



City Council
311 Vernon Street
Roseville, California 95678

September 6, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



RE: COMMENT LETTER – PHASE II SMALL MS4 GENERAL PERMIT

Dear Ms. Townsend and Members of the Board:

Thank you for the opportunity to submit comments on the State Water Resources Control Board’s (“Board”) draft General Permit (“draft Permit”) to regulate small municipal separate storm sewer systems (“MS4s”). We appreciate the time extension of the initial review period as well as the inclusion of a second review draft within the permit adoption process. The additional timeline has allowed us to better evaluate the impacts this permit may have upon our City, our local economy and the future growth of our community.

This letter presents our primary concerns with the draft Permit as well as provides a legal opinion prepared by Best Best& Krieger (Attachment A). We have also included suggested technical comments and concerns (Attachment B).

40.1 → T City of Roseville supports and joins in comments sent separately by:

- California Stormwater Quality Association (CASQA)
- Statewide Stormwater Coalition (SSC)

The City’s open space and creeks are an important amenity to our City. **We support the statewide goal of clean water** and recognize its importance on the overall health of the state aquatic system, its benefit to the state’s fisheries, and as a foundation to a sustainable water supply. We recognize the challenges faced by the Board and Board staff in crafting a balanced permit that will ultimately result in cost effective improvements to water quality, particularly in light of our state and our nations faltering economy.

40.2 → **The draft Permit is neither balanced nor cost effective.** It is, unaffordable; unaffordable to our City and to our local businesses. As presented in the SSC letter, the draft Permit will impose substantial, unavoidable new costs **yet we have no practical way to raise revenue to achieve permit compliance.**

40.3 → **The City of Roseville anticipates its stormwater program costs to increase from approximately \$800,000 per year to as high as \$3.5 million in year 1 with a 5 year average annual cost of \$2.9 million.** This represents a 3.6-fold increase in compliance costs (4.3 times in year 1). Given the City’s average population estimated over the permit term of 121,185 this would result in an average annual program cost of \$61.10 per household (based on 2.54

persons per household). This is \$15.10 to \$43.10 more per household than the \$18-\$46 per household annual costs of Phase I MS4 programs cited within the Fact Sheet of the permit (page 10). Attachment C to this comment letter includes our detailed cost estimate.

40.4 → **General fund revenues for all California Cities are down. Revenue to the City of Roseville has fallen \$20.2 million** since fiscal year 2007. The City of Roseville has implemented employee layoffs, early retirements, salary reductions, and community service level reductions to address structural financial deficits. The City was able to use one time money and deferrals to balance the General Fund budget this fiscal year; however the existing structural deficits is expected to continue in future years. The impact of **expanded and new state regulations will continue to degrade the City's ability to fund core services**. The additional \$2.1 million per year required to fund the stormwater quality program would require the City to decide what other valuable services we would have to reduce or eliminate. To put this into perspective, \$2.1 million per year could fund 20 police officers, or two-thirds of our open library time or one-and-a-half fire stations.

40.5 → **The Permit, as drafted, will significantly burden our existing businesses.** We will be placed in the unenviable position of enforcing draconian requirements for existing business, many of which are already struggling. This draft Permit **requires businesses to retrofit their sties with costly stormwater Best Management Practices (BMPs)**. The BMPs cited in the draft Permit include requiring manufacturing, processing and material storage areas (including loading and unloading, storage, disposal, cleaning, maintenance and fueling operations) to be located indoors or under protective covering; requiring the use of grading, berms or curbing to prevent runoff of contaminated flows and diversion of run-on away from specified areas and diverting, infiltrating, reusing, containing, or otherwise reducing stormwater runoff, to minimize pollutants in discharges. These BMPs will be extremely costly if not cost prohibitive.

It is unclear how businesses can practically implement these requirements without significant site modifications. There are no allowances in the permit for infeasibility related to cost or other site constraint issues that could be discovered. In addition to the costs associated with the installation of new BMPs, business would be subject to entitlement, permitting and processing fees, and quite possibly CEQA review. Businesses fortunate enough to be in a position of expanded growth opportunities will be forced to pay for costly improvements over hiring new employees. **Quite possibly, our local business will choose to relocate to neighboring Phase I cites that do not require these retrofitting standards or leave the state all together.**

We request the Board, significantly overhaul the draft Permit.

40.6 → • *The permit must be streamlined with focus placed on what is absolutely necessary to protect water quality with implementation timelines phased in over multiple permit cycles.*

40.7 → • *Unnecessary cost intensive studies and reporting requirements must be eliminated. All retrofitting requirements must be removed.*

40.8 → • *Water monitoring programs should be the responsibility of the state where data can be collected in a consistent and efficient manner focusing dollars on high priority state water quality issues first. A comprehensive data set collected and maintained by the*

CITY OF ROSEVILLE
DRAFT PHASE II GENERAL PERMIT COMMENTS
September 6, 2011

State would allow for the creation of sound policy based on scientific data to clearly address problem areas.

- 40.9 → • *The permit must be drafted in clear language without ambiguity, especially given the recent Ninth Circuit Court of Appeals decisions involving Los Angeles County and the NRDC that effectively eliminates the iterative processes allowed for permit compliance.*

- 40.10 → • *A rewrite of the draft Permit should be accomplished with the assistance of permittees, the business community, the Regional Boards who will have interpretation and enforcement responsibilities and independent legal counsel.*

- 40.11 → • *The draft Permit should include an economic analysis that recognizes the costs that cities must bear in the implementation process and recognize the revenue raising constraints that most MS4 local governments face in light of Propositions 218 and 26.*

We believe the recognition of costs tied to the permit provisions will help the Board prioritize what is most important to include in the permit, determine a reasonable phasing approach and develop a permit that is both implementable and achieves the water quality goals established by the State. Your consideration of our comments is greatly appreciated and we look forward to working with Board staff on redrafting this permit.

Sincerely,



Pauline Roccucci
Mayor, City of Roseville

ATTACHMENTS

- A: Legal Opinion
- B: Technical Comments
- C: Detailed Cost Estimate

cc: Senator Ted Gaines
Assembly Member Beth Gaines
Roseville City Council
Ray Kerridge, Roseville City Manager

ATTACHMENT A
LEGAL OPINION



BEST BEST & KRIEGER
ATTORNEYS AT LAW

INDIAN WELLS
(760) 568-2611
IRVINE
(949) 263-2600
LOS ANGELES
(213) 617-8100
ONTARIO
(909) 989-8584

655 WEST BROADWAY, 15TH FLOOR, SAN DIEGO, CA 92101
PHONE: (619) 525-1300 | FAX: (619) 233-6118 | WWW.BBK.LAW.COM

RIVERSIDE
(951) 686-1450
SACRAMENTO
(916) 325-4000
WALNUT CREEK
(925) 977-3300
WASHINGTON, DC
(202) 785-0600

SHAWN HAGERTY
(619) 525-1327
SHAWN.HAGERTY@BBKLAW.COM
FILE No. 82510.00117

August 12, 2011

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Comment Letter – Phase II Small MS4 General Permit

Dear Ms. Townsend:

The City of Roseville (“City”) has retained Best Best & Krieger LLP (“BBK”) to provide legal comments on the draft National Pollutant Discharge Elimination System (“NPDES”) General Permit and Waste Discharge Requirements (“WDRs”) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (“MS4s”) (the “Draft Permit”).¹ Our comment letter is divided into two parts. Section I of the letter addresses the unfunded state mandates issues presented in the Draft Permit. Section II of the letter contains more general legal comments on the Draft Permit.

SECTION I.
UNFUNDED STATE MANDATES

The Draft Permit includes many new programs or higher levels of service that qualify as unfunded state mandates. As explained below, the State Board should either delete those new programs or higher levels of services from the Draft Permit or be prepared to pay for them.

A. Overview of State Mandates Law As Applied to Storm Water Permits

Article XIII B, Section 6(a) of the California Constitution (“Section 6”) 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” Section 6 applies to storm water

¹ The Draft Permit is dated June 7, 2011. Several of the attachments to the Draft Permit were reissued by the State Board on or about July 8, 2011.
82510.00117\6637624.2



permits issued by the State Board and the Regional Water Quality Control Boards.² Thus, Section 6 will apply to the State Board's reissuance of the Small MS4 Permit.

Section 6 was added to the California Constitution by voter approval in 1979, as part of a larger effort that had as its goal both limiting state and local spending and restricting the ability of local entities to raise revenue. Section 6 must be viewed as a "safety valve" designed to protect local governments from being placed in the untenable position of being required by the state, on the one hand, to implement certain state mandated programs while also, on the other hand, being prohibited from raising the money needed to pay for those state mandated programs.³ Recognizing that such a situation was neither a fair nor a wise approach to governing, the voters enacted Section 6 to prevent state government from shifting financial responsibility for carrying out governmental functions to local agencies without the state paying for them.

