact, the Los Angeles Water Board acted to lessen any duplication of effort and costs to the municipal permittees by exempting them from inspection requirements if the same facility has been inspected by the Board.

<sup>68</sup> Vol. 55, Federal Register (Fed.Reg.), at 48009.

Thus, U.S. EPA specifically mandated that industrial facilities were to be subject to permits issued directly to them by the Water Boards and also through MS4 permits, where municipalities must regulate the facilities: "Dischargers of storm water associated with industrial activity through municipal separate storm sewer systems will be subject to municipal management programs that address such discharges as well as to an individual or general NPDES permit for those discharges."<sup>89</sup>

#### Requirements for MS4s to Conduct Inspections

The federal regulations also specifically require local storm water agencies, as part of their responsibilities under NPDES permits, to conduct inspections.<sup>90</sup> 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.<sup>91</sup> The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers, they must conduct inspections. The Los Angeles Water Board is charged with administering and enforcing the permit. Its policing responsibilities may also include inspecting the facilities and waters it regulates, but that does not mean it is shifting its responsibilities when it properly mandates inspections by MS4s.

#### The Process of Selecting Which Businesses MS4s Must Regulate

The claimants contend that federally mandated inspections do not include restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Instead, they claim that the federal mandate is limited to municipal landfills, hazardous waste sites, industrial facilities listed under the federal Superfund law, and industrial facilities that the permittees themselves determined are contributing substantial pollutants to their systems.

They base this contention on the U.S. EPA's regulations for MS4 applications. The federal regulation states that the storm water management plan that MS4s must submit must address the municipalities' enforcement against pollutants from "municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of [the federal Superfund law], and *industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system.*"<sup>92</sup> The claim is essentially that, after MS4s submitted their first application for a permit, which was required by the U.S. EPA regulations in 1990,<sup>93</sup> and listed any industrial facilities they deemed to be contributors of substantial pollutant loading, the federal law did not mandate any further actions, regardless of whether new information or monitoring might reveal such

<sup>89</sup> *Id.* at 48058.

<sup>90</sup> 40 C.F.R. § 122.26(d)(2)(iv)(C). While the U.S. EPA regulations are phrased as "application requirements," wherein the MS4 must propose the various BMPs that will achieve MEP, these requirements must be included in the mandatory storm water management program. (*Los Angeles, supra*, 143 Cal.App.4th 985, 993.)

<sup>91</sup> See, e.g. CWA § 402(b)(2)(B); 40 C.F.R. § 122.44(l).

<sup>92</sup> 40 C.F.R. § 122.26(d)(2)(iv)(C); emphasis added.

<sup>93</sup> Vol. 55, Fed.Reg. 47990.

contributors. This is not a reasonable reading of the federal regulation. In adopting this regulation, U.S. EPA acknowledged that this initial selection by MS4s was only a starting point and that the mandate was to follow where information and monitoring led:

"The object of [the requirements in 122.26(d)(2)(iv)(C)] is initially to set priorities for monitoring requirements. Then, if the situation requires controls can be developed and instituted. . . . the selection of facilities is only a means of setting priorities for facilities for the development of municipal plans. ¶ EPA agrees. . . . that there will be other facilities that are significant sources of pollutants and should be addressed by municipalities as soon as possible under management programs."

As early as 1993, the Executive Officer of the Los Angeles Water Board directed all of the cities regulated by the permit to implement facility inspections of "auto repair shops, auto body shops, auto parts and accessory shops, gasoline stations, and restaurants."<sup>94</sup> The letter noted that the BMPs listed therein constitute the minimum required for area-wide implementation, and that the list "is not an additional requirement, but incorporates BMPs already proposed by some permittees." Thus, it appears that the inspection requirements were, in fact, proposed by permittees.<sup>95</sup> In any event, MEP is not limited to the sources and controls proposed by the permittees. U.S. EPA Guidance documents make clear that MEP requires an iterative process, where municipalities assess sources, conduct investigations, and improve their programs.<sup>96</sup>

The Local Governments have the Authority to Levy Service Charges, Fees, or Assessments to Pay for the Programs

The County and cities need not spend tax monies to comply with the Permit. They can and do adopt fees from their residents and businesses that fund their storm water programs. The City of Los Angeles (the largest entity covered by the permit, and which has not filed any test claims) adopted a fee ordinance, based on property assessments, for implementation of the program. All of the municipalities have the ability to charge fees to businesses to cover inspection costs. The cities' trash collection responsibilities, which include placement of trash receptacles, are also paid for through existing fees. Moreover, the trash receptacle requirements that are the subject of the Test Claims are limited to public transit stops. Any additional costs associated with trash removal at these transit stops, a service cities already provide, could be borne by transit users through higher transit fees.

