BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Los Angeles Regional Quality Control Board
Order No. 01-182
Permit CAS004001
Parts 4C2a., 4C2b, 4E & 4F5c3

Filed September 2, 2003, (03-TC-04)
September 26, 2003 (03-TC-19)
by the County of Los Angeles, Claimant

Filed September 30, 2003 (03-TC-20 & 03-TC-21) by the Cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill, Claimants

Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21

Municipal Stormwater and Urban Runoff Discharges

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Adopted July 31, 2009)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Leonard Kaye and Judith Fries appeared on behalf of the County of Los Angeles. Howard Gest appeared on behalf of the cities. Michael Lauffer appeared on behalf of the State Water Resources Control Board and the Regional Water Quality Control Board. Carla Castaneda and Susan Geanacou appeared on behalf of the Department of Finance. Geoffrey Brosseau appeared on behalf of the Bay Area Stormwater Management Agencies Association.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 4-2.

Summary of Findings

The consolidated test claim, filed by the County of Los Angeles and several cities, allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of various facilities to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board.

The Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate on local agencies subject to the permit that are not subject to a trash total

maximum daily load:[1] "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

BACKGROUND

The claimants allege various activities related to placement and maintenance of trash receptacles at transit stops and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites to reduce stormwater pollution in compliance with a permit issued by the Los Angeles Regional Water Quality Control Board (LA Regional Board), a state agency.

History of the test claims

The test claims were filed in September 2003,[2] by the County of Los Angeles and several cities within it (the permit covers the Los Angeles County Flood Control District and 84 cities in Los Angeles County, all except Long Beach). The Commission originally refused jurisdiction over the permits based on Government Code section 17516's definition of "executive order" that excludes permits issued by the State Water Resources Control Board (State Water Board) or Regional Water Quality Control Boards (regional boards). After litigation, the Second District Court of Appeal held that the exclusion of permits and orders of the State and Regional Water Boards from the definition of "executive order" is unconstitutional. The court issued a writ commanding the Commission to set aside the decision "affirming your Executive Director's rejection of Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21" and to fully consider those claims.[3]

The County of Los Angeles and the cities re-filed their claims in October and November 2007. The claims were consolidated by the Executive Director in December 2008. Thus, the

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[1] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

[2] Originally, test claims 03-TC-04 (*Transit Trash Receptacles*) and 03-TC-19 (*Inspection of Industrial/Commercial Facilities)* were filed by the County of Los Angeles on September 5, 2003. Test claim 03-TC-21 (*Stormwater Pollution Requirements*) was filed by the Cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina on September 30, 2003. Test claim 03-TC-20 (*Waste Discharge Requirements*) was filed by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village on September 30, 2003.

[3] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.

reimbursement period is as though the claims were filed in September 2003, i.e., beginning July 1, 2002.[4]

Before discussing the specifics of the permit, an overview of municipal stormwater pollution puts the permit in context.

Municipal stormwater

One of the main objectives of the permit is "to assure that stormwater discharges from the MS4 [Municipal Separate Storm Sewer Systems][5] shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-stormwater to the MS4 has been effectively prohibited." (Permit, p. 13.)

Stormwater runoff flows untreated from urban streets directly into streams, lakes and the ocean. To illustrate the effect of stormwater[6] on water pollution, the Ninth Circuit Court of Appeal has stated the following:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[7]

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[4] Government Code section 17557, subdivision (e).

[5] Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2. (40 C.F.R. § 122.26 (b)(8).)

[6] Storm water means "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26 (b)(13).)

[7] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (2003) 344 F.3d 832, 840-841.

Because of the stormwater pollution problems described by the Ninth Circuit above, California and the federal government regulate stormwater runoff as described below.

California law

The California Supreme Court summarized the state statutory scheme and regulatory agencies applicable to this test claim as follows:

> In California, the controlling law is the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which was enacted in 1969. (Wat. Code, § 13000 et seq., added by Stats.1969, ch. 482, § 18, p. 1051.) Its goal is "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) The task of accomplishing this belongs to the State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards; together the State Board and the regional boards comprise "the principal state agencies with primary responsibility for the coordination and control of water quality." (§ 13001.) As relevant here, one of those regional boards oversees the Los Angeles region (the Los Angeles Regional Board).
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> Whereas the State Board establishes statewide policy for water quality control (§ 13140), the regional boards "formulate and adopt water quality control plans for all areas within [a] region" (§ 13240).[8]

Much of what the regional board does, especially as pertaining to permits like the one in this claim, is based in federal law as described below.

Federal law

The Federal Clean Water Act (CWA) was amended in 1972 to implement a permitting system for all discharges of pollutants[9] from point sources[10] to waters of the United States, since

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[8] *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.

[9] According to the federal regulations, "Discharge of a pollutant" means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 C.F.R. § 122.2.)

[10] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

discharges of pollutants are illegal except under a permit.[11] The permits, issued under the national pollutant discharge elimination system, are called NPDES permits. Under the CWA, each state is free to enforce its own water quality laws so long as its effluent limitations[12] are not "less stringent" than those set out in the CWA (33 USCA 1370). The California Supreme Court described NPDES permits as follows:

> Part of the federal Clean Water Act is the National Pollutant Discharge Elimination System (NPDES), "[t]he primary means" for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma, supra*, 503 U.S. at p. 101, 112 S.Ct. 1046.) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)[13]

In the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13370 et seq.), the Legislature found that the state should implement the federal law in order to avoid direct regulation by the federal government. The Legislature requires the permit program to be consistent with federal law, and charges the State and Regional Water Boards with implementing the federal program (Wat. Code, §§ 13372 & 13370). The State Water Resources Control Board (State Board) incorporates the regulations from the U.S. EPA for implementing the federal permit program, so both the Clean Water Act and U.S. EPA regulations apply to California's permit program (Cal.Code Regs., tit. 23, § 2235.2).

When a regional board adopts an NPDES permit, it must adopt as stringent a permit as U.S. EPA would have (federal Clean Water Act, § 402 (b)). As the California Supreme Court stated:

> The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to "enforce any effluent limitation" that is not " *less stringent* " than the federal standard (*id.* § 1370, italics added). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are *more stringent*

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[11] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[12] *Effluent limitation* means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean. (40 C.F.R. § 122.2.)

[13] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 621. Actually, State and regional board permits allowing discharges into state waters are called "waste discharge requirements" (Wat. Code, § 13263).

than required by federal law-from taking into account the economic effects of doing so.[14]

Actions that dischargers must implement as prescribed in permits are commonly called "best management practices" or BMPs.[15]

Stormwater was not regulated by U.S. EPA in 1973 because of the difficulty of doing so. This exemption from regulation was overturned in *Natural Resources Defense Council v. Costle* (1977) 568 F.2d 1369, which ordered U.S. EPA to require NPDES permits for stormwater runoff. By 1987, U.S. EPA still had not adopted regulations to implement a permitting system for stormwater runoff. The Ninth Circuit Court of Appeals explained the next step as follows:

> In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation.[16]

NPDES permits are required for "A discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[17] The federal Clean Water Act specifies the following criteria for municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis;
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> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
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> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[18]

In 1990, U.S. EPA adopted regulations to implement Clean Water Act section 402(p), defining which entities need to apply for permits and the information to include in the permit application.

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[14] *City of Burbank v. State Water Resources Control Bd., supra,* 35 Cal.4th 613, 627-628.

[15] Best management practices, or BMPs, means "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2.)

[16] *Environmental Defense Center, Inc. v. U.S. E.P.A., supra,* 344 F.3d 832, 841-842.

[17] 33 USCA 1342 (p)(2)(C).

[18] 33 USCA 1342 (p)(3)(B).

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

> [A] comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.[19]

General state-wide permits

In addition to the regional stormwater permit at issue in this claim, the State Board has issued two general statewide permits,[20] as described in the permit as follows:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. … Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations. (Permit, p. 11.)

The State Board has statutory fee authority to conduct inspections to enforce the general state-wide permits.[21] The statewide permits are discussed in further detail in the analysis.

The Los Angeles Regional Board permit (Order No. 01-182, Permit CAS004001)

To obtain the permit, the County of Los Angeles, on behalf of all permittees, submitted on January 31, 2001 a Report of Waste Discharge, which constitutes a permit application, and a Stormwater Quality Management Program, which constituted the permittees' proposal for best management practices that would be required in the permit.[22]

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[19] 40 Code of Federal Regulations section 122.26 (d)(2)(iv).

[20] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA within a geographical area." (40 CFR § 122.2.)

[21] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii).

[22] State Water Resources Control Board, comments submitted April 18, 2008, page 8 and attachment 36.

The permit states that its objective is: "to protect the beneficial uses of receiving waters in Los Angeles County."[23] The permit was upheld by the Second District Court of Appeal in 2006, which described it as follows:

> The 72-page permit is divided into 6 parts. There is an overview and findings followed by a statement of discharge prohibitions; a listing of receiving water limitations; the Storm Water Quality Management Program; an explanation of special provisions; a set of definitions; and a list of what are characterized as standard provisions. The county, the flood control district, and the 84 cities are designated in the permit as the permittees.[24]

After finding that "the county, the flood control district, and the 84 cities discharge and contribute to the release of pollutants from "municipal separate storm sewer systems" (storm drain systems)" and that the discharges were the subject of regional board permits in 1990 and 1996, the regional board found that the storm drain systems in the county discharged a host of specified pollutants into local waters. The permit summed up by stating: "Various reports prepared by the regional board, the Los Angeles County Grand Jury, and academic institutions indicated pollutants are threatening to or actually impairing the beneficial uses of water bodies in the Los Angeles region."[25]

The permit also specifies prohibited and allowable discharges, receiving water limitations, the implementation of the Storm Water Quality Management Program "requiring the use of best management practices to reduce pollutant discharge into the storm drain systems to the maximum extent possible."[26] As the court described the permit:

> In the prohibited discharges portion of the permit, the county and the cities were required to "effectively prohibit non-stormwater discharges" into their storm sewer systems. This prohibition contains the following exceptions: where the discharge is covered by a National Pollutant Discharge Elimination permit for non-stormwater emission; natural springs and rising ground water; flows from riparian habitats or wetlands; stream diversions pursuant to a permit issued by the

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[23] Permit page 13. The permit also says: "This permit is intended to develop, achieve, and implement a timely comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the US subject to the Permittees' jurisdiction."

[24] *County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 990.

[25] *County of Los Angeles v. California State Water Resources Control Board , supra,*143 Cal.App.4th 985, 990

[26] *County of Los Angeles v. California State Water Resources Control Board,, supra*, 143 Cal.App.4th 985, 994.

> regional board; "uncontaminated ground water infiltrations" … and waters from emergency fire-fighting flows.[27]

There is also a list of permissible discharges that are incidental to urban activity, as specified (e.g., landscape irrigation runoff, etc.). In the part on receiving water limitations, the permit prohibits discharges from storm sewer systems that "cause or contribute" to violations of "Water Quality Standards" objectives in receiving waters as specified in state and federal water quality plans. Storm or non-stormwater discharges from storm sewer systems which constitute a nuisance are also prohibited.[28]

To comply with the receiving water limitations, the permittees must implement control measures in accordance with the permit.[29]

The permittees are also to implement the Storm Water Quality Management Program (SQMP) that meets the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduces the pollutants in stormwaters to the maximum extent possible with the use of best management practices. And the permittees must revise the SQMP to comply with specified total maximum daily load (TMDL) allocations.[30] If a permittee modified the countywide SQMP, it must implement a local management program. Each permittee is required by November 1, 2002, to adopt a stormwater and urban runoff ordinance. By December 2, 2002, each permittee must certify that it had the legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[31]

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[27] *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985, 991-992.

[28] "'Nuisance' means anything that meets all of the following requirements: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; (3) occurs during, or as a result of, the treatment or disposal of wastes." *Id.* at 992.

[29] If the Storm Water Quality Management Program did not assure compliance with the receiving water requirements, the permittee must immediately notify the regional board; submit a Receiving Water Limitations Compliance Report that describes the best management practices currently being used and proposed changes to them; submit an implementation schedule as part of the Receiving Water Limitations Compliance Report; and, after approval by the regional board, promptly implement the new best management practices. If the permittee makes these changes, even if there were further receiving water discharges beyond those addressed in the Water Limitations Compliance Report, additional changes to the best management practices need not be made unless directed to do so by the regional board. *Id.* at 993.

[30] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

[31] *County of Los Angeles v. California State Water Resources Control Board*, *supra*, 143 Cal.App.4th 985.

The permit gives the County of Los Angeles additional responsibilities as principal permittee, such as coordination of the SQMP and convening watershed management committees. In addition, the permit contains a development construction program under which permittees are to implement programs to control runoff from construction sites, with additional requirements imposed on sites one acre or larger, and more on those five acres or larger. Permittees are to eliminate all illicit connections and discharges to the storm drain system, and must document, track and report all cases.