To implement Section 6, the Legislature created the Commission on State Mandates ("Commission").⁴ The Commission has sole and exclusive jurisdiction to determine whether a state law or order of a state agency is an unfunded state mandate.⁵ In accordance with Section 6, Government Code section 17500 et seq., and case law, the Commission has determined that an unfunded state mandate exists when: (a) the state imposes a new program or higher level of service that is; (b) mandated by state law, not federal law; and (c) when the local government lacks adequate fee authority to pay for the new program or higher level of service.

The Commission has issued two recent decisions that apply the unfunded state mandates law to storm water permits, both of which have determined that certain elements of storm water permits constitute unfunded state mandates.⁶ In one decision involving the Los Angeles County Phase I Storm Water Permit, the Commission found that the requirement to install trash cans at transit facilities constituted an unfunded state mandate. In a second decision involving the San Diego County Phase I Storm Water Permit, the Commission found that the street sweeping, street sweeping reporting, conveyance system cleaning, conveyance system cleaning reporting, educational component, watershed activities and collaboration, Regional Urban Runoff Management Program, program effectiveness assessment, long-term effectiveness assessment and all permittee collaboration components of the permit were unfunded state mandates.

² County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 920 (holding that Government Code section 17516(c), which purports to bar State and Regional Board orders from the state mandates process, is unconstitutional as applied to storm water permits).

³ Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, 735; County of San Diego v. State of California (1997) 15 Cal.4th 68, 81.

⁴ See Government Code §§ 17500 et seq. and California Code of Regulations, Title 2, Chapter 2.5, §§ 1181 et seq.

⁵ Government Code §§ 17551 and 17552; Kinlaw v. State of California (1991) 54 Cal.3d 326, 331-334.

⁶ In Re Test Claim on Los Angeles Regional Water Quality Control Board Order No. 01-182, Permit CAS004001 (Test Claims 03-TC-09, 03-TC-19, 03-TC-21), Statement of Decision dated July 31, 2009 ("Los Angeles Test Claim"); In Re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001, Permit CAS0108758, Statement of Decision dated March 26, 2010 ("San Diego Test Claim").

These two decisions represent the Commission's views on how the state mandates law applies to storm water permits. As such, the decisions provide insight into how the Commission would assess the state mandates issues presented in the Draft Permit. As explained in more detail below, the Draft Permit includes many new programs or higher levels of service that the Commission has either already determined constitute unfunded state mandates or which the Commission's analysis in the Los Angeles and San Diego Test Claims would suggest are unfunded state mandates.

B. The Draft Permit Contains Many New Programs or High Levels of Service

The unfunded state mandates law applies when a state agency imposes a new program or higher level of service on a local agency. To determine if a program is new or imposes a higher level of service, the Commission will compare the challenged program with the legal requirements in effect immediately before the enactment of the challenged program. If the program did not exist under previous law, it is a new program. A "higher level of service" occurs when the new requirements are intended to provide an enhanced level of service to the public that is more specific than the prior law.⁷

Whether the Draft Permit imposes new programs or higher levels of service therefore requires a comparison of the Draft Permit with State Board Order No. 2003-2005-DWQ, the existing Small MS4 Permit ("Existing Permit"). Without attachments, the Existing Permit is only 19 pages long and tracks precisely the 6 minimum measures that U.S. EPA determined in the Phase II Storm Water Regulations to be sufficient to reduce the discharge of pollutants from MS4s to the maximum extent practicable ("MEP"). In contrast, the Draft Permit is, without attachments, 93 pages long and includes multiple programs and requirements that either are not addressed in the Phase II Storm Water Regulations at all or greatly enhance the requirements of the 6 minimum measures.

A comparison between the Draft Permit and the Existing Permit reveals that the Draft Permit contains many new programs. Specifically, the following program elements contained in the Draft Permit are not required by the Existing Permit and, consistent with the Commission's analysis, would represent new programs under the state mandates law.

- The requirement to regulate landscape irrigation, irrigation water, lawn watering, individual residential car washing and street wash water. (Draft Permit, Section B.3). The regulation of these categories of non-storm water is not required by the Existing Permit. (See Existing Permit, Section D.2.c.(6).)
- The development of an Enforcement Response Plan. (Draft Permit, Section E.4.c). Nothing in the Existing Permit requires an Enforcement Response Plan, particularly one that contains the detail reflected in the Draft Permit and that expressly requires the dischargers to assume

⁷ San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal.4th 859, 878.



responsibility for “front-line” enforcement of the Construction General Permit and the Industrial General Permit.

- The requirement to secure adequate resources to comply with the mandates of the Draft Permit. (Draft Permit, Section E.4.d). The Existing Permit does not contain such a requirement. This is particularly true with regard to the specific capital and O & M expenditure, staffing and other reporting requirements of Draft Permit, Section E.4.d.(ii) and (iii).
- The development of a trash reduction program. (Draft Permit, Section E.10). The Existing Permit does not require the development of such a program.⁸
- The development of an industrial/commercial runoff program. (Draft Permit, Section E.11). The Existing Permit does not require such a program.⁹
- The development of a receiving water monitoring program. (Draft Permit, Section E.13). The Existing Permit does not require such a program.
- The development of an effectiveness assessment program, including pollutant loading quantification. (Draft Permit, Section E.14). The Existing Permit does not require such a program.¹⁰
- The incorporation of TMDLs and implementation plans. (Draft Permit, Section E.16). The Existing Permit does not address how TMDLs apply to the Existing Permit.

A comparison between the Draft Permit and the Existing Permit also reveals that the Draft Permit contains many higher levels of service. Specifically, the following program elements contained in the Draft Permit are enhanced program requirements that represent higher levels of service under the state mandates law:

- Major components of the Public Outreach and Education Program. (Draft Permit, Section E.5.) Under the Existing Permit, dischargers “must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the

⁸ The Commission determined in the Los Angeles Test Claim that the requirement to install trash cans at transit facilities was an unfunded state mandate.

⁹ The Commission determined in the Los Angeles Test Claim that industrial and construction inspections were state mandates.

¹⁰ The Commission determined in the San Diego Test Claim that the effectiveness assessment programs in the permit were unfunded state mandates.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

public can take to reduce pollutants in storm water runoff.” In contrast to this one sentence requirement of the Existing Permit, Section E.5 of the Draft Permit contains a host of very specific and enhanced education and outreach requirements that must be targeted to many different groups. For example, Section E.5.b mandates the use of very involved Community-Based Social Marketing (“CBSM”) strategies or a CBSM equivalent. Section E.5.b then enumerates at least 13 express requirements for such a CBSM program, including implementing at least 2 surveys during the permit term, conveying the message to 20% of the target audience each year and providing educational information that goes well beyond the storm water program itself. Sections E.5.c (Industrial/Commercial) and E.5.d (Construction) contain similar provisions that greatly exceed the requirements of the Existing Permit. All of these components are higher levels of service.¹¹

- Major components of the Public Involvement and Participation Program. (Draft Permit, Section E.6.) The Existing Permit provides that the dischargers “must at a minimum comply with State and local public notice requirements when implementing a public involvement/participation program.” (Existing Permit, Section D.2.b.) In contrast to this one sentence requirement, Section E.6 of the Draft Permit requires the development of a public involvement and participation strategy, a budget to implement that strategy, the establishment of a citizen’s advisory group containing specified members, and the sponsoring of activities. (Draft Permit, Section E.6.(d).(ii).(a)-(d).) All of these components are higher levels of service.
- Major components of the Illicit Discharge Detection and Elimination (“IDDE”) Program. (Draft Permit, Section E.7.) The Existing Permit requires the development and implementation of an IDDE program, but provides flexibility in the development of such a program. (Existing Permit, Section D.2.c.) In contrast, Section E.7 of the Draft Permit contains at least 6 very specific and enhanced requirements. Section E.7.a requires that a GIS map containing specialized information be prepared and updated. Section E.7.b requires that dischargers develop priority areas that are “likely” to have illicit discharges and specifies that 20% of the urbanized area be included in that designation. Section E.7.c requires field observations, field screening and analytical monitoring at specified intervals. Section E.7.d requires the investigation of any illicit discharge within 48 hours and requires corrective action in a very short time period. Section E.7.d requires the development of a Spill Response Plan. Section

¹¹ The Commission determined in the San Diego Test Claim that several educational components in the permit were unfunded state mandates.
82510.00117/6637624.2



BEST BEST & KRIEGER
ATTORNEYS AT LAW

E.7.e requires a specific training program. All of these requirements are higher levels of service.