The cities and the County have failed to show that they must use tax monies to pay for these requirements. It is also clear that any "additional" costs that could conceivably be considered additional to the federal mandate would be *de minimis* and would not require payment from tax monies. For example, it is assumed that most cities routinely place trash receptacles at bus stops. In fact, the claimants make no allegation of any increased costs from this requirement;

<sup>94</sup> Letter dated June 17, 1993, from Robert P. Ghirelli to Thomas A. Tidemanson. Attachment 34.

<sup>95</sup> The issue of proposals by the permittees is discussed below.

<sup>96</sup> See, e.g. U.S. EPA document on Evaluating the Effectiveness of Municipal Storm Water Programs.

instead, they conflate any costs by listing "estimated trash receptacles, catch basin, and/or other treatment devices – capital and installation costs."<sup>97</sup>

#### The Local Governments Applied for the Permit and Proposed the Programs

The County and cities bound by the permit requested the mandate and the Permit allows alternatives in the manner of compliance. The County and cities jointly applied for the permit and proposed a management plan that is consistent with many of the requirements in the permit. Relevant portions of the Report of Waste Discharge that the County submitted are attached. The entire Report of Waste Discharge is available upon request. It is clear from these attachments, which include not only proposed programs but a draft permit, that many of the programs subject to the claims—including regulation of industrial and commercial sites, and specifically restaurants and automobile-service businesses—were proposed in the permittees' original plan submitted in February 2001. For example, the permittees proposed that the permit prohibit discharge of wash waters from gas stations, auto repair garages, and other automotive service facilities.<sup>98</sup> In addition, the permittees proposed a requirement that they "visit" automotive service and food service facilities every two years, and that they "revisit" facilities and take enforcement action if there is evidence of continuing illicit discharges.<sup>99</sup> The permittees submitted a lengthy list of proposed BMPs that site inspectors should look for during site visits.<sup>100</sup> Whether the term is "site visit" or "inspection," it is clear that the permittees proposed the mandate. The permittees also proposed that the permit mandate trash collection alongside, or in improved open channels.<sup>101</sup>

The permit was issued upon the joint request of all of the petitioners, with the County acting as the lead. Where the County and 84 cities apply for a single area-wide permit, the permit writer obviously is not required to write separate requirements for each entity and the County may be presumed to speak for the whole.

#### The Programs are not Mandates Peculiar to Government

Finally, the NPDES permit program, and the storm water requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES storm water permits. These permits, however, are more stringent than municipal permits because the federal law requires that they meet more stringent technology-based standards and that they attain strict compliance with water quality standards in receiving waters.<sup>102</sup> As such, the only difference between the municipal storm water program and other storm water requirements is that federal law provides separate, more lax requirements for the municipalities.

<sup>97</sup> Claim 03-TC-21, at p.2.

<sup>98</sup> Report of Waste Discharge at R0000026.

<sup>99</sup> *Id.* at R0000031.

<sup>100</sup> *Id.* at R0000273 – R0000380.

<sup>101</sup> *Id.* at R0000036.

<sup>102</sup> *Defenders of Wildlife v. Browner, supra.*

The Water Boards' implementation of federal law reflects this dichotomy and the fact that the municipalities receive their own permit, as required by CWA section 402(p)(3)(B) does not change the fact that storm water permit requirements are not peculiar to local government.

It is the municipalities who operate MS4s and who discharge pollutants to surface waters. It is the municipalities who must obtain permits and comply with those permits. Similarly, industrial dischargers who discharge storm water runoff to waters of the United States must also obtain and comply with permits. The state is not the discharger (except in those situations where state agencies operate MS4s, such as the Department of Transportation, where they are themselves subject to permits), and the state is not uniquely shifting a new program or higher level of service onto municipalities.<sup>103</sup>

#### Discussion of Test Claims that were not Substantiated

##### Development Construction Program (Part 4.E)

Test claim 03-TC-21 claims subvention of costs for the development construction program. It did not, however, include any substantiation of this claim.