In this claim, however, claimants only allege activities in parts 4C2a, 4C2b, 4E and 4F5c3 of the permit. These parts concern placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I industrial facilities (as defined) and construction sites, as quoted below.

Co-Claimants' Position

Co-claimants assert that parts 4C2a, 4C2b, 4E and 4F5c3 of the LA Regional Board's permit constitute a reimbursable state-mandate within the meaning of article XIII B, section 6, and Government Code section 17514.

Transit Trash Receptacles: Los Angeles County ("County") filed test claims 03-TC-04 and 03-TC-19. In 03-TC-04, *Transit Trash Receptacles*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, the claimants allege the following activities as stated in the permit part 4F5c3 (Part 4, Special Provisions, F. Public Agency Activities Program, 5. Storm Drain Operation and Management):

> c. Permittees not subject to a trash TMDL[32] shall: [¶]…[¶]
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> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Claimant County asserts that this permit condition requires the following:

1. Identifying all transit stops within its jurisdiction except for the Los Angeles River and Ballona Creek Watershed Management areas.
2. Selecting proper trash receptacle design and evaluating proper placement of trash receptacles.
3. Designing receptacle pad improvement, if needed.
4. Constructing and installing trash receptacle units.
5. Collecting trash and maintaining receptacles.

Inspection of Industrial and Commercial Facilities: In claim 03-TC-19, *Inspection of Industrial/ Commercial Facilities*, filed by the County, and 03-TC-20, *Waste Discharge Requirements,* filed by the cities, claimants allege the following activities as stated in the permit parts 4C2a and 4C2b (Part 4, Special Provisions, C. Industrial/Commercial Facilities Control Program):

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[32] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards. See <http://www.epa.gov/OWOW/tmdl> as of October 3, 2008.

2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections-: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with State law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP [Storm Water Quality Management Program]. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on stormwater pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;

- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO [Retail Gasoline Outlet] and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices.

b) Phase I Facilities[33]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[34] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[35] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[36] to stormwater. For those facilities that do

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[33] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[34] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[35] Attachment B of the Permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

[36] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Inspection of Construction Sites: In claims 03-TC-20 and 03-TC-21, *Waste Discharge Requirements*, the cities allege the activities in permit parts 4C2a, 4C2b, and 4F5c3, as listed in the test claims cited above, in addition to the following activities as stated in part 4E of the permit (Part 4, Special Provisions, E. Development Construction Program):

- For construction sites one acre or greater, each Permittee shall comply with all conditions in section E1 above and shall: …

  (b) Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. The Local SWPPP [Storm Water Pollution Prevention Plan] shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

  Part 4E3 of the Order provides, in relevant part, as follows:

  3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E1 and E2 and shall:

  a) require, prior to issuing a grading permit for all projects requiring coverage under the state general permit,[37] proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;" [40 CFR §122.26 (b)(14), Emphasis added.]

[37] A general permit means "an NPDES 'permit' issued under [40 CFR] §122.28 authorizing a category of discharges under the CWA [Clean Water Act] within a geographical area." (40 CFR § 122.2.) California has issued one general permit for construction activity and one for industrial activity.

Activity Storm Water Permit][38] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

Both county and city claimants allege more than $1000 in costs in each test claim to comply with the permit activities.

In comments submitted June 4, 2009 on the draft staff analysis, the County of Los Angeles asserts that local agencies do not have fee authority to collect trash from trash receptacles that must be placed at transit stops, and that voter approval under Proposition 218 would be required to do so. The County also argues that voter approval under Proposition 218 would be required for stormwater inspection costs, and cites as evidence the City of Santa Clarita's stormwater pollution prevention fee, as well as legislative proposals now in the legislature that would, if enacted, provide fee authority.

In comments submitted June 8, 2009 on the draft staff analysis, the cities disagree with the conclusion that they have fee authority to recoup the costs of the transit-stop trash receptacles, and disagree that they have fee authority to inspect facilities covered by the state-issued general stormwater permits, as discussed in more detail below.

State Agency Positions

Department of Finance: Finance, in comments filed March 27, 2008 on all four test claims, alleges that the permit does not impose a reimbursable mandate within the meaning of section 6 of article XIII B of the California Constitution because "The permit conditions imposed on the local agencies are required by federal laws" so they are not reimbursable pursuant to Government Code section 17556, subdivision (c). Finance asserts that "requirements of the permit are federally required to comply with the NPDES [National Pollutant Discharge Elimination System] program … [and] is enforceable under the federal CWA [Clean Water Act]."

Finance also argues that the claimants had discretion over the activities and conditions to include in the permit application. The permittees submitted a Storm Water Quality Management Program prevention report with their applications, in which they had the option to use "best management practices" to identify alternative practices to reduce water pollution. Since the local agencies prescribed the activities to be included in the permit, the requirements are a downstream result of the local agencies' decision to include the particular activities in the permit. Finance cites the *Kern* case,[39] which held that if participation in the underlying program is voluntary, the resulting new consequential requirements are not reimbursable mandates.

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[38] See page 11, paragraph 22 of the permit for a description of the statewide permits.

[39] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727

Finally, Finance states that some local agencies are using fees for funding the claimed permit activities, so should the Commission find that the permit constitutes a reimbursable mandate, the fees should be considered as offsetting revenues.

Finance submitted comments on the draft staff analysis on June 19, 2009, agreeing that the local agencies have fee authority sufficient to pay for the mandated activities. Finance disagrees, however, with the portion of the analysis that finds that the activities are not federal mandates.

State Water Resources Control Board: The State Board filed comments on the four test claims on April 18, 2008, noting that the federal CWA mandates that municipalities apply for and receive permits regulating discharges of pollutants from their municipal separate storm sewer system (MS4) to waters of the United States. "Pursuant to federal regulations, the Permit contains numerous requirements for the cities and County to take actions to reduce the flow of pollutants into the rivers and the Bay, known as Best Management practices (BMPs)."

The State Board asserts that the permit is mandated on the local governments by federal law, and applies to many dischargers of stormwater, both public and private, so it is not unique to local governments. The federal mandate requires that the permit be issued to the local governments, and the specific requirements challenged are consistent with the minimum requirements of federal law. According to the State Board, even if the permit were interpreted as going beyond federal law, any additional state requirements are de minimis. And the costs are not subject to reimbursement because the programs were proposed by the cities and County themselves, and because they have the ability to fund these requirements through charges and fees and are not required to raise taxes.

In comments filed with the State Board on April 10, 2008 (attached to the State Board comments on the test claim), the United States Environmental Protection Agency (U.S. EPA) asserts that the permit conditions reduce pollutants to the "maximum extent practicable." The transit trash receptacle and inspection programs, according to U.S. EPA, are founded in section 402 (p) of the Clean Water Act, and are well within the scope of the federal regulations (40 CFR § 122.26 (d)(2)(iv)(A)(3)).

In its comments on the draft staff analysis submitted June 5, 2009, the State Board agrees with the conclusion and staff recommendation to deny the test claim, but disagrees with parts of the analysis. The State Board asserts that federal law: (1) requires local agencies to obtain NPDES permits from California Water Boards, and (2) mandates the permit, which is less stringent than permits for private industry. The State Board also states that the permit does not exceed the minimum federal mandate, as found by a court of appeal. Finally, the State Board argues that the federal stormwater law is one of general application, and therefore does not impose a state mandate.

Interested Party Positions

Bay Area Stormwater Management Agencies Association: In comments on the draft staff analysis received June 3, 2009 (although the letter is dated April 29, 2009) the Bay Area Stormwater Management Agencies Association (BASMAA) states that this matter is of statewide importance with broad implications, and fundamentally a matter of public finance. BASMAA also urges keeping the voters' objectives paramount. BASMAA agrees that the permit requirements are a new program or higher level of service and that the requirements go beyond the federal Clean Water Act's mandates. As for the portion of the draft staff analysis that

discusses local agency fee authority, BASMAA calls it "myopic" saying it "falls short in its consideration of all potentially relevant issues and appellate court precedents that need to be presented to the Commission to serve the interest of the public." (Comments p. 3.) BASMAA contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the Proposition 218 voting requirement or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

League of California Cities and California State Association of Counties (CSAC): In joint comments on the draft staff analysis received June 4, 2009, the League of Cities and CSAC agree with the draft staff analysis that the permit is a mandate, but question whether the *Connell* and *County of Fresno* decisions are still valid as applied to Government Code section 17556, subdivision (d), which prohibit the Commission from finding costs mandated by the state if the local agency has fee authority. This is because of the voters' approval of Proposition 218 in 1996. The League and CSAC urge the Commission not to find that fee authority exists for local agencies (1) to the extent there may be doubt about whether a local agency has it, and (2) to the extent that there is no person upon which the local agency can impose the fee.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[40] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[41] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[42] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[40] Article XIII B, section 6, subdivision (a), provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[42] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

task.[43] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[44]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[45] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[46] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[47]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[48]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[49] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[50]

The permit provisions in the consolidated test claim are discussed separately to determine whether they are reimbursable state-mandates.

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[43] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[44] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[45] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[46] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[48] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[49] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[50] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) subject to article XIII B, section 6, of the California Constitution?

The issues discussed here are whether the permit provisions are an executive order within the meaning of Government Code section 17516, whether they are discretionary, and whether they constitute a federal mandate.

A. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) an executive order within the meaning of Government Code section 17516?

The Commission has jurisdiction over test claims involving statutes and executive orders as defined by Government Code section 17516, which defines an "executive order" for purposes of state mandates, as "any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.
(b) Any officer or official serving at the pleasure of the Governor.
(c) Any agency, department, board, or commission of state government."[51]

The LA Regional Water Board is a state agency.[52] The permit it issued is both a plan for reducing water pollution, and contains requirements for local agencies toward that end. Therefore, the Commission finds that the permit is an executive order within the meaning of article XIII B, section 6 and Government Code section 17516.

B. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) the result of claimants' discretion?

The permit provisions require placing and maintaining trash receptacles at transit stops and inspecting specified facilities and construction sites.

The Department of Finance, in comments submitted March 27, 2008, asserts that the claimants had discretion over what activities and conditions to include in the permit application, so that any resulting costs are downstream of the claimant's decision to include those provisions in the permit. Thus, Finance argues that the costs are not mandated by the state.

Similarly, the State Board, in its April 18, 2008 comments, cites the Stormwater Quality Management Program (SQMP) submitted by the county that constituted the claimants' proposal for the BMPs required under the permit. The State Water Board refers to (on p. 28 of the SQMP) the county's proposal to "collect trash along open channels and encourage voluntary trash collection in natural stream channels." The State Water Board further states that the SQMP (pp. 22-23) contains the municipalities' proposal for (1) site visits to industrial and commercial facilities, including automotive service businesses and restaurants to verify evidence of BMP

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[51] Section 17516 also states: "'Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code." The Second District Court of Appeal has held that this statutory language is unconstitutional. *County of Los Angeles v. Commission on State Mandates, supra*, 150 Cal.App.4th 898, 904.

[52] Water Code section 13200 et seq.

implementation, and (2) maintaining a database of automotive and food service facilities including whether they have NPDES stormwater permit coverage.

Claimant County of Los Angeles, in its June 23, 2008 rebuttal comments (pp.3-4), stated whether or not most jurisdictions place transit receptacles at transit stops is not relevant to the existence of a state mandate because Government Code section 17565 provides that if a local agency has been incurring costs for activities that are subsequently mandated by the state, the activities are still subject to reimbursement. The County also states that the permit application only proposed an industrial/commercial *educational* site visit program, not an inspection program. The claimants allege that the inspection program was previously the state's duty, but that the permit shifted it to the local agencies.

Claimant cities in their June 28, 2008 comments also construe the SQMP proposal as involving only educational site visits, which they characterize as very different from compliance inspections. And cities assert that "nowhere in the Report of Waste Discharge do the applicants propose compliance inspections of facilities that hold general industrial and general construction stormwater permits for compliance with those permits." According to the cities, the city and county objected orally and in writing to the inspection permit provision.

In determining whether the permit provisions at issue are a downstream activity resulting from the discretionary decision by the local agencies, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[53]

The Commission finds that the permit activities at issue were not undertaken at the option or discretion of the claimants. The claimants were required by state and federal law to submit the NPDES permit application in the form of a Report of Waste Discharge and SQMP. Submitting them was not discretionary. According to the record,[54] the county on behalf of all claimants, submitted on January 31, 2001 a Report of Waste Discharge (ROWD), which constitutes a permit application, and a SQMP, which constitutes the claimants' proposal for best management practices that would be required in the permit.

The duty to apply for an NPDES permit is not within the claimants' discretion. According to the federal regulation:

> a) *Duty to apply.* (1) Any person[55] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a

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[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[54] State Water Resources Control Board, comments submitted April 18, 2008, page 8 & attachment 36.

[55] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

> complete application to the Director in accordance with this section and part 124 of this chapter.[56]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[57] Thus, submitting the ROWD is not discretionary.