- Major components of the Construction Site Storm Water Runoff Control Program. (Draft Permit, Section E.8.) The Existing Permit requires the development of a program to reduce pollutants in any storm water runoff to the MS4 from construction sites. (Existing Permit, Section D.2.d.) The program focuses on the development of erosion and sediment control measures, requirements to implement those erosion and sediment control measures and enforcement of those measures. In contrast, Section E.8 contains very specific measures to inventory all construction sites (Section E.8.a), to inspect sites at designated frequencies (Section E.8.c), to train staff, including requiring staff to be certified as Qualified SWPPP Developers or Practitioners (Section E.8.d), and to educate construction site operators (Section E.8.e). All of these requirements are higher levels of service.
- Major components of the Pollution Prevention/Good Housekeeping Program. (Draft Permit, Section E.9.) The Existing Permit requires the development and implementation of an operation and maintenance program that includes a training component designed to prevent or reduce pollutant runoff from municipal operations. (Existing Permit, Section D.2.f.) In contrast, Section E.9 of the Draft Permit contains very extensive new requirements for such a program. Dischargers must inventory all of their facilities (Section E.9.a), map them (Section E.9.b), annually assess them for pollutant “hotspots” (Section E.9.c), develop SWPPPs for each “hotspot” (Section E.9.d), inspect them regularly and at specified intervals (Section E.9.e), develop a storm drain assessment, with at least 20% of all catch basins prioritized at high (Section E.9.f), maintain storm drains at specific intervals, including cleaning all catch basins within one week of being found one-third full and removing trash and debris in high priority areas 3 times per year (Section E.9.g), develop a very specific O&M assessment, incorporate water quality and habitat enhancement features in flood management facilities, including implementing 2 changes or 2 additions to 2 projects per year unless infeasible (Section E.9.i), implementing a pesticides, herbicides and fertilizer program (Section E.9.j) and conducting annual training (Section E.9.k). These requirements are higher levels of service.¹²

¹² The Commission determined in the San Diego Test Claim that the conveyance cleaning and conveyance cleaning reporting requirements in the permit were unfunded state mandates, including a provision to clean catch basins that were one-third full.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

- Major components of the Post-Construction Storm Water Management Program. (Draft Permit, Section E.12.) The Existing Permit requires the development, implementation and enforcement of a program to address storm water runoff from new development and redevelopment projects, but provides flexibility in the development of such a program. (Existing Permit, Section D.2.e.) While certain larger communities (generally over 50,000) had to follow more detailed rules for program development, these more detailed requirements still maintained program flexibility, as evidenced by the different ways different Regional Boards handled enrollment for entities subject to these rules. In contrast to both of these requirements of the Existing Permit, Section E.12 of the Draft Permit contains enhanced and very detailed program requirements. Among other things, Section E.12 requires a watershed baseline characterization (Section E.12.b.1), watershed sediment budgets, interim hydromodification management (Section E.12.b.4), long-term watershed process management, including numeric criteria (Section E.12.b.5), and treatment system verification (Section E.12.b.8). These requirements are higher levels of service.¹³
- Major components of the reporting requirements and reporting program. (Draft Permit Section E.16 and individual elements of each of the new programs and higher levels of services identified above). The Existing Permit contains an annual reporting requirement. (Existing Permit, Section 2.F.) In contrast, the Draft Permit contains very detailed reporting requirements for almost every element of the program. These detailed reporting requirements are a higher level of service.¹⁴

C. The New Programs or Higher Levels of Service are Imposed Under State Law not Federal Law

The second question under the state mandates law is whether the new program or higher level of service is imposed under state law or federal law. Consistent with the purposes of Section 6, which seeks to prevent the state from shifting state program responsibility to local governments without providing funding, federal mandates are not subject to reimbursement under the state mandates law.¹⁵ The portions of the Draft Permit identified above are state law requirements, not federal ones.

¹³ The Commission determined in the San Diego Test Claim that the hydromodification and low impact development portions of the permit were state mandates.

¹⁴ The Commission determined in the San Diego Test Claim that many of the reporting requirements of the permit were unfunded state mandates, including the reporting requirements for street sweeping and conveyance system cleaning.

¹⁵ Government Code § 17556(c); Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564, 1593.
82510.00117\6637624.2



BEST BEST & KRIEGER
ATTORNEYS AT LAW

The Small MS4 Permit issued by the State Board is a state permit, not a federal permit, that is issued under state law.¹⁶ The State's NPDES program, including the Small MS4 Permit, is administered "in lieu of the federal program under state law"¹⁷ The State's NPDES program is not a delegation of federal authority, but instead is a state program which functions in lieu of the federal program.¹⁸ There is no legitimate legal dispute on this question.¹⁹ Therefore, the only question under the unfunded states mandates law is what elements of the state program are required by the federal regulations. Anything not required by the federal regulations is imposed under state law.

To determine what elements of the State's NPDES Program are required by the federal regulations, the Commission will look to the express requirements of the Clean Water Act and the federal regulations. Since states are free to implement more stringent requirements as part of their state NPDES programs that exceed the federal requirements,²⁰ the Commission will compare the requirements of the Draft Permit with the specific requirements of the Clean Water Act and regulations. For example, in the Los Angeles and San Diego Test Claim decisions, the Commission looked carefully at the requirements of the Clean Water Act and the Phase I Regulations and compared the express requirements of those laws with the requirements of the permits at issue. Those challenged portions of the permits that were not required by the federal regulations were considered to be state mandates. Here, the Phase II Regulations would guide the Commission's analysis. As explained below, the Draft Permit exceeds the requirements of the Phase II Regulations.

1. The New Programs and Higher Levels of Service in the Draft Permit Exceed the Requirements of the Six Minimum Measures.

Section 402(p)(3)(B) of the Clean Water Act requires that an NPDES permit be obtained for discharges from municipal storm sewers, and further requires that those permits meet the requirements of Section 402(p)(3)(B)(i) to (iii). Section 402(p)(3)(B)(4) and (6) required U.S. EPA to adopt regulations for such permits in two phase—Phase I, applicable to larger MS4s and Phase II, applicable to small MS4s. Specific to small MS4s, Section 402(p)(3)(B)(6) required

¹⁶ Shell Oil Company v. Train (9th Cir. 1978) 585 F.2d 408, 410-412.

¹⁷ 33 U.S.C. §§ 1342(b) and 1342(c)(i); 40 C.F.R. § 123.22.

¹⁸ State of California v. U.S. Department of Navy (9th Cir. 1988) 845 F.2d 222, 225-226 (noting that "state permit programs are not a delegation of federal authority, but instead are state programs which function in lieu of the federal program.").

¹⁹ Both Congress and the courts have resolved this question in a way that leaves no room for legal dispute. Congress has made clear that "such a state program is one which is established under state law and which functions in lieu of the federal program. It is not a delegation of federal authority. This is a point which has been widely misunderstood with regard to the permit program under Section 402 of the Act. That Section . . . provides for state programs which function in lieu of the federal program and does not involve a delegation of federal authority." (H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess., p. 104) Myriad cases have confirmed this point. (District of Columbia v. Schramm (D.C. Cir. 1980) 631 F.2d 854, 861; American Paper Institute, Inc. v. U.S. E. P.A. (7th Cir. 1989) 890 F.2d 869, 874; Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Bd. (E.D. VA 1978) 453 F.Supp. 122, 126; Chesapeake Bay Foundation, Inc. v. United States (E.D. VA 1978) 445 F.Supp. 1349, 1353)

²⁰ 33 U.S.C. § 1370; Water Code § 13377.

EPA to adopt regulations which, among other things, establish a “comprehensive program” for small MS4s and create, at a minimum, requirements for state storm water management programs.

In 1999, EPA issued its Phase II Storm Water Regulations.²¹ The Phase II Regulations establish six minimum control measures that must be implemented through NPDES permits. These six minimum control measures are (1) public education and outreach; (2) public involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction storm water management in new development and redevelopment; and (6) pollution prevention and good housekeeping of municipal operations. In the Phase II Regulations, U.S. EPA was very clear that implementation of these six minimum measures through an NPDES permit would achieve the MEP standard and, absent evidence to the contrary, would also be sufficient to achieve state water quality standards. In fact, U.S. EPA stated in guidance to the Phase II Regulations that it “strongly recommends that until the evaluation of the storm water program in § 122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4,” except in limited cases.²²

The six minimum control measures contained in the Phase II Regulations therefore represent the federal mandates under the Clean Water Act. To the extent the requirements of the Draft Permit exceed the six minimum control measures, they represent state mandates, not federal mandates. As noted above, the Existing Permit incorporates the six minimum measures verbatim from the Phase II Regulations. Therefore, the analysis above regarding the comparison between the Existing Permit and the Draft Permit also serves to illustrate the components of the Draft Permit that exceed the federal mandates. In other words, the new programs identified above exceed the federal mandates because they are not one of the six minimum control measures. The higher levels of service identified above exceed the federal mandates because they go beyond the requirements of the six minimum measures as set forth in the Phase II Regulations. Together the new programs and higher levels of service exceed the federal requirements.