##### Public Agency Activities Program (Part 4.F.5 and 6)

Test claims 03-TC-04, 03-TC-20, and 03-TC-21 claim subvention for portions of the public agency activities program. Test claim 03-TC-21 claims subvention for the all requirements concerning storm drain operation and streets and roads maintenance, while test claims 03-TC-04 and 03-TC-20 are limited to the requirements to place trash receptacles at transit stops and to maintain these receptacles. Test claim 03-TC-21, however, did not include any substantiation of this claim, apart from the discussion of trash receptacles, above.

##### Discharge Prohibitions and Receiving Water Limitations (Parts 1 and 2)

Test claim 03-TC-21 challenges the discharges prohibitions and receiving water limitations in the Permit. Parts 1 and 2 contain the basic prohibitions and requirements for attaining compliance with water quality standards through an iterative process. The whole of the claim is that, "if enforced and read to literally [*sic*] to require the City to prevent any and all exceedances from urban runoff of all water quality standards or water quality objectives" the costs would be excessive. The court in *County of Los Angeles, supra*, rejected this exaggeration of the permit's terms and found the requirements to be entirely reasonable. In addition, the *Rancho Cucamonga and Building Industry Association* both upheld identical provisions and found them to be reasonable and to be consistent with the minimum federal standard of MEP.

<sup>103</sup> The State Water Board issues a separate permit to the Department of Transportation, for both its municipal activities (roads and freeways) and its industrial facilities (construction and maintenance yards). The permit is available at <http://www.waterboards.ca.gov/stormwtr/docs/caltrans/caltranspmt.pdf>.

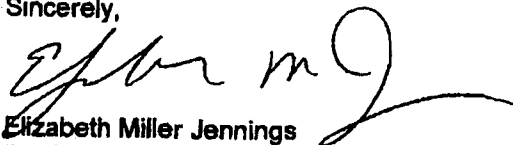
April 18, 2008

Conclusion

For all the reasons set forth above, the Test Claims must be dismissed. The Permit requirements have already been upheld by the courts as reflecting the federal Clean Water Act's requirements for municipal storm water permitting. The permit in its entirety, including the Test Claim provisions, reflects the federally mandated, federal minimum standard of reducing pollutants to the "maximum extent practicable." Further, the cities can pay for any costs associated with the requirements by levying service charges or fees. Finally, to the extent that any portion of the claims would otherwise qualify for subvention, they are *de minimis* and therefore do not warrant subvention.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

Sincerely,



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Los Angeles Regional Water Quality  
Control Board  
320 West 4th Street, Suite 200  
Los Angeles, CA 90013

Continued on next page

Ms. Paula Higashi, Executive Director

- 23 -

April 18, 2008

cc: (Continued)

Ms. Carla Castaneda  
Department of Finance (A-15)  
915 L Street, 11th Floor  
Sacramento, CA 95814

Michael J. Levy, Esq. [via email only]  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Floor [95814]  
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Ms. Dorothy Rice [via email only]  
Executive Director  
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1001 I Street, 22<sup>nd</sup> Floor [95814]  
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Interested Persons List

**PROOF OF SERVICE**

I, JEANNETTE L. BASHAW, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within documents:

**LETTER TO COMMISSION ON STATE MANDATES DATED APRIL 18, 2008, REGARDING STORM WATER POLLUTION CONTROL REQUIREMENTS, FILES 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21: RESPONSE TO TEST CLAIMS 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21**

	<b>BY FACSIMILE:</b> I caused a true and correct copy of the document to be transmitted by a facsimile machine compliant with rule 2003 of the California Rules of Court to the offices of the addresses at the telephone numbers shown on the service list.
X	<b>BY HAND DELIVERY:</b> I caused a true and correct copy of the document(s) to be hand-delivered to the person(s) as shown.
	<b>BY OVERNIGHT MAIL TO ALL PARTIES LISTED:</b> I am readily familiar with my employer's practice for the collection and processing of overnight mail packages. Under that practice, packages would be deposited with an overnight mail carrier that same day, with overnight delivery charges thereon fully prepaid, in the ordinary course of business.
X	<b>BY FIRST CLASS MAIL TO ALL PARTIES LISTED:</b> I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

By placing a true copy thereof in separate, sealed envelopes addressed to:

See Exhibit A attached hereto and made a part hereof.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 18, 2008, at Sacramento, California.

  
\_\_\_\_\_  
JEANNETTE L. BASHAW

## EXHIBIT A

**(VIA HAND DELIVERY)**

Paula Higashi, Executive Director  
Commission on State Mandates  
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**(VIA U.S. MAIL)**

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**(VIA U.S. MAIL)**

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