Federal regulations also anticipate the filing of an application for a stormwater permit, which contains the information in the SQMP. The regulation states in part:

> (d) *Application requirements for large and medium municipal separate storm sewer discharges.* The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application.[58]

According to the permit, section 122.26, subdivision (d), of the federal regulations contains the essential components of the SQMP (p. 32), which is an enforceable element of the permit (p. 45). Section 122.26, subdivision (d)(2)(iv)(C), in the federal regulations is interpreted in the permit to "require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4." (p. 35.) In short, the claimants were required by law to submit the ROWD and SQMP, with specified contents.

Because the claimants do not voluntarily participate in the NPDES program, the Commission finds that the *Kern High School Dist.* case does not apply to the permit, the contents of which were not the result of the claimants' discretion.

C. Are the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b)?

The next issue is whether the parts of the permit at issue are federally mandated, as asserted by the State Board and the Department of Finance (whose comments are detailed below). If so, the parts of the permit would not constitute a state mandate.

In *County of Los Angeles v. Commission on State Mandates,* the court stated as follows regarding this permit: "We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."[59] But after

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[56] 40 Code of Federal Regulations, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[57] Water Code section 13376.

[58] 40 Code of Federal Regulations, section 122.26 (d).

[59] *County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898, 914.

summarizing the arguments on both sides, the court declined to decide the issue, stating: "Resolution of the federal or state nature of these [permit] obligations therefore is premature and, thus, not properly before this court."[60] The court agreed with the Commission (calling it an "inescapable conclusion") that the federal versus state issues in the test claims must be addressed in the first instance by the Commission.[61]

The California Supreme Court has stated that "article XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[62]

When analyzing federal law in the context of a test claim under article XII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[63] When federal law imposes a mandate on the state, however, and the state "freely [chooses] to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government."[64]

Similarly, Government Code section 17556, subdivision (c), states that the Commission shall not find "costs mandated by the state" if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

In *Long Beach Unified School Dist. v. State of California*,[65] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[66] The *Long Beach* court stated that unlike the federal law at issue, "the executive

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[60] *Id.* at page 918.

[61] *Id.* at page 917. The court cited *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830, 837, in support.

[62] *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 879-880, emphasis in original.

[63] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593, citing *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513 and 17556, subdivision (c).

[64] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1594.

[65] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[66] *Id.* at page 173.

Order and guidelines require specific actions … [that were] required acts. These requirements constitute a higher level of service."[67]

In analyzing the permit under the federal Clean Water Act, we keep the following in mind. First, each state is free to enforce its own water quality laws so long as its effluent limitations are not "less stringent" than those set out in the Clean Water Act.[68] Second, the California Supreme Court has acknowledged that an NPDES permit may contain terms that are federally mandated and terms that exceed federal law.[69] The federal Clean Water Act also allows for more stringent measures, as follows:[70]

> Permits for discharges from municipal storm sewers [¶]…[¶] (iii) shall require controls to reduce the discharges of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the … State determines appropriate for the control of such pollutants. (33 U.S.C.A. 1342 (p)(3)(B)(iii).)

As discussed further below, the Commission finds that the permit activities are not federally mandated because federal law does not require the permittees to install and maintain trash receptacles at transit stops, or require inspections of restaurants, automotive service facilities, retail gasoline outlets or automotive dealerships. As to inspecting phase I facilities or construction sites, the federal regulatory scheme authorizes states to perform the inspections under a general statewide permit, making it possible to avoid imposing a mandate on the local agencies to do so.

In its June 2009 comments on the draft staff analysis, the State Board disagrees that specific mandates in the permit exceed the federal requirements, the State Board argues:

> This approach fails to recognize that NPDES storm water permits, whether issued by U.S. EPA or California's Water Boards, are designed to translate the general federal mandate into specific programs and enforceable requirements. Whether issued by U.S. EPA or the California's Water Boards, the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their storm water to the maximum extent practicable. The federally required pollutant reduction is a federal mandate. … The fact that state agencies have responsibility for specifying the federal permit requirements for municipalities does not convert the federal mandate into a state mandate.[71]

The Commission disagrees. Based on the *Long Beach Unified School Dist.* case discussed above and applied in the analysis below, the specific requirements in the permit may constitute a state mandate even though they are imposed in order to comply with the federal Clean Water Act.

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[67] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[68] 33 U.S.C. § 1370.

[69] *City of Burbank v. State Water Resources Control Board, supra,* 35 Cal.4th 613, 618, 628.

[70] 33 USCA section 1370.

[71] State Board comments submitted June 2009, page 6.

Finance, in its June 2009 comments on the draft staff analysis, distinguishes this permit from the issue in the *Long Beach Unified School Dist.* case. According to Finance, in *Long Beach,* the courts had suggested certain steps and approaches that might help alleviate racial discrimination, although the state's executive order and guidelines required specific actions. But in this claim, federal law requires NPDES permits to include specific requirements.

The Commission agrees that NPDES permits are required to include specific measures. But as discussed in more detail below, those measures are not the same as the specific requirements at issue in this permit (in Parts 4C2a, 4C2b, 4E, and 4F5c3).

The State Board's June 2009 comments also discuss *County of Los Angeles v. State Water Resources Control Board,*[72] which involved the same permit as in this test claim. The State Board asserts that this case holds, in an unpublished part, that "the permit did not exceed the federal minimum requirements for the MS4 program."[73] (Comments, p. 5.) The State Board asserts that the Commission is bound by this decision.

The Commission reads the *County of Los Angeles* case differently than the State Board. The plaintiffs (permittees and others) in that case challenged the permit on a variety of issues, including that the regional board did not have jurisdiction to issue it, and that it violated the California Environmental Quality Act. The court did not, however, discuss the permit conditions at issue in this test claim. In the portion cited by the State Board, the court was addressing the consideration of the permit's economic effects. One of the plaintiffs' challenges to the permit was that the regional board was required to consider the economic effects in issuing the permit. By alleging the regional board had not done so, the plaintiffs argued that the permit imposed conditions more stringent than required by the federal Clean Water Act. The court held that the plaintiff's contentions were waived for failure to set forth all the documents received by the regional board, and that the regional board had considered the costs and benefits of implementation of the permit. In other parts of the opinion, however, the court acknowledged the regional board's authority to impose permit restrictions beyond the "maximum extent feasible"[74]

The *County of Los Angeles* case is silent on the permit provisions at issue in this claim[75] (Parts 4C2a, 4C2b, 4E, and 4F5c3) except when it said: "we need no [sic] address the parties'

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[72] *County of Los Angeles v. State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

[73] The court's opinion, including the unpublished parts, are in attachment 26 of the State Board's comments submitted April 18, 2008.

[74] See page 18 of attachment 26 of the State Board's comments submitted April 18, 2008.

[75] In *County of Los Angeles,* the plaintiffs also challenged the following parts of the permit: (1) part 2.1 that deals with receiving water restrictions and that prohibits all water discharges that violate water quality standards or objectives regardless of whether the best management practices are reasonable; (2) part 3.C, which requires the permittees to revise their storm water quality management programs in order to implement the total maximum daily loads for impaired water bodies, and (3) parts 3.G and 4., which authorize the regional board to require strict requirements with numeric limits on pollutants which are incorporated into the total maximum daily load restrictions. The court held that these contentions were waived for failure to set forth all the

remaining contentions concerning trash receptacles."[76] The court also said inspections under the permit were not unlawful. Nonetheless, the case is not binding on the Commission in deciding the issues in this claim.

California in the NPDES program: By way of background, under the federal statutory scheme, a stormwater permit may be administered by the Administrator of U.S. EPA or by a state-designated agency, but states are not required to have an NPDES program. Subdivision (b) of section 1324 of the federal Clean Water Act, the section that describes the NPDES program (and which, in subdivision (p), describes the requirements for the municipal stormwater system permits) states in part:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator [of U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. [Emphasis added.]

And the federal stormwater statute states that the permits:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B)(iii). [Emphasis added].)

The federal statutory scheme indicates that California is neither required to have an NPDES program nor to issue stormwater permits. According to section 1342 (p) quoted above, the Administrator of U.S. EPA would do so if California had no program. The California Legislature, when adopting the NPDES program[77] to comply with the Federal Water Pollution Control Act of 1972 stated the following findings and declaration in Water Code section 13370:

(a) The Federal Water Pollution Control Act [citation omitted] as amended, provides for permit systems to regulate the discharge of pollutants … to the navigable waters of the United States and to regulate the use and disposal of sewage sludge.

(b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act.

(c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government, of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the

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applicable evidence, and that the regional board has authority to impose restrictions beyond the maximum extent feasible.

[76] See page 22, attachment 26 of the State Board's comments submitted April 18, 2008.

[77] Water Code section 13374 states: "The term 'waste discharge requirements' as referred to in this division is the equivalent of the term 'permits' as used in the Federal water Pollution Control Act, as amended."

> provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Act for the purpose of carrying out its responsibilities under this program.

Based on this Water Code section 13370, in which California voluntarily adopts the permitting program, and on the federal statutes quoted above that authorize but do not expressly require states to have this program, the state has freely chosen[78] to effect the stormwater permit program.

Any further discussion in this analysis of federal "requirements" should be construed in the context of California's choice to participate in the federal regulatory NPDES program.

In its June 2009 comments on the draft staff analysis, the State Board argues as follows:

> [T]he … analysis treats the state's decision to *administer* the NPDES permit program in 1972 as the 'choice' referred to in *Hayes.* …The state's 'choice' to administer the program in lieu of the federal government does not alter the federal requirement on municipalities to reduce pollutants in these discharges to the maximum extent practicable.[79]

Finance, in its June 2009 comments, also disagrees with this part of the draft staff analysis, asserting that the duty to apply for a NPDES permit is required by federal law on public and private dischargers, which in this case are local agencies.

Even though California opted into the NPDES program, further analysis is needed to determine whether the federal regulations impose a mandate on the local agencies. To the extent that state requirements go beyond the federal requirements, there would be a state mandate.[80] Thus, the permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) are discussed below in context of the following federal law governing stormwater permits: Clean Water Act section 402(p) (33 USCA 1342 (p)(3)(B)) and Code of Federal Regulations, title 40, section 122.26.

Placing and maintaining trash receptacles at transit stops (part 4F5c3): This part of the permit states:

> c. Permittees not subject to a trash TMDL[81] shall: [¶]…[¶]
> (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

The comments of the State Water Board and U.S. EPA assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations. The U.S.

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[78] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[79] State Board comments submitted June 2009, page 4.

[80] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173. Government Code section 17556, subdivision (b).

[81] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

EPA submitted a letter to the State Water Board regarding the permit conditions in April 2008, which the State Water Board attached to its comments. Regarding the trash receptacles, the letter states:

> [M]aintaining trash receptacles at all public transit stops is well within the scope of these [Federal] regulations. Among the minimum controls required to reduce pollutants from runoff from commercial and residential areas are practices for "operating and maintaining public streets, roads, and highways … [40 CFR] § 122.26(d)(2)(iv)(A)(3).[82]

U.S. EPA also cites EPA's national menu of BMPs for stormwater management programs, "which recommends a number of BMPs to reduce trash discharges." Among the recommendations is 'improved infrastructure' for trash management when necessary, which includes the placement of trash receptacles at appropriate locations based on expected need."[83]

The State Water Board, in comments filed April 18, 2008, states that part 4F of the permit (regarding trash receptacles) concerns "the municipalities' own activities, as opposed to its regulation of discharges into its system by others." The State Water Board cites the same section 122.26 regulation as U.S. EPA, and states that the requirements "reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable. It is federal law that animates the requirement and federal law that mandates specificity in describing the BMPs." The State Water Board alleges that two appellate courts[84] have determined that the permit provisions constitute the "maximum extent practicable" standard, which is the minimum requirement under federal law.

The Department of Finance also asserts that the permit requirements are a federal mandate.

The County of Los Angeles, in comments filed June 23, 2008, states that "Nothing in the federal Clean Water Act requires the County to install trash receptacles at transit stops. Nothing in the federal regulations or the Clean Water Act itself imposes this obligation." The county states that the U.S.EPA's citation to BMPs for stormwater management programs "may be permitted under federal law … and even encouraged as 'reasonable expectations.' But such requirements are not mandated on the County by federal law." The County admits the existence of "an abundance of federal guidance and encouragement to have the County install and maintain trash receptacles at all public transit stops. But these are merely federal suggestions, not mandates."

The city claimants, in comments filed June 25, 2008, also argue that the requirement for transit trash receptacles is not a federal mandate, stating that nothing in the Clean Water Act or the federal regulations requires cities to install trash receptacles at transit stops. City claimants also submit a survey of other municipal stormwater permits, finding that none of those issued by U.S. EPA required installation of trash receptacles at transit stops.

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[82] Letter from Alexis Strauss, Director, Water Division, U.S. EPA, to Tam M. Doduc, Chair, and Dorothy Rice, Executive Director, State Water Resources Control Board, April 10, 2008, page 3.

[83] *Id.* at page 3.