2. The New Programs or Higher Levels of Service Cannot Be Converted into Federal Mandates Simply By Reference to MEP

Program requirements that are not mandated by the federal regulations do not become a federal mandate simply because the State Board says the requirements are necessary to achieve the MEP standard found in Section 402(p)(3)(B)(iii) of the Clean Water Act. There are several reasons why this is true.

First, in the Phase II Regulations, U.S. EPA made clear that the six minimum measures, when properly implemented, “will reduce pollutants to the maximum extent practicable.” Of course, Congress and U.S. EPA, not the state, define the requirements of federal law. Here, U.S.

²¹ Generally contained in 40 CFR § 122.30 et seq. The full Phase II Regulations, with an important Preamble, are contained in 64 FR 68722.

²² 40 CFR §122.34(e)(2).



EPA has found that the six minimum measures reduce discharges to the MEP. While the State Board is authorized to exceed these requirements under state law, it cannot convert those state mandates into federal mandates by reference to MEP.

Second, the State Board itself has already recognized that the MEP standard reflected in Section 402(p)(3)(B)(iii) prohibits the discharge of pollutants “from” the MS4 that have not been reduced to the MEP and does not extend to discharges “to” the MS4.²³ In connection with a petition filed over the 2001 San Diego Phase I Storm Water Permit, the State Board struck down language in the permit that applied the MEP standard to dischargers “into” MS4s. The State Board concluded that such permit language applied the MEP standard too broadly. Further, the State Board found that the provisions of the permit that regulated discharges “to” the MS4 had to be justified by other state or federal provisions of the law, not by MEP. Thus, the State Board has already found that MEP cannot be used to justify all elements of a permit.

Third, the MEP standard is similar to due process and other broad federal standards which the Commission regularly addresses in the state mandates context. Like these other broad federal standards, the Commission defines the minimum requirements of such federal standards by reference to federal statutes, regulations and court decisions. Here, the Phase II Regulations establish the meaning of MEP, and the elements of the Draft Permit that exceed those requirements are state mandates, not federal mandates.

D. The Permittees Lack Adequate Fee Authority to pay for the State Mandated New Programs or Higher Levels of Service

To qualify as a reimbursable state mandate, the local agency subject to the mandate must lack adequate fee authority to pay for the mandate.²⁴ A local agency will have adequate fee authority if it “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” In both the Los Angeles and San Diego Test Claims, the Commission determined that “a local agency does not have sufficient fee authority . . . if the fee or assessment is contingent on the outcome of an election by voters or property owners.” On this issue, the Commission reasoned that under “Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.”

The Commission’s decisions in the Los Angeles and San Diego Test Claims demonstrate that dischargers do not have adequate fee authority to pay for the new programs or higher levels of service required by the Draft Permit.

²³ In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association, State Water Board Order WQ 2001-15.

²⁴ Government Code § 17556(d)
82510.001176637624.2



E. Unless the State is Willing to Fund These New Programs or Higher Levels of Service, the Sate Board Should not Include Them in the New Small MS4 Permit

The unfunded state mandates law is about funding of state programs. It is a constitutional requirement imposed upon the state to fund programs that it requires local agencies to implement. Everyone involved in storm water regulations recognizes that the current programs are not fully funded at all levels, federal, state and local. In its report on Urban Stormwater Management in the United States, the National Research Council concluded that state and local governments do not have adequate financial support to implement the storm water program in a rigorous ways. Similarly, State Board staff, in the workshops on the Draft Permit, have repeatedly recognized that the programs are underfunded.

Under the state mandates law, the State Board has a clear choice. If it elects to impose new states mandates, on top of ones that are already underfunded, it must provide the funding to implement those mandates. If it does not wish to provide the funding, then the State Board should not include the mandates in the new Permit. Rather, the State Board should work with the dischargers to develop a permit that is consistent with the federal requirements and can be implemented by local agencies. The choice is with the State Board.

SECTION II.
GENERAL LEGAL COMMENTS
ON THE DRAFT PERMIT

The Draft Permit raises other legal concerns beyond the state mandates issues discussed above. Section II of this letter outlines these other key legal issues.

A. The Draft Permit Contains Ambiguous or Misleading Language that Must Be Deleted or Clarified, Especially in Light of Recent Case Law

The Ninth Circuit Court of Appeals recently issued a decision (the "NRDC Decision")²⁵ involving the Los Angeles County Phase I Storm Water Permit that the State Board must take into account in connection with the Draft Permit. In the NRDC Decision, the Ninth Circuit held that the Los Angeles County Flood Control District was liable for discharges from two mass emissions monitoring stations located in the Los Angeles and San Gabriel Rivers because measurements at the stations showed levels of pollutants that exceeded the numeric requirements of the Basin Plan.

The NRDC Decision illustrates several key legal points that emphasize why very careful drafting of the conditions contained in the new Permit is required. According to the Ninth Circuit, courts review a permit's provisions as they would review any contract or legal document. Each permit term is simply enforced as written, and all permit conditions are enforceable. For this reason, the State Board must carefully draft each term in the Permit, and only conditions that are intended to be enforceable as written should be included. In this regard,

²⁵ Natural Resources Defense Council, Inc. v. County of Los Angeles (Filed July 13, 2011) Case No. 10-56017.
82510.00117\6637624.2

it is common for State Board staff to say that a certain permit condition is “intended” to be flexible or that it will not be interpreted in certain ways. These comments are well meaning and are appreciated by program managers because they demonstrate the State Board’s desire to work with dischargers on issues. However, as the NRDC Decision underscores, the permit will be enforced as written. Thus, all ambiguous and misleading language, regardless of how well meaning it may be, must be removed from the Draft Permit. Only express terms that the State Board intends to be enforced as written should be included.

To address this issue, it may be advisable for the State Board to take the approach the U.S. EPA took in its Phase II Regulations. U.S. EPA very clearly separated its “guidance” on how the regulations might be implemented from the mandatory requirements of the regulations. The State Board should consider substantially reducing the enforceable provisions of the Draft Permit and placing much of the broader guidance language in a separate document, such as the Fact Sheet. In this way, the State Board can provide recommendations on how the enforceable components of the Permit are to be implemented without needlessly opening the dischargers up to liability based upon poorly drafted permit language.

A second important component of the NRDC Decision is that it undermines the iterative process that has been the core of State Board’s storm water regulation for years. Even when a discharger is engaging in the iterative process, the discharger may still face liability for poorly drafted permit conditions. The State Board should use the Draft Permit as an opportunity to bolster the iterative process by developing stronger language on the protections afforded to dischargers who engage in the iterative process in good faith. At the same time, the State Board should only include permit provisions that are intended to be enforced as written. It should not allow, as happened in the Los Angeles example, receiving water standards contained in the Basin Plan to be used as numeric, end of pipe effluent limitations.

B. The Draft Permit is Inconsistent with the Requirements of Water Code Section 13360

Water Code section 13360(a) provides that “[n]o waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.” The Draft Permit’s 93 pages of very prescriptive requirements are not consistent with the provisions of Section 13360. Rather than allowing the dischargers to comply with the Permit in any lawful manner, the Draft Permit specifies exactly how the dischargers must comply. Extreme examples include telling dischargers how often they must pick up trash in open channels, who must be on a mandatory “citizen’s advisory committee”, how they must prioritize certain facilities (i.e., at least 20% of x shall be designated as high priority) and what specific type of educational strategy they must use to comply with the educational minimum measure.



In addition to the discussion above regarding the NRDC Decision, Water Code section 13360 demonstrates why the State Board should take a different approach than the prescriptive one taken in the Draft Permit. Water Code section 13360 requires the State Board to set forth the enforceable requirements to which the dischargers must conform, but leaves implementation to the dischargers. If the State Board, similar to U.S. EPA, would like to provide guidance on how to comply, it should do so in documents that are not enforceable themselves. However, to include such requirements in an enforceable permit condition is contrary to Water Code section 13360.