[84] The State Water Board cites: *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region* (2006) 135 Cal.App.4th 1377; *County of Los Angeles v. California State Water Resources Control Board* (2006) 148 Cal.App.4th 985.

The federal law applicable to this issue is section 402 of the Clean Water Act, which states:

> Permits for discharges from municipal storm sewers--
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator[85] or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator[86] of a discharge[87] from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]
>
> (2) Part 2 of the application shall consist of: [¶]…[¶]
>
> (iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design

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[85] Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative. (40 CFR § 122.2.)

[86] "*Owner or operator* means the owner or operator of any "facility or activity" subject to regulation under the NPDES program." (40 CFR § 122.2.)

[87] "*Discharge* when used without qualification means the "discharge of a pollutant. *Discharge of a pollutant* means: (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger." (40 CFR § 122.2.)

and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures[88] to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include: [¶]…[¶]

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities. (40 CFR § 122.26(d)(2)(iv)(A)(3).) [Emphasis added.]

The Commission finds that the plain language of the federal statute (33 USCA § 1342 (p)(3)(B)) and regulation (40 CFR § 122.26 (d)(2)(iv)(A)(3)) does not require the permitees to install and maintain trash receptacles at transit stops.

Specifically, the state freely chose[89] to impose the transit trash receptacle requirement on the permittees because neither the federal statute nor the regulations require it. Nor do they require the permittees to implement "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems"[90] although the regulation requires a description of practices for doing so. Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that "mandate costs that exceed the mandate in the federal law or regulation."[91]

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[88] Minimum control measures are defined in 40 CFR § 122.34 to include: 1) Public education and outreach on storm water impacts; (2) Public involvement/participation; (3) Illicit discharge detection and elimination. (4) Construction site storm water runoff control; (5) Post-construction storm water management in new development and redevelopment.; (6) Pollution prevention/good housekeeping for municipal operations.

[89] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[90] 40 CFR § 122.26(d)(2)(iv)(A)(3).

[91] Government Code section 17556, subdivision (c).

In *Long Beach Unified School Dist. v. State of California*,[92] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[93] The *Long Beach Unified School District* court stated:

> Where courts have suggested that certain steps and approaches may be helpful [in meeting constitutional and case law requirements] the executive Order and guidelines require *specific actions.* …[T]he point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service.[94] [Emphasis added.]

The reasoning of *Long Beach Unified School Dist.* is applicable to this claim. Although "operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems…"[95] is a federal requirement on municipalities, the permit requirement to place trash receptacles at all transit stops and maintain them is an activity, like in *Long Beach Unified School Dist.,* that is a *specified action* going beyond federal law.[96]

Neither of the cases cited by the State Water Board demonstrate that placing trash receptacles at transit stops is required by federal law. In *City of Rancho Cucamonga v. Regional Water Quality Control Board –Santa Ana Region*[97] the court upheld a stormwater permit similar to the one at issue in this claim. The City of Rancho Cucamonga challenged the permit on a variety of grounds, including that it exceeded the federal requirements for stormwater dischargers to "reduce the discharge of pollutants to the maximum extent practicable"[98] and that it was overly prescriptive. The court concluded that the permit did not exceed the maximum extent practicable standard and upheld the permit in all respects. There is no indication in that case, however, that the permit at issue required trash receptacles at transit stops. Similarly, in a suit regarding the same permit at issue in this case, the *Los Angeles County*[99] court dismissed various challenges to the permit, but made no mention of the permit's transit trash receptacle provision.

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[92] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155.

[93] *Id.* at page 173.

[94] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 173.

[95] 40 Code of Federal Regulations, section 122.26 (d)(2)(iv)(A)(3).

[96] *Ibid.*

[97] *City of Rancho Cucamonga v. Regional Water Quality Control Board- Santa Ana Region, supra,* 135 Cal.App.4th 1377.

[98] 33 USCA section 1342 (p)(3(B)(iii).

[99] *County of Los Angeles v. California State Water Resources Control Board, supra,* 143 Cal.App.4th 985.

Therefore, the Commission finds that placing and maintaining trash receptacles at all transit stops within the jurisdiction of each permittee, as specified, is not a federal mandate within the meaning of article XIII B, sections 6 and 9, subdivision (b).

Part 4F5c3 of the permit states as follows:

> c. Permittees not subject to a trash TMDL shall: (3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

Based on the mandatory language (i.e., "shall") in part 4F5c3 of the permit, the Commission finds it is a state mandate for the claimants that are not subject to a trash TMDL to place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003, and to maintain all trash receptacles as necessary.

Inspecting commercial facilities (part 4C2a): Section 4C2a of the permit requires inspections of restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships as follows:

> 2. Inspect Critical Sources – Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections:
>
> (a) Commercial Facilities
>
> (1) Restaurants
>
> Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.
>
> Level of Inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that stormwater BMPs are being effectively implemented in compliance with Statw law, County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:
>
> - has received educational materials on stormwater pollution prevention practices;
> - does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
> - keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
> - does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;

- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspections: Each permittee shall inspect all automotive service facilities within its jurisdiction to confirm that stormwater BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-stormwater to the storm drain;
- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement stormwater pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;

- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight waste receptacles are used and that lids are closed; and
- trains employees to properly manage hazardous materials and wastes as well as to implement other stormwater pollution prevention practices. [¶]…[¶]

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The state asserts that these inspection requirements in permit part 4C2a are a federal mandate.

In comments filed April 18, 2008, the State Water Board quotes from the MS4 Program Evaluation Guide issued by U.S. EPA, asserting that it requires inspections of businesses. The State Water Board also states:

> The federal regulations also specifically require local stormwater agencies, as part of their responsibilities under NPDES permits, to conduct inspections. [citing 40 CFR § 122.26(d)(2)(iv)(C).] Throughout the federal law, there are numerous requirements for entities that discharge pollutants to waters of the United States to monitor and inspect their facilities and their effluent. [citing Clean Water Act §402(b)(2)(B); 40 CFR § 122.44(i)).] The claimants are the dischargers of pollutants into surface waters; as part of their permit allowing these dischargers they must conduct inspections.

Similarly, the April 10, 2008 letter from U.S. EPA to the State Water Board and attached to the Board's comments submitted April 18, 2008, states:

> A program for commercial and industrial facility inspection and enforcement that includes restaurants and automobile facilities, would appear to be both practicable and effective. Such an inspection program ensures that stormwater discharges from such facilities are reducing their contribution of pollutants and that there are no non-stormwater discharges or illicit connections. Thus these programs are founded in both 402 (p)(3)(B)(ii) and (iii) and are well within the scope of 40 CFR § 122.26(d)(2)(iv)(A) and (B).

The County of Los Angeles, in its June 23, 2008 rebuttal comments, asserts that federal law requires prohibiting non-stormwater discharges into the storm sewers, and reducing the discharge of pollutants in stormwater to the maximum extent practicable (33 USC 1342(p)) but not inspecting restaurants, automotive service facilities, retail gas outlets, or automotive dealerships.

Only municipal landfills, hazardous waste treatment, disposal and recovery facilities and related facilities are required to be inspected (40 CFR § 122.26(d)(2)(iv)(C)).

In comments received June 25, 2008, the city claimants argue that the LA Regional Board freely chose to impose the permit requirements on the permittees, and make the following arguments: (1) The inspection obligations were not contained in two prior permits issued to the cities and the County—thus, the requirements are not federal mandates; (2) No federal statute or regulation requires the cities or the County to inspect restaurants, automotive service facilities, retail gas outlets, automotive dealerships or facilities that hold general industrial permits; (3) Stormwater NPDES permits issued by the U.S. EPA do not contain the requirement to inspect restaurants, auto service facilities, retail gas outlets and automotive dealerships, or require the extensive inspection of facilities that hold general industrial stormwater permits as contained in the Order [i.e. permit]; (4) The Administrator of U.S. EPA, as well as the head of the water division for U.S. EPA Region IX, have specifically stated that a municipality has an obligation under a stormwater permit only to assure compliance with local ordinances; the state retains responsibility to inspect for compliance with state law, including state-issued permits.

The city claimants dispute the State Board's contention that the court in *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377 held that federal law required inspections like those at issue in the permit. The cities quote part of the *City of Rancho Cucamonga* case with the following emphasis:

> Rancho Cucamonga and the other permittees are responsible for inspecting construction and industrial sites and commercial facilities within their jurisdiction for compliance with and enforcement of local municipal ordinances and permits. *But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.* The Regional Board may conduct its own inspections but permittees must still enforce their own laws at these sites. (40 C.F.R. § 122.26, subd. (d)(2) (2005).)

In discussing the federal mandate issue, the applicable federal law is section 402 of the Clean Water Act, which states that municipal storm sewer system permits:

> (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 USCA § 1342 (p)(3)(B).)

The applicable federal regulations (40 CFR § 122.26 (d)(2)(iv)(B)&(C)) state as follows:

> (d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such

operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) Part 2 of the application shall consist of: [¶]…[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]…[¶]

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, <u>including inspections</u>, to implement and enforce an ordinance, orders or similar means <u>to prevent illicit discharges to the municipal separate storm sewer system</u>; this program description shall address all types of illicit discharges, however the following category of non-stormwater discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States [¶]…[¶]

(C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures <u>for inspections</u> and establishing and implementing control measures for such discharges. (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

There is a requirement in subdivision (d)(2)(iv)(B)(1) for implementing and enforcing "an ordinance, orders, or similar means to prevent illicit discharges to the municipal separate storm system." There is no express requirement in federal law, however, to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships. Nor does the

portion of the MS4 Program Evaluation Guide quoted by the State Water Board contain mandatory language to conduct inspections for these facilities.

In its April 2008 comments, the State Water Board argues that this reading of the regulations is not reasonable, and that U.S. EPA acknowledged that the initial selection by MS4s was only a starting point. In its comments (p.15), the State Water Board also states:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. … Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.

The State Water Board would have the Commission read requirements into the federal law that are not there. The Commission, however, cannot read a requirement into a statute or regulation that is not on its face or its legislative history.[100]

Based on the plain language of the federal regulations that are silent on the types of facilities at issue in the permit, the Commission finds that performing inspections at restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships, as specified in the permit, is not a federal mandate.

Moreover, the requirement to inspect the facilities listed in the permit is an activity, as in the *Long Beach Unified School Dist.* case discussed above, [101] that is a specified action going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, the inspections are not federally mandated.

The permit states in part: "Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified …" Based on the mandatory language in part 4C2a of the permit, the Commission finds that this part is a state mandate on the claimants to perform the inspections at restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships at the frequency and levels specified in the permit.

Inspecting phase I industrial facilities (part 4C2b): Part 4C2b of the permit regarding phase I industrial facilities requires the following:

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[100] *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 219-220. "Rules governing the interpretation of statutes also apply to interpretation of regulations." *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037.

[101] *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

b) Phase I Facilities[102]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories:[103] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[104] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to stormwater. For those facilities that do have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

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[102] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[103] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[104] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

The issue is whether these inspection requirements for phase I industrial facilities is a federal mandate. The governing federal regulation is 40 CFR section 122.26 (d)(2)(iv)(B)&(C), which is cited above. Specifically on point is subpart (C), which states that the proposed management program must include the following:

> (C) A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:
>
> (1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges; (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1) & (C)(1).) [Emphasis added.]

The phase I facilities in the permit are defined to include.

> (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities. (Permit, p. 62)

And the Tier 1 facilities in the permit include municipal landfills, hazardous waste treatment, disposal and recovery facilities and facilities subject to SARA Title III (see permit attachment B, pp. B-1 to B-2). Thus, there is a federal requirement to inspect these phase I and tier 1 facilities in the permit. The issue is whether this requirement constitutes a federal mandate on local agencies. The Commission finds that it does not.

It is the state that mandates the phase I inspection and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[105] This is because the federal regulatory scheme provides an alternative means of regulating and inspecting these industrial facilities under the state-enforced, statewide permit, as follows:

[105] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

(c) Application requirements for stormwater discharges associated with industrial activity[106] and stormwater discharges associated with small construction activity -

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. Facilities that are required to obtain an individual permit, or any discharge of stormwater which the Director is evaluating for designation (see 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph. [Emphasis added.]

The state has issued a statewide general activity industrial permit (GIASP) that is enforced through the regional boards.[107] This, along with the statewide construction permit, is described in the permit itself:

> To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for stormwater discharges: one for stormwater from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for stormwater from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging stormwater associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for stormwater discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and

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[106] According to 40 CFR § 122.26, (b)(14): "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶](x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more."