C. The Draft Permit Improperly Expands Requirements of TMDLs Without Going through the Basin Plan Amendment Process

When the State Board includes effluent limitations in an NPDES permit based upon a TMDL, it must do so in a manner that is “consistent with the assumptions and requirements of any available wasteload allocation for the discharge”²⁶ In the Draft Permit, the State Board appears to have expanded requirements of the various Basin Plan Amendments that incorporate the listed TMDLs and their corresponding implementation plans. For example, the Draft Permit appears to require the City of Roseville, as well as the City of Woodland, to perform certain requirements that are not imposed on it under the Basin Plan Amendment at issue. The Draft Permit must be revised to only include TMDL requirements that are consistent with the assumptions and requirements of the existing wasteload allocations. Any requirements that are not consistent with the relevant Basin Plan Amendment must be deleted.

D. The Draft Permit Should Allow for More Flexible Water Capture Solutions Consistent with the State Recycled Water Policy

In February of 2009, the State Board adopted the Recycled Water Policy. Among other things, the Recycled Water Policy identified storm water as a valuable resource that must play a part in augmenting the state’s water supply. The Recycled Water Policy established very ambitious goals for increasing the capture and reuse of storm water.

The Draft Permit includes provisions that require the capture and infiltration of storm water. (See, e.g., Draft Permit, Section E.12.b.3.) However, as with many recent Phase I permits issued by the Regional Boards, the Draft Permit appears to stress on-site solutions over regional projects that might have similar water quality benefits but greater groundwater recharge and storm water capture results. The Draft Permit should provide more flexibility on these issues, and the State Board should use the Draft Permit as an opportunity to provide flexibility in order to achieve the goals of the Recycled Water Policy.

²⁶ 40 CFR section 122.44(d)(1)(vii)(B).
82510.00117/6637624.2

E. The Draft Permit Should Only Include Provisions that Can be Achieved By the Dischargers, Not Requirements that Dischargers Cannot Achieve Without Approval of Others

The Draft Permit includes many provisions that are mandatory as to the dischargers but the implementation of which are not entirely within the control of the dischargers. By way of example, Section E.9.i.(ii) of the Draft Permit states that “the Permittee shall develop and implement a process to incorporate water quality and habitat enhancement features in the design of all new and retrofitted flood management projects that are associated with the MS4 or that discharge to the MS4.” The Draft Permit goes on to provide that the “Permittee shall implement changes or additions to two flood management projects per year to enhance water quality and habitat functions, unless a feasibility analysis demonstrates the infeasibility of such changes or additions.”

Mandatory provisions such as E.9.i.(ii) should be deleted from the Draft Permit. It is an undue burden on local agencies to be required to implement certain projects or programs while not having complete control of the ability to complete the project or program. In the flood management example, many other entities are involved in flood management projects, including, without limitation, flood control districts and the Army Corps of Engineers. Imposing a mandatory requirement on dischargers to perform something over which they do not have complete control is not fair, and only exposes dischargers to liability. The unfairness of this language is not mitigated by the infeasibility language inserted in the Draft Permit. An infeasibility analysis is costly and the standard for infeasibility is not clear. The Draft Permit should only include mandatory provisions that the dischargers have the ability, on their own, to achieve.

F. The Draft Permit Cannot Purport to Provide Dischargers with Authority that the State Board Does not Possess

The Draft Permit includes language that purports to authorize dischargers to perform certain functions or activities without identifying the State Board’s authority to make the authorization. For example, Section E.7.d.(ii).(e) of the Draft Permit states that the “Permittees may seek recovery and remediation costs from responsible parties or require compensation for the cost of field screening and investigations.” The ability of dischargers to seek cost recovery is limited by the California Constitution, state statutes, city charters and local ordinances. It is unclear under what authority the State Board is providing dischargers with the power to seek recovery of such costs. If the State Board has specific authority to make such an authorization, the Draft Permit and Fact Sheet should explain the legal basis for the authorization. If the State Board does not have specific authority to make such an authorization, provisions such as this one must be deleted from the Draft Permit.

G. The Draft Permit Should Clarify How the Permit's Requirements Relate to Already Enrolled Entities and Their Current Program Efforts, Such as the Joint Effort in the Central Coast

The Draft Permit contains a repeated footnote stating that if "a Regional Water Board Executive Officer determines that a Renewal Traditional Small MS4 Permittee's current implementation of its program BMPs meets the MEP standard and is equally or more effective at reducing pollutant discharges than implementation of the requirements of this Section, the Executive Officer may require continued implementation of the Permittee's current program BMPs and reporting requirements in lieu of implementation of the requirements of this Section." (See, e.g., Draft Permit, Section E.4, fn. 9.)

While it makes good sense to accommodate the current programs of Renewal Traditional Small MS4 Permittees within the structure of the Draft Permit, the authority delegated to the Regional Boards is too great and creates too much confusion about the applicability of enforceable provisions of the Permit. A better approach would be to find that the current programs of Renewal Traditional Small MS4s that have been enrolled under the Existing Permit satisfy the requirements of the Draft Permit. If a role for the Regional Board is necessary, the State Board should redraft this footnote to create a presumption that current programs satisfy the requirements of the Draft Permit, and require the Regional Board to make findings to the contrary. If this course is pursued, the Draft Permit should also provide a vehicle by which Renewal Traditional Small MS4s who believe that their current programs exceed the requirements of the Draft Permit may elect to implement the requirements of the Draft Permit rather than their current programs.

H. The Draft Permit Should Clearly Specify the Regional Board's Authority

Section F of the Draft Permit contains a one paragraph discussion of the authority of the Regional Boards to oversee, modify and enforce the Draft Permit. This broad delegation of authority is inconsistent with the statewide nature of this general permit and the need for clarity on the enforceable provisions of the Permit. As the 8 years of implementation of the Existing Permit by the Regional Boards demonstrates, the broad delegation of authority in the Draft Permit will result in inconsistent and unfair implementation of the Permit. Certain dischargers will be required to comply with requirements not expressly found in the Draft Permit, while other dischargers under the same Permit will not be faced with those requirements. While the Regional Boards may play an oversight role, the State Board should specify in the Draft Permit the extent, and limits, of that role. Without such clarity, there will be ambiguity and disputes over the requirements of the Permit. In light of the NRDC Decision, dischargers will need to pursue available remedies to clarify what enforceable requirements actually apply to them. This will divert money to permit disputes that could more appropriately be spent on permit implementation.

The need for the State Board to specify the Regional Board's authority is entirely consistent with the preceding comments regarding Water Code section 13360 and the need for



the State Board to reduce the prescriptive nature of the Draft Permit as to the dischargers. Consistent with its role as the final decision maker on water quality issues, the State Board should be very specific about the role the Regional Boards. This specificity is needed to ensure statewide consistency and clarity about the enforceable terms of the Permit. In contrast and consistent with Water Code section 13360, the State Board should establish the key enforceable provisions of the Permit, but let the dischargers decide how best to achieve those requirements. The Draft Permit turns these legal requirements on their heads. The Draft Permit is very prescriptive as to the dischargers, but provides very broad authority to the Regional Board. Consistent with the requirements and policy of Porter-Cologne, these approaches should be reversed.

I. The Findings in the Draft Permit and The Fact Sheet Do Not Support the Draft Permit's Requirements

The federal regulations require that the Draft Permit be accompanied by a fact sheet²⁷ meeting the applicable requirements for such fact sheets.²⁸ In addition, as a quasi-judicial decision, the Draft Permit must contain findings and those findings must be supported by evidence in the record.²⁹

Neither the Fact Sheet nor the findings in the Draft Permit support the significant new programs or higher levels of service required in the Draft Permit. For example, neither the Fact Sheet nor the findings contain a clear discussion of the federal and state law authorities pursuant to which the Draft Permit is issued, and neither delineates between authority under federal law and authority under state law. The Fact Sheet, the findings and the Draft Permit itself should specify the state or federal authority under which an enforceable condition of the Draft Permit is imposed. Without such an explanation of the State Board's legal authority, the dischargers are not provided with a sufficient opportunity to assess the legal and factual basis upon which each permit condition is imposed.

²⁷ 40 CFR section 124.6(e).

²⁸ 40 CFR sections 124.8 and 124.56.

²⁹ 40 CFR section 124.6(e)(requiring that draft permits be based on the administrative record); Topanga Ass'n for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506.
82510.001176637624.2

Jeanine Townsend
Clerk of the Board
Page 17
August 12, 2011



SECTION III.
CONCLUSION

Thank you for this opportunity to provide the State Board with these legal comments on behalf of the City of Roseville. We look forward to the State Board's written responses to them and a revised draft of the proposed permit.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP

ATTACHMENT B
TECHNICAL COMMENTS

ATTACHMENT B

The City is concerned with meeting the overall requirements of the draft Phase II permit. In addition to the comments from CASQA and the SCC, the following specific areas of concern are expressed below:

B. Discharge Requirements

B.3 The draft Phase II permit omits several allowable non-stormwater discharges included within the Federal Register including landscape irrigation, irrigation water, lawn watering, individual residential car washing and street was water. These allowable discharges should be placed back into the draft Permit or there should be clear explanation as to why they are being omitted. The omission of individual residential car washing will be a provision of the permit that will be politically and functionally impossible for MS4s to enforce. It is unrealistic to expect that individuals will cease washing their cars at home.