[107] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

> non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.[108]

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities (specified in part 4C2b of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4C2b of the permit. In fact, the State Board collects fees for the regional boards for performing inspections under the GIASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

In its April 18, 2008 comments, the State Water Board asserts:

> Because the federal mandate requires Water Boards to choose specific BMPs [Best Management Practices] that are included in MS4 permits as requirements, the 'discretion' exercised in selecting those BMPs is necessarily a part of the federal mandate. It is not comparable to the discretion that the courts in *Hayes* or *San Diego* spoke of, where the state truly had a 'free choice.' The Los Angeles Water Board was mandated by federal law to select BMPs that would result in compliance with the federal MEP [Maximum Extent Practicable] standard. … Therefore, it is clear that the mere exercise of discretion in selecting BMPs does not create a reimbursable mandate.[109]

The Commission disagrees. Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the "owner or operator of the discharge") the Commission finds that the state has freely chosen[110] to impose these activities on the permittees. Therefore, the Commission finds that there is no federal mandate on the claimants to perform inspections of phase I facilities as specified in part 4C2b of the permit.

As to whether the permit is a state mandate, part 4C2b contains the following mandatory language:

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[108] Permit, page 11, paragraph 22.

[109] State Water Board comments, submitted April 18, 2008, page 15.

[110] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

b) Phase I Facilities[111]

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below. [Emphasis added.]

Frequency of Inspection

Facilities in Tier 1 Categories:[112] Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories:[113] Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004, Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity[114] to stormwater. For those facilities that do

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[111] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

[112] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 1 categories as follows (with Phase I facilities listed in italics): "*Municipal landfills …; Hazardous Waste Treatment, Disposal and Recovery Facilities; Facilities Subject to SARA Title III …;* Restaurants; *Wholesale trade (scrap, auto dismantling)…;* Automotive service facilities; *Fabricated metal products …; Motor freight …; Chemical/allied products …;* Automotive Dealers/Gas Stations …; *Primary Metals.*"

[113] Attachment B of the permit (pp. B-1 to B-2) lists the Tier 2 categories as follows (with Phase I facilities listed in italics): "*Electric/Gas/Sanitary…; Air Transportation …; Rubbers/Miscellaneous Plastics …; Local/Suburban Transit …; Railroad Transportation …; Oil & Gas Extraction …; Lumber/Wood Products…; Machinery Manufacturing …; Transportation Equipment …; Stone, Clay, Glass, Concrete …; Leather/Leather Products…; Miscellaneous Manufacturing …; Food and kindred Products…; Mining of Nonmetallic Minerals …; Printing and Publishing …; Electric/Electronics …; Paper and Allied Products …; Furniture and Fixtures …;* Laundries …; *Instruments…; Textile Mills Products …; Apparel …*"

[114] "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. … The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): [¶]…[¶] (x) Construction activity including clearing, grading and excavation,

have exposure of industrial activities to stormwater, a Permittee may reduce that frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging stormwater associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

Based on this mandatory language to perform the inspections of phase I facilities as specified, the Commission finds that part 4C2b of the permit is a state-mandate.

Inspecting construction sites (part 4E): Part 4E of the permit contains the following requirements:

- Implement a program to control runoff from construction activity at all construction sites within each permittees jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater, each permittee shall:

- Require the preparation and submittal of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).
  - If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
  - If non-compliance continues the Regional Board shall be notified for further joint enforcement actions. (Permit, 4E2b.)

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except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more." [40 CFR §122.26 (b)(14), Emphasis added.]

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP (Permit, 4E2c.)
- For sites five acres and greater:
    - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
    - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
    - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

The applicable federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) on the issue of whether the inspection of construction sites is a federal mandate is as follows:

> (d) Application requirements for large[115] and medium[116] municipal separate storm sewer discharges. The operator[117] of a discharge from a large or medium

[115] "(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 250,000 or more as

municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. … Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include; [¶]…[¶]

(2) Part 2 of the application shall consist of: [¶]…[¶]

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on: [¶]…[¶]

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in stormwater runoff

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determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or (ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(4).)

[116] "(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either: (i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix G of this part); or (ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or (iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. …" (40 CFR § 122.26 (b)(7).)

[117] "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." (40 CFR § 122.2.)

> from construction sites to the municipal storm sewer system, which shall include: [¶]…[¶]
>
> (3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and … [Emphasis added.]

The language of the federal regulation indicates a duty to inspect construction sites and enforce control measures as specified in part 4E of the permit. The *Rancho Cucamonga* case cited by the State Board also states that federal law requires NPDES permittees to inspect construction sites.[118]

The issue, however, is whether the federal requirements to inspect construction sites and enforce control measures amounts to a federal mandate on the local agencies. The Commission finds that it does not. First, the federal regulations quoted above do not specify the frequency or other specifics of the inspection program as the permit does. These are activities, as in the *Long Beach Unified School Dist.* case discussed above,[119] that are specified actions going beyond the federal requirement for inspections "to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26, subd. (d)(2)(iv)(B)(1).) As such, it is not a federal mandate for the local agency permittees to inspect construction sites.

Moreover, it is the state that mandates the inspections of construction sites and related activities in that the state freely chooses to impose the inspection and enforcement requirements on the local agency permittees.[120] The federal regulations do not require: (1) a municipality to have a separate permit for construction activity or enforcement; or (2) that the inspections and related activities in part 4E of the permit be conducted by the owner or operator of the discharge. Rather, these activities may be conducted by the state under a state-wide, state-enforced, general permit, as stated in the federal stormwater regulation (40 CFR § 122.26 (c)), which states in part:

> (c) Application requirements for stormwater discharges associated with industrial activity [includes construction activity of five or more acres] and stormwater discharges associated with small construction activity[121] [construction activity from one to less than five acres]--

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[118] *City of Rancho Cucamonga v. Regional Water Quality Control Bd.-Santa Ana Region, supra,* 135 Cal.App.4th 1377, 1390.

[119] *Long Beach Unified School Dist. v. State of California, supra*, 225 Cal.App.3d 155.

[120] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[121] According to 40 CFR § 122.26, (b)(15): "Storm water discharge associated with small construction activity means the discharge of storm water from: (i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The

(1) Individual application. Dischargers of stormwater associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated stormwater general permit. [Emphasis added.]

The state has issued a statewide general construction permit, as described on page 11 of the permit as quoted above, which is enforced through the regional boards.[122] In fact, the State Board collects fees for the regional board for performing inspections under the GCASP (see Wat. Code, § 13260, subd. (d)(2)(B)(ii)).

There is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities (in part 4E of the permit) under the state-enforced general permit. Nor does federal law require the owner or operator of the discharge to perform these activities in part 4E of the permit. Therefore, the Commission finds that the requirement for local-agency permittees to inspect construction sites in section 4E of the permit is not a federal mandate.

The Commission finds that, based on the permit's mandatory language, the following activities in part 4E are state mandates on the permittees within the meaning of article XIII B, section 6:

- Implement a program to control runoff from construction activity at all construction sites within each permittee's jurisdiction, and ensure the specified minimum requirements are effectively implemented at all construction sites. (Permit, 4E1.)

  For construction sites one acre or greater:

- Require the preparation of a Local SWPPP [Storm Water Pollution Prevention Plan], with specified contents, for approval prior to issuing a grading permit for construction projects. (Permit, 4E2a.)
- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet seasons. (Permit, 4E2b.)
- Review the Local SWPPP for compliance with local codes, ordinances, and permits. (Permit, 4E2b.)
- For inspected sites that have not adequately implemented their Local SWPPP, conduct a follow-up inspection to ensure compliance will take place within 2 weeks.
  - If compliance has not been attained, take additional actions to achieve compliance (as specified in municipal codes).

Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where: …"

[122] For example, page 2 of the Fact Sheet for the General Construction Activity Storm Water Permit states: "This General Permit shall be implemented and enforced by the nine California Regional Water Quality Control Boards (RWQCBs)."

- If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, enforce the local ordinance requirements, and
- If non-compliance continues, notify the Regional Board for further joint enforcement actions. (Permit, 4E2b.)

- Require by March 10, 2003, before issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction stormwater permit, proof of a Waste Discharger Identification Number for filing a Notice of Intent for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs [Best Management Practices] as the State SWPPP. (Permit, 4E2c.)
- For sites five acres and greater:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) number for filing a Notice of Intent (NOI) for coverage under the GCASP [General Construction Activity Storm Water Permit] and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.
  - Require proof of an Notice of Intent (NOI) and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to track grading permits issued by each permittee. (Permit, 4E3.)
- For projects subject to the GCASP [General Construction Activity Storm Water Permit], permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, permittees shall include, at a minimum, the following documentation: Project location; Developer; Estimated project size; and Records of communication with the developer regarding filing requirements. (Permit, 4E4b.)
- Train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the stormwater management program no later than August 1, 2002, and annually thereafter. For permittees with a population of 250,000 or more (2000 US Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees. (Permit, 4E5.)

One of the requirements in part 4E3c of the permit is to: "Use an effective system to track grading permits issued by each permittee. To satisfy this requirement, the use of a database or

GIS system is encouraged, but not required." The Commission finds that, based on the plain language of this provision, using an effective system to track grading permits is a state mandate, although use of a database or GIS system is not.

Overall, the Commission finds that the permit provisions (parts 4C2a, 4C2b, 4E & 4F5c3) are subject to article XIII B, section 6, of the California Constitution.

Issue 2: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E, and 4F5c3) impose a new program or higher level of service?

The next issue is whether the permit provisions at issue, i.e., found above to be state-mandated, are a program, and whether they are a new program or higher level of service.

First, courts have defined a "program" for purposes of article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[123]

The State Water Board, in its April 2008 comments, argues that the NPDES program is not a program because "the NPDES permit program, and the stormwater requirements specifically, are not peculiar to local government. Industrial and construction facilities must also obtain NPDES stormwater permits."

In comments submitted June 25, 2008, the cities call the State Board's argument inapposite, and cite the *Carmel Valley Fire Protection District* case[124] regarding whether the permit constitutes a "program." According to claimant, "[t]he test is not whether the general program applies to both governmental and non-governmental entities. The test is whether the specific executive orders at issue apply to both government and non-governmental entities."

The Commission finds that the permit activities constitute a program within the meaning of article XIII B, section 6. The permit activities are limited to local governmental entities. The permit defines the "permittees" as the County of Los Angeles and 84 incorporated cities within the Los Angeles County Flood Control District (Permit, p. 1 & attachment A). The permit lists no private entities as "permittees." Moreover, the permit provides a service to the public by preventing or abating pollution in waterways and beaches in Los Angeles County. (Or as stated on page 13 of the permit: "The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County.") Therefore, the Commission finds that the permit is a program within the meaning of article XIII B, section 6.

In its comments on the draft staff analysis submitted June 5, 2009, the State Board disagrees with this conclusion because NPDES permits may also apply to private entities.

The State Board made this same argument in *County of Los Angeles v. Commission on State Mandates*, which the court addressed by stating: "[T]he applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation

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[123] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[124] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."[125]

In other words, the issue is not whether NPDES permits generally constitute a "program" within the meaning of article XIII B, section 6. The only issue before the Commission is whether the permit in this test claim (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitutes a program because this permit is the only one over which the Commission has jurisdiction. Because they apply exclusively to local agencies, the Commission finds that the activities (parts 4C2a, 4C2b, 4E & 4F5c3) in this permit (Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001) constitute a program within the meaning of article XIII B, section 6.

The next step to determine whether the permit is a new program or higher level of service, the permit is compared to the legal requirements in effect immediately before its adoption.[126]

The Commission finds that local agencies were not required by state or federal law to place and maintain trash receptacles at transit stops before the permit was adopted. Whether or not most cities or counties do so, as argued by the State Water Board in its April 2008 comments, is not relevant to finding a state-mandated new program or higher level of service because even if they do, Government Code section 17565 states: "If a local agency … at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency … for those costs incurred after the operative date of the mandate."

Because the transit trash receptacle requirement is newly mandated by the permit, and based on the plain language of part 4F5c3 of the permit, the Commission finds that it is a new program or higher level of service to place trash receptacles at transit stops and maintain them as specified in the permit.

For the same reason, the Commission finds that the inspections and enforcement activities at industrial and commercial facilities, including restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, and phase I facilities (in parts 4C2a & 4C2b of the permit) as well as inspection and enforcement at construction sites (in part 4E of the permit) are a new program or higher level of service. These were not required activities of the permittees prior to the permit's adoption.

In sum, the Commission finds that all the permit provisions at issue in this test claim impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Issue 3: Do the transit trash receptacle and inspection permit provisions (Parts 4C2a, 4C2b, 4E & 4F5c3) impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

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[125] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.

[126] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

The final issue is whether the permit provisions impose costs mandated by the state,[127] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claims. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Government Code section 17564 requires reimbursement claims to exceed $1000 to be eligible for reimbursement.

In test claims 03-TC-20 and 03-TC-21, the cities' claimant representative declares (p. 24) that the cities will incur costs estimated to exceed $1000 to implement the permit conditions.

In test claim 03-TC-04, the County of Los Angeles states (p. 18) that the costs in providing the services claimed "far exceed the minimum reimbursement amount of $1000 per annum." In the attached declaration for *Transit Trash Receptacles*, the County declares (pp. 22-23) the following itemization of costs from December 13, 2001 to October 31, 2002:

> (1) Identify all transit stops in the jurisdiction: $19,989.17;
>
> (2) Select proper trash receptacle design, evaluate proper placement, specification and drawing preparation: $38,461.87;
>
> (3) Preliminary engineering works (construction contract preparation, specification reviewing process, bid advertising and awarding): $19,662.02;
>
> (4) Construct and install trash receptacle units: $230,755.58, construction management $34,628.31;
>
> (5) Trash collection and receptacle maintenance in FY 2002-03, $3,513.94, maintenance contractor costs for maintaining and collecting trash in FY 2002-03, $93,982.50;
>
> (6) Projected costs for on-going maintenance in FY 2003-04, $375,570.00.

Similarly, attached to claim 03-TC-19 (pp. 20-21) are declarations that itemize the County of Los Angeles' costs for *Inspection of Industrial/Commercial Facilities* program, from December 13, 2001 to September 15, 2003, as follows:

> (1) inspect 1744 restaurants: $234,931.83;
>
> (2) inspect 1110 automotive service facilities: $149,526.36;
>
> (3) inspect 249 retail gasoline outlets and automotive dealerships: $33,542.45;
>
> (4) Identify and inspect all Phase I (387 Tier 1 and 543 Tier 2) facilities within the jurisdiction: $125,155.31;
>
> (5) Total $543,155.95.

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[127] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

These declarations illustrate that the costs associated with the permit activities exceed $1,000. The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, which is discussed below.

A. Did the claimants request the activities in the permit within the meaning of Government Code section 17556, subdivision (a)?

The first issue is whether the claimants requested the activities in the permit. The Department of Finance and the State Water Board both asserted that they did. As discussed above, the claimants were required to submit a Report of Waste Discharge and Stormwater Quality Management Plan before the permit was issued.

Government Code section 17556, subdivision (a), provides that the Commission shall not find costs mandated by the state if:

> (a) The claim is submitted by a local agency … that requested legislative authority for that local agency … to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency … that requests authorization for that local agency … to implement a given program shall constitute a request within the meaning of this subdivision.

Based on the language of the statute, section 17556, subdivision (a), does not apply because the permit is not a statute, the claimants did not request "legislative authority" to implement the permit, and the record lacks any resolutions adopted by the claimants. Therefore, the Commission finds that the claimants did not request the activities in the permit within the meaning of Government Code section 17556, subdivision (a).

B. Do the claimants have fee authority for the permit activities within the meaning of Government Code section 17556, subdivision (d)?

Government Code section 17556, subdivision (d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The constitutionality of Government Code section 17556, subdivision (d), was upheld by the California Supreme Court in *County of Fresno v. State of California*,[128] in which the court held that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes. The court stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles, supra,* 43 Cal.3d at p. 61.) The provision was intended to

[128] *County of Fresno v. State of California , supra,* 53 Cal.3d 482.

> preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*
>
> In view of the foregoing analysis, the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, the statute provides that "The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.[129]

In *Connell v. Superior Court,*[130] the dispute was whether local agencies had sufficient fee authority for a mandate involving increased purity of reclaimed wastewater used for certain types of irrigation. The court cited statutory fee authority for the reclaimed wastewater, and noted that the water districts did not dispute their fee authority. Rather, the water districts argued that they lacked "sufficient" fee authority in that it was not economically feasible to levy fees sufficient to pay the mandated costs. In finding the fee authority issue is a question of law, the court stated that Government Code section 17556, subdivision (d), is clear and unambiguous, in that its plain language precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute (Wat. Code, § 35470) limited the authority of the Districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section

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[129] *County of Fresno v. State of California, supra,* 53 Cal.3d 482, 487.

[130] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[131]

In its April 18, 2008 comments (p. 19), the State Board asserted that the claimants have fee authority to pay for the trash receptacle and inspection programs in the permit. Likewise, the Department of Finance, in its March 2008 comments, states that "some local agencies have set fees to be used toward funding the claimed permit activities" that should be considered offsetting revenues.

Los Angeles County, in its comments submitted in June 2008, states (p. 2) that it is "without sufficient fee authority to recover its costs." The County points out that the state or regional board has fee authority in Water Code section 13260, subdivision (d)(2)(B)(iii) for inspections of industrial and commercial facilities, but those fees are not shared with the County or the cities.[132] The County also states that the inspections are to determine compliance with the general industrial permit that is enforced by the regional boards.[133]

In their comments received June 25, 2008, the city claimants assert that they do not have fee authority. The cities first note that, for facilities that hold state-issued general industrial or general construction stormwater permits, the state already imposes an annual fee and therefore has occupied the field (Wat. Code, § 13260, subd. (d)(2)(B)(iii)). The cities also relate the difficulty of imposing a fee for inspecting restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships because, although the cities could enact a general businesses license on all businesses, "the cities could not charge other businesses for the cost of inspecting this subgroup without again running the risk of charging fees on the other businesses for services not related to regulation of them." The cities also dispute the State Water Board's assertion that transit users could be charged a fee for the transit trash receptacles because the County and cities do not operate the transit system.

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[131] *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 398-402.

[132] Water Code section 13260, subdivision (d)(2)(B)(i) - (iii) states:

> (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a general industrial or construction stormwater permit under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund. (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in the region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs.

[133] Page 3 of the General Industrial Permit states in part: "Following adoption of this General Permit, the Regional Water Boards shall enforce its provisions."

In comments on the draft staff analysis submitted in June 2009, the League of California Cities and California State Association of Counties (CSAC) question whether the decisions in *Connell* (1997), and *County of Fresno* (1991), can any longer be cited as good authority for the constitutionality of Government Code section 17556, subdivision (d), given the voter-approval requirement of Proposition 218 (discussed below) added to the state Constitution in 1996. Proposition 218 requires, among other things, that new or increased property-related fees be approved by a majority of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners, except for property-related fees for sewer, water, or refuse collection services (Cal. Const., art. XIII D, § 6, subd. (c)).

The League and CSAC also urge the Commission, to the extent there may be legal doubt whether a local agency has the authority to impose a fee, to not find that the fee authority exception to reimbursement in Government Code section 17556, subdivision (d), applies.

The Commission disagrees with the League and CSAC. The Commission cannot ignore the precedents of *Connell* or *County of Fresno*, or find that they conflict with article XIII D of the California Constitution (Proposition 218), until the issue is decided by a court of law. With regards to Government Code section 17556, subdivision (d), article III, section 3.5 of the California Constitution forbids the Commission or any state agency from declaring a statute unenforceable or refusing to enforce it on the basis of its unconstitutionality unless an appellate court declares that it is unconstitutional. Since no appellate court has so declared, the Commission is bound to uphold and analyze the application of Government Code section 17556, subdivision (d), to this test claim.

The issue of local fee authority for the municipal stormwater permit activities, however, is one of first impression for the Commission. Although there are no authorities directly on point, some legal principles emerge that guide the analysis, as discussed below.

1. Local fee authority to inspect commercial and industrial and construction sites (parts 4C2a, 4C2b & 4E)

Fee authority to inspect under the police power: The law on local government fee authority begins with article XI, section 7, of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

The Third District Court of Appeal has stated that article XI, section 7, includes the authority to impose fees. In *Mills v. Trinity County*,[134] a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without the two-thirds affirmative vote of the county electors. In upholding the fees, the court stated:

> [S]o long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution.[135]

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[134] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656.

[135] *Mills v. County of Trinity, supra,* 108 Cal.App.3d 656, 662.

In addition to the *Mills* case, courts have held that water pollution prevention is a valid exercise of government police power.[136] And municipal inspections in furtherance of sanitary regulations have been upheld as "an exercise of that branch of the police power which pertains to the public health."[137]

In *Sinclair Paint v. State Board of Equalization,* [138] the California Supreme Court upheld a fee imposed on manufacturers of paint that funded a child lead-poisoning program, ruling it was a regulatory fee and not a special tax requiring a two-thirds vote under article XIII A, section 4, of the California Constitution (Proposition 13). The court recognized that determining under Proposition 13 whether impositions were fees or taxes is a question of law. In holding that the fee on paint manufacturers was "regulatory" and not a special tax, the court stated:

> From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less "regulatory" in nature than the initial permit or licensing programs that allowed them to operate.
>
> Viewed as a mitigating effects measure, [the fee] is comparable in character to several police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.[139] [Emphasis added.]

The *Sinclair Paint* court also recognized that regulatory fees help to prevent pollution when it stated: "imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."[140]

Although the court's holding in *Sinclair Paint* applied to a state-wide fee, the language it used (putting "ordinances" in the same category as "statutes") recognizes that local agencies also have the police power to impose regulatory fees. Moreover, the court relied on local government police power cases in its analysis.[141]

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[136] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[137] *Sullivan v. City of Los Angeles Dept. of Bldg. & Safety* (1953) 116 Cal.App.2d 807, 811.

[138] *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866.

[139] *Sinclair Paint v. State Board of Equalization, supra*, 15 Cal.4th 866, 877.

[140] *Sinclair Paint v. State Board of Equalization, supra*, 15 Cal.4th 866, 877.

[141] *Sinclair Paint v. State Board of Equalization, supra*, 15 Cal.4th 866, 873. The Court stated: "Because of the close, 'interlocking' relationship between the various sections of article XIII A (Citation omitted) we believe these "special tax" cases [under article XIII A, § 3, state taxes] may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, "special taxes" under article XIII A, section 4, [local government taxes] may apply equally to section 3 cases."

A regulatory fee is an imposition that funds a regulatory program[142] and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. …the regulatory program is for the protection of the health and safety of the public."[143] Courts will uphold regulatory fees if they comply with the following principles:

> Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A section 4 analysis if the "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." [Citations omitted] "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citations omitted] "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." [Citations omitted] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citations omitted] Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[144] [Emphasis added.]

Local fees for inspections of commercial and industrial facilities, and construction sites, would be preventative and could be imposed to comply with the criteria the courts have used to uphold regulatory fees, articulated above. And the regulatory fees fall within the local police power to prevent, clean up, or mitigate pollution.

Therefore, pursuant to article XI, section 7, the Commission finds that the claimants have fee authority within the meaning of Government Code section 17556, subdivision (d), sufficient to carry out the mandated activities in parts 4C2a, 4C2b and 4E of the permit. Therefore, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code section 17514 and 17556 to perform the activities in those parts of the permit (commercial, phase I, and construction site inspections and related activities).

In fact, in June 2005, claimant Covina adopted stormwater inspection fees on restaurants, retail gasoline outlets, automotive service facilities, etc., as part of its business license fee, expressly for the purpose of complying with the permit at issue in this test claim.[145]

Statutory fee authority to operate and maintain storm drains: Health and Safety Code section 5471 expressly authorizes cities and counties to charge fees for storm drainage maintenance and operation services:

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[142] *California Assn. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 950.

[143] *Ibid.*

[144] *California Assn. of Prof. Scientists v. Dept. of Fish and Game, supra,* 79 Cal.App.4th 935, 945.

[145] City of Covina, Resolution No. 05-6455.

> [A]any entity[146] shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system. … Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities ….

The statute makes no mention of "inspecting" commercial or industrial facilities or construction sites. Rather, the fee revenues are used for "maintenance and operation" of storm drainage facilities. Thus, for the types of businesses regulated by the permit (restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites) the Commission cannot find that pursuant to Health and Safety Code section 5471, the claimants have fee authority "sufficient" to pay for the mandated inspection program within the meaning of Government Code section 17556. The statute's "operation and maintenance" of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

2. Local fee authority under the police power and the Public Resources Code to place and maintain trash receptacles at transit stops (Permit, 4F5c3)

As discussed above, part 4F5c3 of the permit requires the County and cities to place and maintain trash receptacles at transit stops in their jurisdictions. Public Resources Code section 40059, subdivision (a), suggests that the County and cities have fee authority to perform this activity as follows:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

The statute gives local governments the authority over the "nature, location and extent of providing solid waste handling services" and is broad enough to encompass "placing and maintaining" receptacles at transit stops. The statute also provides local governments with broad authority over the "level of services, charges and fees."

The draft staff analysis determined that the claimants had fee authority under Public Resources Code section 40059 and the police power (Cal. Const. art. XI, § 7) to install and maintain trash receptacles at transit stops and recommended that the Commission deny the test claim with respect to part 4F5c3 of the permit.

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[146] Entity is defined to include "counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." Health and Safety Code section 5470, subdivision (e).

The city claimants, in June 2009 comments on the draft staff analysis, argue that section 40059, subdivision (a), does not apply here because it was adopted as a "savings provision" in legislation establishing the Integrated Waste Management Board (IWMB) in order to ensure that local trash collection agreements would not be affected by the IWMB legislation. The cities also cite *Waste Resources Technologies v. Department of Public Health* (1994) 23 Cal.app.4th 299, which held that the statute reflected the Legislature's intent to allow for local regulation of waste collection. According to the cities, the statute "was not intended as an *imprimatur* for local agencies to assess fees on their residents or on businesses to pay for the costs of trash generated by transit users when that requirement was established not as a matter of local choice but rather state mandate." (Comments, p. 7.)