This section indicates that discharges from potable water sources are allowable discharges. However in the context of section B.4 that may not be the case when you read the provisions of incidental and non-incidental run-off. There appears to be conflicts here.

B.4 This section of the permit is confusing and sets forth many unrealistic expectations of MS4s. The Phase II draft permit states “Discharges of Incidental Runoff shall be *controlled* (emphasis added).” “Incidental runoff is defined as unintended small amounts...” and “Water leaving an area is not considered incidental if.....it is due to excessive application”. This language is too vague. How would one distinguish between overspray and excessive application? It is subjective and will only lead to litigation if meaningful enforcement is attempted.

It is unclear what is intended of items a-e. Are these to be addressed with incidental runoff or for flows determined to not be incidental runoff? One possible interpretation is that an allowance for incidental runoff is implied as long as it's *controlled* by implementing items a-e. If this is the case, item e requires MS4s to take “Any other actions necessary to prevent the discharge of incidental runoff to the MS4 or waters of the U.S.” This means there is no such thing as incidental runoff that is permitted.

Implementing items a-e are unrealistic. We could not begin to enforce the provisions of items a-c with any effectiveness.

- Item a: The MS4 is to “Detect leaks (for example, from broken sprinkler heads) and correct the leaks wither within 72 hours of learning of the leak or prior to the release of 1,000 gallons, whichever occurs first. How is an MS4 to know when 1,000 gallons has been leaked? That would be nearly impossible to determine, even if you knew when the leak began.

- Item b: How is the MS4 to realistically ensure the proper design and aim of sprinkler heads?
- Item c: The MS4 is to enforce the provision to “Do not water during precipitation events.” The only way to enforce this would be to outlaw irrigating all together. It is a ridiculous notion that MS4s can control or predict the weather sufficiently to ensure no one will water when it rains.
- Item d: This section requires “...no discharge occurs unless the discharge is a result of a 25-year, 24-hour storm event or greater” and that we must notify the Regional Board by email “no less than four hours prior to the discharge”. Again we can’t predict the weather to the degree of identifying when a 25 year storm is within 4 hours of happening.
- Item e: MS4s are being required to take “Any other action necessary to prevent” incidental runoff. Incidental runoff is defined as “minimal overspray”. What would you suggest and MS4 do to prevent this?

E.5 Public Outreach and Education Program

The requirement to utilize Community Based Social Marketing should be removed from all references within the draft permit. A highly respected public relations firm specializing in governmental marketing was asked to review the provisions. They estimated the first year cost to implement provision E.5 at nearly \$650,000 in the first year and over \$400,000 per year thereafter.

Provision E.5.b.ii.i requires MS4s to provide “Technical and financial assistance and implementation guidance related to stormwater-friendly landscaping.” The requirement to provide undefined financial assistance is ambiguous. This needs greater clarity.

E.8 Construction Site Storm Water Runoff Control Program

E.8.a Documentation and Reporting – In general, by requiring Permittee’s to develop a redundant electronic database for tracking, documenting, and reporting to the State will take away allocated human resources from actual field observation. We propose the State Water Board fully utilize SMART’s in a way that allows for complete and thorough information and communication with Phase II communities. Secondly, we see no direct benefit of conducting surveys to demonstrate the awareness and potential behavioral changes in the attendees.

E.8.b To review, plan check, and approve the relevant construction plan documents by verifying BMP quantified soil loss should not be the responsibility of the municipalities but instead be either the certified QSD or State Water Board for whom the WDID fee is collected. We propose that Phase II communities should merely be obligated to “accepting” the SWPPP for general completeness prior to construction, and that the State Certified QSD and/or State Water Board assume the responsibility of approval.

E.8.c Table A: Inspection Frequency – Ideally, Permittee’s will utilize qualified stormwater staff to observe construction projects within their jurisdictions. By requiring specific inspections based upon weather conditions and rainfalls will require Permittee’s to arrange for “Stand-By”

inspection staff to achieve compliance. This provision is unrealistic from every manageable reason feasible.

E.12.b.3 – Water Quality Run-Off Standards – Redevelopment District Incentive

Redevelopment projects are often within infill areas of City's and in some cases within Redevelopment districts. Full conformance with the SWP is difficult on an individual basis, which has a detrimental effect in providing momentum to the redevelopment district. The success of many redevelopment districts relies on the ability to provide quantifiable costs and permit conditions. Permittees should be given an opportunity to establish a district wide SW treatment management plan to install regional treatment that benefits redevelopment areas, and an associated stormwater mitigation fee to fund the management plan. In doing so, individual projects could proceed within the redevelopment district, providing momentum to the district, and eventually enough money will be collected to implement the management plan. The benefit of this approach eliminates individual redundancies, provides incentives, and costs less. If individual projects within the redevelopment district can't provide SW management on their property, then the district may not fully develop, the neighborhood stays status quo, and there is no water quality benefit at all.

Provisions should be made that allows for runoff reduction credits when LID's are installed which provide source control treatment or evapotranspiration resulting in a net decrease of storm water leaving the site.

The requirement to size treatment facilities with a 200% increase in flow for that portion of the 85th percentile when the waters are not captured should be changed to require a treatment facility at 100% flow or as decreased for runoff reductions associated with LID's.

E.12.b.3 – Water Quality Run-Off Standards

Clay Soils: Infiltration practices are infeasible where soils have low infiltration rates. Infiltration rates should be quantified to qualify for this exemption. The infiltration rate should be set consistent with that of a clay soil so that a geotechnical engineer will be able to verify if the exemption applies to a particular site.

E.12.b.3.i.a.4 - The treatment standards shall not apply for private development projects that have effectuated a Specific Plan approval prior to January 2010 and where the planning application has been deemed complete by a Permittee, so long as the project applicant is diligently pursuing the project. Diligent pursuance may be demonstrated by the project applicant's submittal of supplemental information to the original application, plans, or other documents required for any necessary approvals of the project by the Permittee.

In addition, Capital Improvement projects with an approved environmental document should be exempt from having to comply with these standards.

E.13 Receiving Water Monitoring

It is Roseville's contention that receiving water monitoring is not one of the 6 Minimum Control Measures and was never intended by the Federal Phase II Rule, as such it should be eliminated from this draft permit as an unfunded mandate. Additionally, we contend that the requirements

of the Draft permit will not provide good quality data that is statistically significant, consistent and scientifically defensible.

The State should reconsider the reasoning and the resulting benefits afforded by the monitoring requirements of the draft Permit. If water quality monitoring is to be conducted to improve the overall knowledge of the waters of the State, as is stated by the Fact Sheet to the draft Order. That scale of assessment should be the responsibility of the State. Although requiring MS4s to gather monitoring information may provide a volume of data to the State, this data may be inconsistent and highly variable due to inherent differences in data collection amongst the MS4s. This will reduce the quality and reliability of the data. Instead, we recommend that one entity, the State's Surface Water Ambient Monitoring Program (SWAMP), be responsible for receiving water monitoring throughout the State. Currently, the MS4s contribute to SWAMP through our annual permit renewal fees. It would be most cost effective for the MS4s to continue to support SWAMP, perhaps even increase this support, to get better quality data that the State may use in a variety of ways to improve water quality.

Conversely, if we, as MS4s, are undertaking this task for the betterment of our individual programs, the broad requirements of the draft Permit go beyond the parameters that are under the control of the MS4. The Permit requires the MS4s to monitor parameters that do not originate from or even pass through our stormwater conveyance systems such as temperature & dissolved oxygen. It also requires us to conduct bioassessments of our waterways. We do not have control over these parameters and cannot adjust our programs to improve them. If local resources are to be used for receiving water monitoring with the intent of making improvements to our programs, MS4s should monitor only the constituents of concern that originate from our jurisdictions.

Certainly, the limited number of samples required under the provisions of the draft permit is only a snap shot of the status of a receiving water. It is not representative of general trends across an MS4. Moreover, it is not an indicator of need for overall modifications to a Stormwater Management Program. Numerous rounds of sampling are required to provide statistically significant data to determine that. Certainly, it is beyond the ability of an MS4 to provide that level of monitoring data.

It is our conclusion that to provide useful data for the improvement water quality throughout the state. The Surface Water Ambient Monitoring Program should shoulder the responsibility of monitoring and the Receiving Water Monitoring section of the draft permit should be removed.