The cities also argue that a valid fee must have a causal connection or nexus between the person or entity paying the fee, and the benefit or burden being addressed. Claimants assert that there is no group on which the claimants can assess a fee that has a relationship with the trash receptacles because the burden is created by the transit riders but benefits the public at large. City claimants also argue that they cannot assess fees on transit agencies or increase transit fares to recoup the cost of installing and maintaining trash receptacles because they have no authority to do so. As an example, the claimants cite the Metropolitan Transit Authority's (the largest public transit operator in Los Angeles County) authority to set fares (Pub. Util. Code, § 30638) that rests exclusively with the MTA's board.

As to the police power, City claimants argue that they cannot use it to assess fees on property owners or businesses for the cost of transit trash receptacles because doing so would collect more than the actual cost of the collection and thereby create a special tax that would require a two-thirds vote (Cal. Const. art. XIII A, § 4). And according to the claimants, they do not have statutory fee authority to assess property owners for the cost of installing and maintaining trash receptacles. Finally, claimants assert that a fee on property owners for transit stop trash receptacles, even if it were not a special tax, would require a vote under Proposition 218 (Cal. Const., art. XIII D).

The County of Los Angeles, in its June 2009 comments on the draft staff analysis, argues that local agencies do not have fee authority over bus operators, and for support cites *Biber Electric Co. v. City of San Carlos* (1960) 181 Cal.App.2d 342, which held that a local fee would conflict with a general state Vehicle Code provision. The County also asserts that no fee could be imposed on bus riders because the pollution prevention would benefit all county residents, not only those riding buses, and that such a fee would require a vote under Proposition 218 because the fee's purpose would be excluding trash from storm drains rather than routine collection.

The League of California Cities and CSAC, in their June 2009 comments on the draft staff analysis, criticize the conclusion that fee authority exists for transit trash receptacles because the analysis does not discuss upon whom the fee would be imposed. They also dispute the application of the *Connell* case because the issue is not whether the fee is economically feasible, but whether it is legally feasible. The League and CSAC point out that local agencies have no authority to impose the fee on transit agencies or their ridership, and that Proposition 218 imposes procedural and substantive requirements on adjacent business owners and residences, so that the local agency could not impose the fee or assessment on them without their consent. Thus, the League and CSAC argue that the local agencies do not have fee authority pursuant to

Government Code section 17556, subdivision (d): "sufficient to pay for the mandated program or increased level of service."

After considering these arguments, the Commission agrees that Government Code section 17556, subdivision (d), does not apply to the placement and maintenance of transit trash receptacles as specified in the permit because the claimants do not have the authority to impose fees.

Michael Lauffer was asked at the Commission hearing on July 31, 2009, why the transit trash requirement in the permit was not imposed on transit agencies. Mr. Lauffer testified that transit agencies were not named historically on the permits, and that the Board, at the time it established the requirements, thought it was appropriate to place them on municipalities. He also testified that nothing would prevent the municipalities under the permit from working with Metropolitan Transit Authority (MTA) to cooperatively implement the transit trash requirement, or to have the MTA carry out the primary obligation for meeting it. He added that the transit stops were public facilities, the language used in the federal regulations, which is why the permit included the requirement to place the trash receptacles there.[147]

Because the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks)[148] or transit district property (for bus or metro or subway stations), there are no entities on which the claimants would have authority to impose the fees. The plain language of Public Resources Code section 40059 provides no fee authority over transit districts or transit riders, and the Metropolitan Transit Authority's fee statutes grant fee authority exclusively to its board (Pub. Util. Code, §§ 30638 & 130051.12).

Additionally, the claimants do not have fee authority under the police power because they do not provide the "services necessary to the activity for which the fee is charged."[149]

Thus, the Commission finds that part 4F5c3 of the permit imposes costs mandated by the state within the meaning of Government Code section 17514 and 17556.

The remainder of this analysis addresses the arguments raised by the claimants that their local fee authority for inspections would be preempted by a statute granting the state fee authority, and that a local fee would be a special tax. The application of Proposition 218 on the fee authority for inspection is also discussed.

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[147] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, pages 52-53.

[148] "The general rule views the sidewalk as part of the street; it … holds the city liable for pedestrian injuries caused by the dangerous condition of the sidewalk." *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 832.

[149] *California Assn. of Prof. Scientists v. Dept of Fish and Game, supra*, 79 Cal.App.4th, 935, 945.

3. Local fee authority to inspect industrial or construction sites (parts 4C2a, 4C2b & 4E) performed under the statewide general permits would not be preempted by state fee authority in Water Code section 13260, subdivision (b)(2)(B)

In their comments submitted in June 2008 (p. 14), the city claimants argue that the permittees cannot impose fees for inspections of industrial or commercial or construction sites as follows:

> [W]ith respect to facilities that hold state-issued general industrial or general construction stormwater permits, the state had occupied the field. …[T]he state already imposes an annual fee on general industrial and general construction stormwater permittees. That fee is explicitly designated, in part, to cover inspections of these facilities and regulatory compliance. Water Code § 13260(d)(2)(B).
>
> This state fee thus preempts any fee that the Cities or County could charge for inspection of these facilities.

The cities also assert that in 2001, the regional board initiated negotiation of a contract with the County whereby the regional board would pay the County to perform inspections of facilities that held general industrial stormwater permits (the 'Phase I facilities') on the regional board's behalf. Immediately after the permit was issued, the regional board terminated those negotiations.

In comments submitted in June 2009 on the draft staff analysis, city claimants clarify that their comments "are not directed towards the claimants' ability to assess fees for inspections of the other commercial establishments, i.e., restaurants and automotive service facilities, retail gasoline outlets and automobile dealerships, or Phase I facilities or construction sites that are not required to hold a state-issued general industrial or general construction stormwater permit."

According to the city claimants, fees for inspecting the phase I industrial facilities and construction sites under the statewide permits (the GIASP and GCASP) would be preempted by state fee authority in Water Code section 13260, under which the State Board collects fees for inspecting those sites. The city claimants state the fact that the specific destination of the funds from the fees in Water Code section 13260, subdivision (d)(2)(iii) is spelled out is evidence of intent that the Legislature fully occupied the field for inspections of GIASP and GCASP permit holders.

Because the fee authority to inspect commercial facilities (identified in the permit as restaurants, automotive service facilities, retail gasoline outlets and automotive dealerships) is not contested by the city claimants, the discussion below is limited to industrial and construction site inspections performed under the statewide permits concurrently with the permit at issue in this claim.

The California Supreme Court has outlined the following rules as to when a statute preempts a local ordinance by fully occupying the field:

> A local ordinance *enters a field fully occupied* by state law in either of two situations-when the Legislature "expressly manifest[s]" its intent to occupy the legal area or when the Legislature "impliedly" occupies the field. (*Sherwin-Williams, supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p.

551["[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field ... municipal power [to regulate in that area] is lost."].)

When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality." (*Sherwin-Williams*, *supra,* 4 Cal.4th at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)[150]

The state statute at issue, the stormwater fee statute, in subdivision (d) of section 13260 of the Water Code, reads in pertinent part:

(d)(1)(A) Each person who is subject to subdivision (a) [who discharges waste that affects the quality of waters of the state] or (c) shall submit an annual fee according to a fee schedule established by the state board.

(B) The total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(C) Recoverable costs include, but are not limited to, costs incurred in reviewing waste discharge reports, prescribing terms of waste discharge requirements and monitoring requirements, enforcing and evaluating compliance with waste discharge requirements and waiver requirements, conducting surface water and groundwater monitoring and modeling, analyzing laboratory samples, and reviewing documents prepared for the purpose of regulating the discharge of waste, and administrative costs incurred in connection with carrying out those actions. [¶]…[¶]

(2) Subject to subparagraph (B), any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(B) (i) Notwithstanding subparagraph (A), the fees collected pursuant to this section from stormwater dischargers that are subject to a <u>general industrial or construction stormwater permit</u> under the national pollutant discharge elimination system (NPDES) shall be separately accounted for in the Waste Discharge Permit Fund.

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[150] *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068. Emphasis in original.

> (ii) Not less than 50 percent of the money in the Waste Discharge Permit Fund that is separately accounted for pursuant to clause (i) is available, upon appropriation by the Legislature, for expenditure by the regional board with jurisdiction over the permitted industry or construction site that generated the fee to carry out stormwater programs in that region. (iii) Each regional board that receives money pursuant to clause (ii) shall spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. (Wat. Code, § 13260, subds. (d)(1) & (d)(2).) [Emphasis added.]

The State Water Board has adopted regulations to implement the stormwater fee that include fee schedules based on the threat to water quality and a complexity rating.[151] At the hearing on July 31, 2009, Michael Lauffer of the State Water Board testified that the fee is established annually by the State Board, based on the legislative appropriation for the boards to carry out their responsibilities. Mr. Lauffer testified that the annual fee for industrial facilities under this Water Code statute is $833, and the fee for construction facilities is variable, starting at $238, plus $24 per acre, with a cap of $2,600. [152]

The issue is whether Water Code section 13260, subdivision (d)(1) and (d)(2), preempts local fee authority. In resolving this, we look for express or implied preemption or intent to occupy the field.[153]

First, there is no express intent on the face of the Water Code statute to preempt any local fee ordinance because the statute is silent on local fees. As to implied intent to occupy the field of law, the Supreme Court has stated that it may be found if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.[154]

The city claimants, in their comments on the draft staff analysis submitted in June 2009, argue as follows with regard to Water Code section 13260:

> Here, the Legislature adopted a statute that specifically established a mechanism for fees to be assessed on GIASP and GCASP holders, for those funds to be

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[151] Fees for NPDES permits for municipal separate stormwater sewer systems are in subdivision (b) of section 2200 of title 23 of the California Code of Regulations.

[152] Commission on State Mandates, Public Hearing, Reporter's Transcript of Proceedings, July 31, 2009, page 111.

[153] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[154] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

> segregated and sent to the regional boards, and for a specified amount of those funds ("not less than 50 percent of the money") to be used by the regional boards "solely" on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs. Water Code section 13260(d)(2)(iii). Such a specific determination as to the destination of the funds for the purposes of inspection and compliance evidences the intent of the Legislature that the issue of funding for GIASP and GCASP inspections be "fully occupied."

The Commission disagrees. Specific determination of funds is not a factor the courts use to determine whether a state statute fully occupies the field. Applying the Supreme Court's factors from the *O'Connell v. City of Stockton* case, the subject matter of stormwater fees has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern."[155] The Water Code's single fee statute for state permit holders does not rise to that level. Second, the Commission cannot find that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."[156] No clear indication of a paramount state concern can be found on the face of the Water Code fee statute. And the third instance does not apply because the subject is not "of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

The legislative history of the Water Code provision does not indicate any intent to occupy the field. The legislative history of the amendment to require 50 percent of the fees to be used for stormwater inspection and regulatory compliance issues indicated as follows:

> …California's 1994 Water Quality Inventory Report states that storm waters and urban run-off are the leading sources of pollution in California estuaries and ocean waters. Proponents argue that non-compliance is rampant, with approximately 10,000 industries in the Los Angeles area alone who are required but have failed to obtain storm water permits. Further, proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site and question whether adequate revenues are returned to the regional boards for this program.[157]

The Legislature acknowledged that the state inspections at the time the statute was enacted were inadequate to prevent the pollution that the statewide permits were intended to prevent.

And the regional board, via the permit, acknowledges the role of both local regulation and state regulation under the general permits. Page 11 of the permit states:

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[155] *O'Connell v. City of Stockton, supra,* 41 Cal.4th 1061, 1068.

[156] *Ibid.*

[157] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assem. Bill No. 1186 (1997-1998 Reg. Sess.) as amended August 6, 1997.

> The U.S. EPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in stormwater discharges to the MS4. The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES stormwater and non-stormwater permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

As to inspection of construction sites, section 4E of the permit states:

> If compliance has not been achieved, and the site is also covered under a statewide general construction stormwater permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

Moreover, the Water Code statute provides broader fee authority than a local inspection fee. The statute requires the regional board to "spend not less than 50 percent of that money solely on stormwater inspection and regulatory compliance issues associated with industrial and construction stormwater programs." (Wat. Code, § 13260, subd. (d)(2)(iii). Emphasis added.) Because the fees for GIASP and GCASP permit holders may also be spent on "regulatory compliance issues" in addition to the inspections, the Commission cannot find that a local fee ordinance would duplicate or be "coextensive" with state fee authority, and therefore cannot find that the state fee statute occupies the field. A local fee would merely partially overlap with the state fee.

As for the phase I facilities[158] subject to inspection, the inspections do not occupy the field because the permit specifies that these need not be inspected if the regional board has inspected them within the past 24 months.

According to the State Board's April 2008 comments, the overlapping fees were envisioned by U.S./EPA.