ATTACHMENT C
DETAILED COST ESTIMATE

ATTACHMENT C - DETAILED COST ESTIMATE SUMMARY

ONE TIME COST BY YEAR					
	2012 -13	2013 -14	2014 -15	2015 -16	2016 -17
	\$ 1,060,028.03	\$ 307,669.48	\$ 1,008,695.21	\$ 108,206.16	\$ 108,826.48
\$					

**ROBEVILLE - PHASE II PERMIT
IMPLEMENTATION COST ESTIMATE
SUMMARY**

YEAR	COST BY YEAR				
	2012 -13	2013 -14	2014 -15	2015 -16	2016 -17
Base Costs	\$ 2,396,193.77	\$ 2,396,193.77	\$ 2,396,193.77	\$ 2,396,193.77	\$ 2,396,193.77
One Time Costs	\$ 1,060,028.03	\$ 307,669.48	\$ 1,008,695.21	\$ 108,206.16	\$ 108,826.48
Total Cost	\$ 3,456,221.80	\$ 2,703,863.24	\$ 3,404,888.98	\$ 2,504,399.93	\$ 2,505,020.24
Est Population	118,979	120,579	121,182	121,768	122,397
Cost per resident	\$ 28.81	\$ 22.42	\$ 28.10	\$ 20.56	\$ 20.47
Cost per household	\$ 73.17	\$ 56.86	\$ 71.37	\$ 52.23	\$ 51.98

AVERAGE ANNUAL COST FOR 5 YEARS	
Total Annual Avg Cost for 5 Years	\$ 2,914,879
5 Year Avg Population	121,165
Avg Cost per Resident	\$ 24.05
Avg Cost per Household	\$ 61.10

Residents per household

2.54

PROGRAM ELEMENT	ANNUAL COSTS	ONE-TIME COSTS	TOTAL COST
E.4 PROGRAM MANAGEMENT ELEMENT	\$ 125,800	\$ 36,255	\$ 162,055
E.5 PUBLIC OUTREACH AND EDUCATION PROGRAM	\$ 400,000	\$ 604,126	\$ 1,004,126
E.6 PUBLIC INVOLVEMENT AND PARTICIPATION PROGRAM	\$ 16,804	\$ 20,562	\$ 37,366
E.7 ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM	\$ 118,359	\$ 51,939	\$ 170,299
E.8 CONSTRUCTION SITE STORM WATER RUNOFF CONTROL PROGRAM	\$ 339,984	\$ 15,280	\$ 355,264
E.9 POLLUTION PREVENTION/GOOD HOUSEKEEPING FOR PERMITTEE OPERATIONS PROGRAM	\$ 1,007,986	\$ 449,752	\$ 1,456,738
E.10 TRASH REDUCTION PROGRAM	\$ 10,388	\$ 14,637	\$ 25,025
E.11 INDUSTRIAL/COMMERCIAL FACILITY RUNOFF CONTROL PROGRAM	\$ 132,883	\$ 231,287	\$ 363,950
E.12 POST CONSTRUCTION STORM WATER MANAGEMENT PROGRAM	\$ 25,842	\$ 811,712	\$ 837,555
E.13 RECEIVING WATER MONITORING	\$ 41,357	\$ 112,000	\$ 153,357
E.14 PROGRAM EFFECTIVENESS ASSESSMENT AND IMPROVEMENT	\$ 82,311	\$ 213,252	\$ 305,563
E.15 TOTAL MAXIMUM DAILY LOADS COMPLIANCE REQUIREMENTS	\$ -	\$ 50,631	\$ 50,631
E.16 ONLINE ANNUAL REPORTING PROGRAM	\$ 24,762	\$ -	\$ 24,762
TOTAL	\$ 2,335,184	\$ 2,810,435	\$ 4,948,628

Other annual costs - permit fees, vehicles, office supply etc.

CITY OF ROSEVILLE - PHASE II PERMIT IMPLEMENTATION COST ESTIMATE

PERMIT ELEMENT	PERMIT COMPLIANCE YEAR (SPECIFIC DATE IF MAY 15TH UNLESS OTHERWISE NOTED)	STAFF LEVEL	STAFF PER WEEK	STAFF PER YEAR	FTB	BPTB	STAFFING COSTS	OTHER COSTS (contaminant, lab fee)	ANNUAL COST/ Yr = 1/10-1	TOTAL COST	ANNUAL COST	ONE TIME COST	One Time Cost Schedule				On Time FTE
													2018-13	2013-14	2014-16	2016-17	
E.8.a Inspections, Visual Monitoring and Remedial Action	2016	Sr. Engr. Associate Inspector	1	52	0.025	165,045	4,128			4,128.13	4,128.13						
			2	104	0.05	330,074	8,256			8,256.26	8,256.26						
			156	8,256	0.15	4,953,912	7,851			7,851.00	7,851.00						
E.8.f Storm Drain System Assessment and Prioritization	2015	Sr. Engr. Associate	0.2	26	0.013	165,045	2,063			2,063.08	2,063.08						
			0.2	39	0.015	247,574	4,901			4,901.62	4,901.62						
			1	52	0.025	247,574	4,901			4,901.62	4,901.62						
E.8.g Maintenance of Storm Drain System	2018	Sr. Engr. Inspector	1	52	0.025	165,045	12,378			12,378.38	12,378.38						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
E.8.h Permits Operations and Maintenance Activities (OM)	2014	Sr. Engr. Associate	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	26	0.013	165,045	2,063			2,063.08	2,063.08						
			0.2	39	0.015	247,574	4,901			4,901.62	4,901.62						
			1	52	0.025	247,574	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
E.8.i Incorporation of Water Quality and Habitat Management Features in Flood Management Facilities	2014	Manager	3	156	0.075	247,574	16,370			16,368.65	16,368.65						
			3	208	0.1	330,074	21,826			21,826.20	21,826.20						
			0.2	26	0.013	165,045	2,063			2,063.08	2,063.08						
			0.2	39	0.015	247,574	4,901			4,901.62	4,901.62						
			1	52	0.025	247,574	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
E.8.j Permitted Herbicide and Fungicide Application and Management	2013	Sr. Engr. Associate	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
E.8.k Training and Education	2013	Sr. Engr. Associate	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	26	0.013	165,045	2,063			2,063.08	2,063.08						
			0.2	39	0.015	247,574	4,901			4,901.62	4,901.62						
			1	52	0.025	247,574	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
E.8 Sub-Total							636,718.02			636,718.02	1,907,965.83	448,752.09					
E.9 TOXIN REDUCTION PROGRAM	2016	SU Director	0.2	10.4	0.005	289,215	1,446			1,446.08	1,446.08						
		Manager	0.5	26	0.013	213,262	2,728			2,728.28	2,728.28						
		Sr. Engr. Associate	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
		Engr. Tech.	0.2	10.4	0.005	185,545	2,633			2,633.06	2,633.06						
		Associate	0.1	5.2	0.0025	92,772.5	1,316.5			1,316.53	1,316.53						
		Inspector	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	10.4	0.005	98,013	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
							836,718.02			836,718.02	1,907,965.83	448,752.09					
E.10 TOXIN REDUCTION PROGRAM	2016	SU Director	0.2	10.4	0.005	289,215	1,446			1,446.08	1,446.08						
		Manager	0.5	26	0.013	213,262	2,728			2,728.28	2,728.28						
		Sr. Engr. Associate	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
		Engr. Tech.	0.2	10.4	0.005	185,545	2,633			2,633.06	2,633.06						
		Associate	0.1	5.2	0.0025	92,772.5	1,316.5			1,316.53	1,316.53						
		Inspector	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	10.4	0.005	98,013	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
							836,718.02			836,718.02	1,907,965.83	448,752.09					
E.11 TOXIN REDUCTION PROGRAM	2013	Associate	5	260	0.125	165,045	17,209			17,209.25	17,209.25						
		Inspector	6	312	0.15	213,262	2,728			2,728.28	2,728.28						
		Engr. Tech.	20	1,040	0.05	185,545	2,633			2,633.06	2,633.06						
		Associate	0.2	10.4	0.005	136,074	680			680.37	680.37						
		Inspector	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	10.4	0.005	98,013	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
							25,633.21			25,633.21	14,637.45						
E.11 a Industrial Program	2013	Associate	5	260	0.125	165,045	17,209			17,209.25	17,209.25						
		Inspector	6	312	0.15	213,262	2,728			2,728.28	2,728.28						
		Engr. Tech.	20	1,040	0.05	185,545	2,633			2,633.06	2,633.06						
		Associate	0.2	10.4	0.005	136,074	680			680.37	680.37						
		Inspector	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
			0.2	10.4	0.005	98,013	4,901			4,901.62	4,901.62						
			156	8,256	0.05	495,135	36,752			36,752.00	36,752.00						
							25,633.21			25,633.21	14,637.45						
E.11 b Industrial/Commercial/Stormwater	2014	Associate	0.4	20.8	0.015	136,074	1,361			1,361.74	1,361.74						
		Inspector	0.2	10.4	0.005	136,074	680			680.37	680.37						
		Associate	0.2	10.4	0.005	136,074	680			680.37	680.37						
		Inspector	4	208	0.05	165,045	8,252			8,252.25	8,252.25						
		Associate	0.2	10.4	0.005	136,074	680			680.37	680.37						
		Inspector	4	208	0.05	165,045	8,252			8,252.25	8,252.25						
		Sr. Engr.	1	52	0.025	247,574	4,901			4,901.62	4,901.62						
			1	52	0.025	247,574	4,901			4,901.62	4,901.62						
			6	312	0.05	495,135	36,752			36,752.00	36,752.00						
							342,450.08			342,450.08	152,943.22	20,000.00					
E.11 c Scope of Inspection	2016	Sr. Engr.	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						
E.11 f Staff Training	2016	Consultant Trainer	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
		Training coordinator	2	104	0.05	165,045	8,252			8,252.25	8,252.25						
			2	208	0.1	330,074	16,504			16,504.50	16,504.50						

CITY OF ROSELVILLE - PHASE II PERMIT IMPLEMENTATION COST ESTIMATE

PERMIT ELEMENT	PERMIT COMPLIANCE YEAR (SPECIFIC DATE OR MAY 15TH UNLESS OTHERWISE NOTED)	STAFF LEVEL	START HOURS PER WEEK	START HOUR PER YEAR	FTE	MTE	STAFFING COSTS	OTHER COSTS (CONSULTING, EQUIPMENT, LAB USE)	ANNUAL COST: Year = 1 May = 2	TOTAL COST	ANNUAL COST	ONE TIME COST	One Time Cost Schedule			One Time FTE		
													2019-20	2014-15	2014-15		2015-16	
E.12.B.4 storm Hydro-moisturization Management Consultant Charges	2016	Sr. Eng.	0.05	104	0.05	165,045	6,252	100,000	165,045	6,252.25	6,252.25	100,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.12.B.5 Long-Term Watershed Process Management Consultant Charges	2016	Sr. Eng.	0.05	104	0.05	165,045	6,252	100,000	165,045	6,252.25	6,252.25	100,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.12.B.6 Management	2017	Manager	3.3	182	0.084	216,242	16,098		216,242	19,097.83	19,097.83	19,097.83	2019-20	2014-15	2014-15	2015-16	0.084	
E.12.B.7 Watershed-based Storm Water Management	2017	Sr. Eng.	2.2	132	0.083	153,943	10,915		153,943	15,007.33	15,007.33	15,007.33	2019-20	2014-15	2014-15	2015-16	0.083	
E.12.B.8 Operations and Maintenance of Storm Water Treatment Systems	2014	operator	0.7	312	0.174	84,813	14,702		84,813	14,701.65	14,701.65	14,701.65	2019-20	2014-15	2014-15	2015-16	0.083	
E.13 Sub-Total								600,000.00	237,654.80	837,654.80	25,842.48	811,742.31						
E.13 RECEIVING WATER BORTORIO																		
E.13.B.1 Develop / Modify Water Quality Monitoring Program	2012	Sr. Eng.	0.025	136	0.025	165,045	4,176	6,000	165,045	4,126.15	4,126.15	6,000.00	2019-20	2014-15	2014-15	2015-16	0.025	
E.13.B.2 Implement Level Receiving Water Monitoring at Urbanized Area Spans >= 5 HUC12. Rotate on an annual basis among those watersheds	2013	Sr. Eng.	0.74	396	0.191	165,045	3,095		165,045	3,094.59	3,094.59		2019-20	2014-15	2014-15	2015-16	0.084	
E.13.B.3 Bio Assessment Sampling, Consultant Sampling equipment costs Lab Costs	2013	Engr. Tech.	0.4	208	0.016	66,434	884	6,000	66,434	884.24	884.24	6,000.00	2019-20	2014-15	2014-15	2015-16	0.083	
E.13.B.4 Follow-up Analysis and Action	2013	Consultant Cost	0.05	26	0.05	165,045	6,252	100,000	165,045	6,252.25	6,252.25	100,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.13 Sub-Total								137,000.00	183,397.31	413,397.31	41,367.31	112,000.00						
E.14 PROGRAM EFFECTIVENESS ASSESSMENT																		
E.14.a Retention Plan	2013	Sr. Eng.	0.05	26	0.05	165,045	6,252	30,000	165,045	6,252.25	6,252.25	30,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.14.b Best Management Practice Condition Assessment	2015	Sr. Eng. / Eng. Tech.	2.0	104	0.05	88,013	4,472		88,013	4,471.70	4,471.70		2019-20	2014-15	2014-15	2015-16	0.050	
E.14.c Municipal Wastewater Plant and Outfalls Condition Assessment (50K for 2 years)	2015	Sr. Eng.	1.84	92	0.074	165,045	13,378	75,000	165,045	13,378.38	13,378.38	75,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.14.d Storm Water Program Modification	2016	Sr. Eng.	0.08	42	0.08	165,045	2,282	10,000	165,045	2,282.00	2,282.00	10,000.00	2019-20	2014-15	2014-15	2015-16	0.050	
E.14 Sub-Total								245,000.00	90,563.33	335,563.33	82,311.00	213,252.25						
E.15 TOTAL MAXIMUM DAILY LOADS COMPLIANCE REQUIREMENTS																		
E.15.a Comply with all approved TMDLs	2013	Sr. Eng.	0.005	26	0.005	165,045	20,631	30,000	165,045	20,631.00	20,631.00	30,000.00	2019-20	2014-15	2014-15	2015-16	0.005	
E.15.b Share Based Permit Limits in Attachment G as needed	2012		0.005	26	0.005	165,045			165,045				2019-20	2014-15	2014-15	2015-16	0.005	
E.15.c Point sources of nonpoint source, SPMATS, and 314	2012		0.005	26	0.005	165,045			165,045				2019-20	2014-15	2014-15	2015-16	0.005	
E.15.d Discharges not meeting waste load allocations	2010		0.005	26	0.005	165,045			165,045				2019-20	2014-15	2014-15	2015-16	0.005	
E.15 Sub-Total																		
E.16 ONLINE ANNUAL REPORTING PROGRAM																		
E.16.a Certification and EIT Reg.	2013	Sr. Eng. / Sr. Eng. / Associate	0.1	52	0.025	165,045	4,126	30,000.00	165,045	4,126.13	4,126.13	30,000.00	2019-20	2014-15	2014-15	2015-16	0.025	
E.16.b Inpiling of Nonpoint Source	2013	Sr. Eng. / Associate	0.1	52	0.025	165,045	523		165,045	523.08	523.08		2019-20	2014-15	2014-15	2015-16	0.025	
E.16.c PO Monitoring, Input	2013	Sr. Eng. / Associate	0.4	208	0.016	138,074	1,361		138,074	1,361.00	1,361.00		2019-20	2014-15	2014-15	2015-16	0.016	
E.16.d PO Reporting	2013	Sr. Eng. / Associate	0.4	208	0.016	138,074	1,361		138,074	1,361.00	1,361.00		2019-20	2014-15	2014-15	2015-16	0.016	
E.16.e Construction	2013	Sr. Eng. / Associate	0.3	156	0.012	165,045	2,053		165,045	2,053.00	2,053.00		2019-20	2014-15	2014-15	2015-16	0.012	
E.16.f Train Program report	2013	Sr. Eng. / Associate	0.2	104	0.008	165,045	2,053		165,045	2,053.00	2,053.00		2019-20	2014-15	2014-15	2015-16	0.008	
E.16.g Pay Construction Reporting	2013	Sr. Eng. / Associate	0.1	52	0.004	138,074	340		138,074	340.00	340.00		2019-20	2014-15	2014-15	2015-16	0.004	
E.16.h Receiving Water Monitoring	2013	Sr. Eng. / Associate	0.3	156	0.012	165,045	2,053		165,045	2,053.00	2,053.00		2019-20	2014-15	2014-15	2015-16	0.012	
E.16.i TMDL	2013	Sr. Eng. / Associate	0.1	52	0.004	138,074	1,032		138,074	1,032.00	1,032.00		2019-20	2014-15	2014-15	2015-16	0.004	
E.16 Sub-Total																		
TOTAL																		