> In addition to the requirements for permits issued to municipalities, the Water Boards are also mandated to issue permits to entities that discharge stormwater "associated with industrial activity." (fn. CWA § 402(p)(2)(B)). As part of its responsibilities for its in lieu program, the State Boards must administer and enforce all of its permits. (fn. CWA § 402(p).) The State Water Board has issued

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[158] On page 62 of the permit, U.S. EPA Phase I Facilities are defined as "facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include: (i) facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N); (ii) manufacturing facilities; (iii) oil and gas/mining facilities; (iv) hazardous waste treatment, storage, or disposal facilities; (v) landfills, land application sites, and open dumps; (vi) recycling facilities; (vii) steam electric power generating facilities; (viii) transportation facilities; (ix) sewage or wastewater treatment works; (x) light manufacturing facilities.

> permits for industrial and construction discharges of stormwater, and the Los Angeles Water Board administers those permits within its jurisdiction. Therefore, the Los Angeles Water Board does conduct inspections at businesses in Los Angeles County to ensure compliance with the state permits. In addition, the MS4 Permit requires the permittees also to conduct inspections. This approach, which may result in two different entities inspecting the same businesses to review stormwater practices, was specifically envisioned and required by U.S. EPA in adopting its stormwater regulations.

U.S./EPA, in its "MS4 Program Evaluation Guidance" document, acknowledged regulation at both the local and state levels as follows:[159]

> In addition to regulation of construction site stormwater at the local level, EPA regulations also require construction sites disturbing greater than one acre to obtain an NPDES permit. This permit can be issued by the state permitting authority or EPA, depending on whether the state has been delegated the NPDES authority. This dual regulation of construction sites at both the local and state or federal level can be confusing to permittees and construction operators.[160]

In fact, as to inspection duties and costs under two permit systems, one court has stated regarding a permit similar to the one in this claim:

> Rancho Cucamonga and the other permittees are responsible for inspection construction and industrial sites and commercial facilities within their jurisdiction for compliance with the enforcement of local municipal ordinance and permits. But the Regional Board continues to be responsible under the 2002 NPDES permit for inspections under the general permits.[161]

The reasoning of the *City of Rancho Cucamonga* case is instructive because a local regulatory fee could be used for local-government inspections, and the state fee is for state or regional inspections under the general statewide permits.

The state permit program and local inspection program under the regional board's permit can be viewed as two programs with similar, overlapping goals. Viewed in this way, the fees for two sets of inspections for construction sites (or for phase I facilities not inspected by the regional board within the past two years) would not necessarily exceed the costs of both sets of inspections.

In short, a local regulatory fee ordinance that provided for inspections of the industrial facilities and construction sites specified in the permit (parts 4C2a, 4C2b & 4E) would not be preempted

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[159] State Water Resources Control Board, comments submitted April 18, 2008, attachment 33.

[160] *Ibid.*

[161] *City of Rancho Cucamonga v. Regional Water Quality Control Board, supra*, 135 Cal.App.4th 1377. The test claim record is silent as to the number of facilities within the permit area that are subject to the General Industrial Activity Storm Water Permit, or how many construction sites within the permit area are subject to the General Construction Activity Storm Water Permit.

by the state fee authority in Water Code section 13260 or in title 23 of the California Code of Regulations.

4. Local fee authority to inspect industrial or construction sites covered under the state permits would not be a "special tax" under article XIII A, section 4, of the California Constitution

In their June 2008 rebuttal comments, the city claimants assert that they do not have sufficient fee authority under Government Code section 17556, subdivision (d). They focus on facilities that hold state-issued general industrial or construction stormwater permits and pay the state-imposed fees pursuant to Water Code section 13260, arguing that an additional local fee for inspecting these facilities would be considered a special tax. According to the city claimants:

> In order for a fee to be considered a "fee" as opposed to a "special tax," the fee cannot exceed the reasonable cost of providing the services necessary for which the fee is charged. See *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660. Any fee assessed by the Cities or the County for inspection of these facilities would be a double assessment, and thus run afoul of this rule.

The city claimants, in their June 2009 comments on the draft staff analysis, again assert that forcing claimants to recover their costs for inspecting the state-permitted GIASP and GCASP facilities and sites, the regional board is creating a special tax on holders of those state permits.

Special taxes are governed by article XIII A, section 4, of the California Constitution:

> Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Government Code section 50076 states that a fee is not a special tax under article XIII A, section 4, if the fees are: (1) "charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged," and (2) "are not levied for unrelated revenue purposes." The California Supreme Court has reaffirmed this rule.[162]

The Commission finds that a local regulatory stormwater fee, if appropriately calculated and charged, would not be a special tax within the meaning of article XIII A, section 4. There is no evidence in the record that a local regulatory fee charged for the stormwater inspections would exceed the reasonable cost of providing the inspections and related services or would otherwise violate the criteria in section 50076.

As the court stated in the *Connell v. Superior Court* case discussed above:

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[162] *Sinclair Paint v. State Board of Equalization, supra,* 15 Cal.4th at p. 876: "[T]he term "special taxes" in article XIII A, section 4, does not embrace fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes."

> The [Water] Districts argue any fees levied by the districts "cannot exceed the cost to the local agency to provide such service," because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.[163]

Similarly, in this claim no one is suggesting that the local agencies levy regulatory fees that exceed their costs. Therefore, the Commission finds that a local regulatory fee for stormwater would not be a "special tax" under article XIII A, section 4, of the California Constitution for the activities at issue in the permit.

5. The local fee to inspect industrial and construction sites would not be subject to voter approval under article XIII D (Proposition 218) of the California Constitution

Some local government fees are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 (1996). Article XIII D defines a property-related fee or charge as any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service. Among other things, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners (article XIII D, § 6, subd. (c)). Exempt from voter approval, however, are property-related fees for sewer, water, or refuse collection services (*Ibid*).

In 2002, an appellate court decision in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, found that a city's charges on developed parcels to fund stormwater management were property-related fees, and were not covered by Proposition 218's exemption for "sewer" or "water" services. This means that an election would be required to impose storm water fees if they are imposed "as an incident of property ownership."

The Commission finds that local fees for inspections of phase I facilities, restaurants, retail gasoline outlets, automotive dealerships, etc., would not be subject to the vote requirement of Proposition 218. In a case involving inspections of apartments in the City of Los Angeles in which a fee was charged to landlords, the California Supreme Court ruled that the regulatory fee for inspecting apartments was not a "levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service" [164] within the meaning of Proposition 218. The court interpreted the phrase "incident of property ownership" as follows:

> The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge

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[163] *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 402.

[164] That is the definition of "fee" or "charge" in article XIII D, section 2, subdivision (e).

> against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[165]
>
> [¶]…[¶] In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The [City of Los Angeles'] ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords.[166]

Following the reasoning of the *Apartment Assoc.* case, the inspection fees on restaurants, retail gasoline outlets, automotive dealerships, phase I facilities, etc., like the fee in *Apartment Assoc.*, would not be imposed on landowners as landowners, nor as an incident of property ownership, but by virtue of business ownership. Thus, the inspection fee would fall outside the voter requirement of Proposition 218.

As to the fees for inspecting construction sites, the Commission finds that they too would not be subject to Proposition 218's voter requirement. Article XIII D of the California Constitution states that it shall not be construed to "affect existing laws relating to the imposition of fees or charges as a condition of property development."[167]

Moreover, the California Supreme Court, in determining whether water connection fees are within the purview of Proposition 218, reasoned that "water service" fees were within the meaning of "property-related services" but "water connection" fees were not.

> Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[168]

The Supreme Court's reasoning applies to local stormwater fees for inspecting construction sites. That is, the fee would not be an incident of property ownership because it results from the owner's voluntary decision to build on or develop the property. Therefore, the Commission finds that local inspection fees for stormwater compliance at construction sites would not be within the purview of the election requirement of Proposition 218. A recent report by the Office of the Legislative Analyst concurs with this conclusion.[169]

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[165] *Apartment Assoc. of Los Angeles County v.City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[166] *Id.* at 842 [Emphasis in original.]

[167] Article XIII D, section 1, subdivision (b).

[168] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427.

[169] "Local governments finance stormwater clean–up services from revenues raised from a variety of fees and, less frequently, through taxes. Property owner fees for stormwater services typically require approval by two–thirds of the voters, or a majority of property owners.

In its June 2009 comments, the County disagrees that stormwater pollution fees would not be subject to the voter requirement in Proposition 218, or that fee authority exists. In support, the County points to unadopted legislation pending in the current or in past legislative sessions that would provide fee authority or expressly exempt stormwater fees from the Proposition 218 voting requirement. For example SCA 18 (2009) would add "stormwater and urban runoff management" fees to those expressly exempted from the vote requirement in article XIII D, putting them in the same category as trash and sewer fees. SB 2058 (2002) would have required the regional water boards to share their fees with counties and cities. And SB 210 (2009) would provide cities and counties with stormwater regulatory or user-based fee authority.

The Commission finds that the unadopted legislative proposals cited by the County are unconvincing to show a lack of regulatory fee authority for business inspections as discussed above. First, courts have said that "As evidence of legislative intent, unadopted proposals have been held to have little value."[170] Second, if they were enacted, the legislative proposals would grant broader fee authority than is found in this analysis. For example, SCA 18, by adding a stormwater exception from the vote requirement in Proposition 218, would authorize *user* fees on residential property for stormwater and urban runoff programs, whereas this analysis addresses the much narrower issue of *regulatory* fees on businesses for inspections. Likewise, SB 2058 would have required the State Board's permit fees to be shared with "counties and cities" for the broad purpose of carrying out stormwater programs rather than for the narrower purpose of inspecting businesses. And SB 210 would likewise provide fee authority that is broader than regulatory fees; as the May 28, 2009 version expressly states in proposed section 16103, subdivision (c), of the Water Code: "The fees authorized under subdivision (a) may be imposed as user-based or regulatory fees consistent with this chapter." In short, the legislative proposals cited by the County do not indicate that fee authority does not exist. Rather, the proposals would, if enacted, provide broader fee authority than now exists.

In comments received June 3, 2009, the Bay Area Stormwater Management Agencies Association (BASMAA) contends that many permit requirements relate to local communities and their residents rather than specific business activities, and require public services that are essentially incident to real property ownership, and/or may only be financed via fees that remain subject to the voting requirements of Proposition 218 or increased property taxes. BASMAA also states that many permit activities would fall on joint power authorities or special districts that have no fee authority, or for which exemptions from Proposition 218 would not be applicable. BASMAA requests that the analysis be revised to revisit the conclusions regarding "funded vs. unfunded" requirements, and to recognize and distinguish the many types of stormwater activities for which regulatory fees would not apply.

Developer fees and fees imposed on businesses that contribute to urban runoff, in contrast, are not restricted by Proposition 218 and may be approved by a vote of the governing body. Taxes for stormwater services require approval by two–thirds of the electorate." Office of the Legislative Analyst. *California's Water: An LAO Primer* (October 22, 2008) page 56.

[170] *County of Sacramento v. State Water Resources Control Board* (2007) 153 Cal.App.4th 1579, 1590.

The Commission disagrees. BASMAA raises issues that are outside the scope of the portions of the Los Angeles stormwater permit (parts 4C2a, 4C2b, 4E & 4Fc3) that were pled by the test claimants. Because the Commission's jurisdiction is limited by those parts of the permit pled in the test claim, it cannot opine on other issues outside the pleadings, even if it would raise issues closely related to other NPDES permits (or even other parts of this NPDES permit).

In sum, the Commission finds that the inspections and related activities at issue in the Los Angeles stormwater permit are not subject to voter approval in article XIII D of the California Constitution (Proposition 218), so a regulatory fee ordinance for stormwater inspections would not be subject to voter approval.

Given the existence of local regulatory fee authority under the police power (Cal. Const, art. XI, § 7), and lacking any evidence or information to the contrary, the Commission finds that the claimants' authority to adopt a regulatory fee is sufficient (pursuant to Gov. Code, § 17556, subd. (d)) to pay for the inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, phase I facilities, as defined, and construction sites, and related activities specified in the permit. Therefore, for the inspections and related activities at issue, the Commission finds that there are no "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

For the reasons discussed above, the Commission finds that the following activity in part 4F5c3 of the permit is a reimbursable state mandate within the meaning of Government Code sections 17514 and 17556: For local agencies subject to the permit that are not subject to a trash TMDL[171] to: "Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary."

The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.

[171] A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

Abbreviations

BMP - Best management practice

CWA – Clean Water Act

GCASP - General Construction Activity Storm Water Permit

GIASP - General Industrial Activity Storm Water Permit

MS4 - Municipal Separate Storm Sewer Systems

NOI - Notice of Intent for coverage under the GCASP

NPDES - national pollutant discharge elimination system

RGO - Retail Gasoline Outlet

ROWD – Report of Waste Discharge

SQMP - Storm Water Quality Management Program

SWPPP - Storm Water Pollution Prevention Plan

TMDL - Total Maximum Daily Load

U.S. EPA – United States Environmental Protection Agency

WDID - Waste Discharger Identification